D. H. Rehor

REVISED LAWS OF NEVADA

CONTAINING

STATE STATUTES OF A GENERAL NATURE FROM 1861 REVISED TO 1912, AND PERTINENT ACTS OF CONGRESS WITH ANNOTATIONS FROM VOLUMES 1 TO 34, NEVADA REPORTS, AND FROM FEDERAL AND STATE DECISIONS

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Justices of the Supreme Court

VOLUME 2

Sections 4828 to 7634, inclusive

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ALPHABETICAL LIST OF TITLES

This list covers the main titles, but does not contain a direct reference to all the duties of officers or all the various subjects found in the numerous acts which are detailed in the table of contents and index.

	SECTIONS	PAGE
Adjutant-General	3991	1158
	4056	1171
	4080	1175
	4250	1218
Adoption of Children	5825–5834	1697
Age of Majority	431	137
Agriculture and Horticulture	432– 476	138
	4655	1328
Apiaries	477– 481	148
Apprentices	482– 497	149
Artesian Well Bounties	702– 717	212
Articles of Confederation	71– 85	13
Assessors	1569–1581	455
	1586	459
Attorney-General	312, 315	90
	4128–4147	1188
Attorneys	498– 525	152
Auditor, State	4148–4153	1193
Authentication of Records	526– 529	156
Bailment	530– 542	158
Bankruptcy	543– 615	161
Banks and Banking	616– 694	191
Benevolent and Other Societies	1390–1397	399
Board of Examiners	314	91
	4455–4481	1267
Bonds	695– 701	210
Bonds and Undertakings	695– 701	210
Bounties	702– 727	212
Bureau of Industry, Agriculture and Irrigation	4486–4494	1274
Bureau of Animal Industry	4390	1249
Capitol Commissioners	4411–4426	1257
Carey Act	3063–3097	872
Children	728– 766	218
Cities and Towns	345	103
	767– 999	233
Civil Practice	4943–5856	1433
Commander-in-Chief	3967	1154
	3988	1158
	4060, 4064	1172
	4071	1173
	4078	1174
Commissioner of Deeds	1000–1004	294
Compilation of Laws	1005–1016	295
Constables	1692	481
	4928	1413
Constitution of the United States	86– 191	19
Constitution of Nevada	226– 427	61

	SECTIONS	PAGE
Controller	312	90
	315	92
	380	114
	4154–4189	1195
Conveyances	1017–1104	297
	1629	469
	1635, 1636	470
Coroners	7542–7560	2087
Corporations	338– 344	102
	1105–1440	318
Counties	1441–1500	412
County Auditors	1554–1592	452
County Clerks	290	85
	1505	436
	1612	465
	1690	481
County Commissioners	284	84
	1501–1568	435
	877– 998	264
County Government and County Officers	283	83
	290	85
	347	103
	367	111
	375	113
	1501–1701	435
County Recorders	1628–1642	469
County Surveyors	1664–1674	476
County Treasurers	1675–1688	478
Courts and Court Officers	316– 333	92
	336	101
	380	114
	4828–4928	1389
Crimes and Punishments	235– 237	65
	6266–6850	1804
Criminal Practice	6851–7560	1945
Deaf, Dumb and Blind	365	111
	1702–1704	485
Declaration of Independence	65– 70	10
Dental Examiners	4427–4444	1260
Desert Land Entries	3150–3162	906
District Attorneys	1593–1612	461
District Court Rules		1425
Divorce	5838–5845	1700
Election of United States Senator	292	86
	1896–1914	546
Elections	250– 255	69
	371	112
	373	113
	413	122
	1705–1914	487
Embalmers	4445–4454	1265
Employer and Employee	1915–1945	550
	6778–6801	1923
Estates of Deceased Persons	5857–6148	1713
Explosives	1946–1948	560
Federal Jurisdiction	1949–1952	561

	SECTIONS	PAGE
Federal Townsites	1953–1993	562
Fees	1994–2046	578
Fish and Game	2047–2113	595
Fish Commissioners	4482–4485	1273
Forestry	2114–2120	608
Franchises	2121–2141	610
Fraternal Societies	1410–1423	405
Game and Fish	2047–2113	595
General Rules of Construction		127
Governor	293– 309	87
	380	114
	3967	1154
	4004	1161
	4190–4197	1205
Guardians	6149–6201	1772
Habeas Corpus	234	64
	6226–6265	1787
Homestead Entries	3115–3135	896
Homesteads	288	84
	2142–2150	615
Hotels and Lodging-Houses	2151–2154	619
Husband and Wife	2155–2194	620
Inspector of Mines	4198–4239	1207
Insurance	1266–1329	368
Insane	365	111
	2195–2212	629
Jails	7603–7622	2102
	1646	473
Jurors and Juries	232	64
	4929–4942	1414
Justices of the Peace	323	97
	1689	481
	4038	1107
	4926	1413
	5714	1670
	6927	1957
	7470–7524	2076
Juvenile Court	728– 756	218
Legislature	259– 293	74
	334– 337	101
	338– 350	102
	374	113
	4111	1184
License and Bullion Tax Agent	4240–4248	1216
Licenses	3867–3904	1130
Liens	2213–2232	634
Lieutenant-Governor	310, 311	90
	4249, 4250	1218
Literary Societies	1365–1372	394
Live Stock	2233–2337	643
Magna Carta	1– 64	1
Marriage	289	85
	2338–2357	666
Medicine, Surgery and Obstetrics	2358–2374	670
Mines and Mining	2375–2496	676
Money and Interest	2497–2501	751

	SECTIONS	PAGE
Names and Emblems	2502–2505	752
Naturalization	2506–2544	754
Negotiable Instruments	2548–2744	769
Nevada Historical Society	2545–2547	768
Notaries Public	2745–2764	796
Noxious Animal Bounties	718– 727	216
Officers Generally	2765–2866	799
Official Advertising	2867	820
Official Bonds	2868–2890	821
Official Oath	2891	826
Optometry	2892–2896	827
Pardons and Paroles—Laws and Rules	307	89
	7623–7634	2109
Partnership	2897–2914	828
Pharmacy Board	4495–4514	1278
Poor and Poor Laws	2915–2928	832
Primary Election	1737–1766	501
Proclamation of Admission of Nevada	430	134
Public Administrators	1615–1627	466
Public Documents and Reports	2929–2951	836
Public Health	2952–3003	841
Public Highways	3004–3062	855
Public Lands	3063–3226	870
Public Libraries	3227–3231	935
Public Records	3232	936
Public Safety	3233–3238	937
Public Schools	353– 355	106
	362	110
	3239–3478	939
Public Service Commission	4515–4548	1283
Public Supplies	3479, 3480	1000
Public Work	3481–3485	1001
Pure Food Law	3486–3510	1002
Railroads	3511–3601	1008
Real Estate	3602–3608	1038
Reclamation Act	3098–3114	890
Registration	1705–1735	487
Religious Societies	1425–1439	408
Residence	3609–3616	1040
Revenue	3617–3904	1042
Rewards	3905–3907	1139
Rights of Way Over Public Lands	3169	912
	3171, 3172	914
		1334
Salaries of State Officers	4192–4391	1205
Salaries of State Officers, Schedule of Sections	4391	1250
Sales of Merchandise	3908–3912	1140
Sales of Unclaimed Property	530– 542	158
Secretary of State	312– 315	90
	380	114
	4056	1171
	4251–4290	1219
Sheep Commission	4586–4602	1310
Sheriffs	1643–1663, 1692	472
Signature by Mark	3913	1142
Soldiers	3914, 3915	1142

	SECTIONS	PAGE
State Agricultural Society	3916–3932	1143
State Armory Building	3933	1146
State Boards, Bureaus and Commissions	4405–4602	1255
State Boundary	3934	1146
State Enabling Act	209– 225	56
State Exhibits	3935–3940	1147
State Hygienic Laboratory	3941–3945	1148
State Library	3946–3964	1149
State Militia	240, 241	67
	363, 364	110
	3965–4086	1153
State Officers	4109–4401	1182
State Orphans' Home	4087–4108	1176
State Police	4271–4304	1224
State Printing Office	4327–4340	1234
State Prison	314	91
	366	111
	7561–7602	2091
State Railroad Commission	4549–4585	1293
State Seal	4402–4404	1254
State Treasurer	312	90
	315	92
	380	114
	4360–4375	1242
State Weather Service Bureau	4405–4410	1256
Superintendent of Public Instruction	4345, 4346	1239
Superintendent of State Printing	4305–4340	1230
Supreme Court Rules		1421
Surveyor-General	312	90
	315	92
	4347–4359	1239
Taxation and Revenue	3617–3904	1044
Telegraph	4603–4630	1314
Telephone	4631–4634	1322
Territorial Enabling Act	192– 208	49
Town Government	877– 998	264
University of Nevada	356– 362	109
	4638–4670	1323
Veterinarian	4376–4390	1246
Virginia City School of Mines	4671	1333
Water—Acts of Congress, Decisions and State Statutes	4672–4791	1333
Weights and Measures	4792–4827	1381
Wills	6202–6225	1783

LAWS OF THE UNITED STATES

Included in this Compilation

	SECTIONS	PAGE
Agricultural Colleges and Experiment Stations	4655	1328
Authentication of Records	526– 528	156
Bankruptcy	543– 615	161
Bureau of Animal Industry	4390	1249
Carey Act	3063–3097	872
Constitution	86– 190	19
Desert Land Entries	3150–3162	906
Election of United States Senator	1901–1906	546
Enabling Act, State of Nevada	209– 220	56
Evidence of United States Laws	529	158
Homestead Entries	288	84
[1] Homestead Entries on Forest Reserves, Act of 1911	3134, 3135	902
Land Laws	3063–3195	872
Mines and Mining	2375–2421	677
Naturalization	2506–2544	754
Organization of Territory of Nevada	192– 208	49
Rights of Way Over Public Lands	3169	912
	3171, 3172	914
Townsites on Public Domain	1953–1979	562
Water	4672–4791	1333

[1] Regarding homestead entries on forest reserves, see also act of June 11, 1906, 34 U. S. Stats. L., p. 233, and National Forest Reserve Use Book.

TABLE OF CONTENTS

NUMERICAL LIST OF TITLES, SUBTITLES, ACTS, AND CHAPTERS OF ACTS HAVING CHAPTERS

Schedules of acts will be found at the heads of titles, and section schedules will be found at the heads of acts or chapters containing more than a few sections.

VOLUME 1

PART I

	SECTIONS	PAGE
Magna Carta	1– 64	1
Declaration of Independence	65– 70	9
Articles of Confederation	71– 85	13
Constitution of the United States	86– 191	19
Territorial Enabling Act	192– 208	49
State Enabling Act	209– 225	56
Constitution of Nevada	226– 427	61
Historical data regarding early government	428, 429	129
Proclamation of President Lincoln announcing the admission of Nevada	430	135

PART II

AGE OF MAJORITY

Act fixing age of majority	431	137

AGRICULTURE AND HORTICULTURE

Agricultural districts	432– 439	138
Aid to district agricultural associations	440– 444	139
Resident selling own products exempt from license	445	140
Horticultural commissioner	446– 453	141
Extermination of field mice and vermin	454– 455	142
Agricultural experiment station	456– 464	143
Agricultural experiment farm at Logan	465– 470	145
Experiment dry farm at Pleasant Valley	471– 476	146

APIARIES

Prevention of disease—Appointment and duties of inspector	477– 481	148

APPRENTICES

General act concerning apprentices	482– 497	149

ATTORNEYS

Act relative to attorneys and counselors at law	498– 525	152

AUTHENTICATION OF RECORDS

Sections from the Revised Statutes of the United States	526– 529	156

BAILMENTS

Relating to sales of unclaimed property	530– 542	158

BANKRUPTCY

Act of Congress of 1898, with amendments of 1903, 1906 and 1910	543– 615	161

BANKS AND BANKING

General act regulating	616– 694	190

	SECTIONS	PAGE
BONDS AND UNDERTAKINGS		
By surety companies	695– 701	210
BOUNTIES		
Artesian, oil and natural-gas wells	702– 717	212
Destruction of noxious animals	718– 727	216
CHILDREN		
Juvenile court law	728– 756	218
Contributory dependency and contributory delinquency	757– 764	230
Illegitimate children	765, 766	232
(Adoption of children)	5825–5834	1697
CITIES AND TOWNS		
Incorporation, classification, government and disincorporation of cities	767– 876	233
Government of towns and cities	877– 893	264
Transfer of surplus funds of unincorporated towns	894	273
Creation of fire department fund for towns	895– 902	273
Fire wardens in unincorporated towns	903– 907	274
Policemen in unincorporated towns	908– 918	275
Abatement of nuisances in unincorporated towns	919– 921	277
Improvement of streets and alleys in unincorporated towns	922– 939	278
Acquisition by unincorporated towns of water, light and sewer systems	940– 953	281
Apportionment of licenses in unincorporated towns	954	284
Platting of land into lots and streets and approval of plats	955– 966	285
Disincorporation of cities and towns incorporated under territorial laws	967– 974	287
Limitation of tax rate in cities and towns	975– 983	288
Bonds for sewerage systems in unincorporated cities and towns	984– 990	290
Bonds for municipal improvements and special assessments	991– 998	292
Exemption of unincorporated cities and towns from payment of costs in tax suits	999	293
COMMISSIONERS OF DEEDS		
Act relating to appointment, duties and fee	1000–1004	294
COMPILATION		
Compilation and force of these laws as evidence	1005–1016	295
CONVEYANCES		
General act	1017–1092	297
Supplemental act concerning county records and certified copies	1093, 1094	315
Act providing that the word "seal" is unnecessary	1095	315
Act concerning conveyances executed out of the state	1096, 1097	316
Act requiring officers taking acknowledgments to keep record	1098, 1099	316
Act to provide for conveyance of mining claims	1100–1102	316
Act concerning conveyance of mining claims by minors	1103, 1104	317
County recorders may take acknowledgments	1629	469
Records to impart notice	1635	470
Certified copies are evidence	1636	471
CORPORATIONS		
General incorporation law	1105–1215	319
Act to enable mining companies to consolidate	1216–1218	351
Old general corporation law	1219–1241	352
Formation of surety companies	1242–1248	361
Incorporation of cooperative associations	1249–1260	362
Franchises for electric light, heat and power companies	1261–1264	366
Act providing that gas companies may erect buildings and lay pipes	1265	367
Act to license and regulate insurance business	1266–1284	368
Act to provide for the incorporation of mutual fire insurance companies	1285–1303	372

CORPORATIONS—Continued SECTIONS PAGE

Act relating to reinsurance and transaction of business by fire insurance companies 1304–1309 378
Act relating to life, health, accident and endowment insurance on assessment plan 1310–1326 379
Act requiring insurance companies to make annual statements 1327–1329 384
Act requiring mining companies to file and mail statements 1330–1340 384
Act to encourage construction of cheap transportation lines 1341–1345 388
Act requiring foreign corporations to furnish evidence of their incorporation 1346, 1347 390
Act requiring foreign corporations to qualify, and regulating business 1348–1350 390
Act requiring foreign corporations to publish annual statements 1351–1354 391
Act giving foreign corporations benefit of statute of limitations 1355 392
Act for regulation of foreign building and loan societies 1356–1360 392
Act requiring nonresident joint-stock companies to furnish security before doing business 1361–1364 393
Schedule of other acts pertaining to corporations 1440 411

FRATERNAL, BENEVOLENT, LITERARY, RELIGIOUS AND ELEEMOSYNARY SOCIETIES

Act to provide for incorporation of religious, charitable, literary, scientific and other associations 1365–1372 394
Corporations for prevention of cruelty to animals 1373–1381 395
Organization of historical and other literary societies 1382–1389 398
Incorporation of hospitals and asylums 1390–1397 399
Incorporation of rural cemetery associations 1398–1409 401
Act incorporating Ancient Order of Hibernians 1410–1415 405
Act incorporating Grand Lodge Knights of Pythias 1416, 1417 406
Act incorporating Grand Lodge Free and Accepted Masons and Grand Lodge Independent Order of Odd Fellows 1418–1423 406
Act extending provisions of above act 1424 407
Act incorporating Protestant Episcopal churches 1425–1433 408
Act incorporating Women's Christian Temperance Union 1434–1439 410
List of other acts relating to corporations 1440 411

COUNTIES

Creation, boundaries, county-seats 1441–1500 412
Churchill County 1449, 1453 415
Clark County 1456, 1457 418
Douglas County 1442, 1450 413
Elko County 1458 418
Esmeralda County 1441, 1450, 1461 413
Eureka County 1462, 1464, 1465 420
Humboldt County 1448, 1466 415
Lander County 1467–1470 422
Lincoln County 1471–1473 424
Lyon County 1445, 1477, 1478 414
Mineral County 1479, 1480 426
Nye County 1481, 1482 427
Ormsby County 1443, 1450 413
Storey County 1446, 1450 414
Washoe County 1444, 1447, 1450, 1483–1485 414
White Pine County 1486, 1488 429
Survey and establishment of county boundaries 1489–1495 431
Removal of county-seats 1496–1500 432

COUNTY GOVERNMENT

COUNTY COMMISSIONERS

Acts creating and defining powers of boards of county commissioners 1501–1530 435

COUNTY COMMISSIONERS—Continued	SECTIONS	PAGE
Act relating to election of county commissioners by districts	1531–1534	447
Act regarding demands against counties	1535, 1536	448
Act prohibiting county commissioners from contracting beyond term	1537, 1538	449
No officer excepting board of county commissioners to contract for county	1539	449
Act authorizing county commissioners to loan or transfer money from one fund to another	1540	449
Act providing for publication of bills allowed against county	1541–1543	450
Act relating to payment of expenses for transporting prisoners	1544, 1545	450
Act fixing number and compensation of county commissioners	1546–1548	451
Act creating board of examiners	1549–1551	451
Act authorizing county commissioners to build or purchase buildings	1552–1554	452
Act authorizing county commissioners to apportion revenues	1554–1559	452
Act authorizing boards of county commissioners to procure alphabetical index of their records	1560, 1561	453
Act defining duties of county commissioners and district attorneys relative to abatement of nuisances	1562	454
Act relating to county certificates of indebtedness, or warrants	1563	454
Act prescribing office hours for county officers	1564, 1565	455
County commissioners may grant leave of absence to county officers	1566–1568	455
ASSESSORS		
Act relating to election, powers, duties, compensation and deputies of assessors	1569–1581, 1586	455
AUDITORS		
Apportionment of county revenues	1554–1559	452
Warrants payable in order of issuance	1563	454
Acts relating to auditors and county indebtedness	1582–1592	458
DISTRICT ATTORNEYS		
Election, bond, duties	1593–1607	461
To report to attorney-general, and partner not to act in criminal cases	1608–1612	461
COUNTY CLERKS		
Schedule of sections relating to election, powers and duties of county clerks	1612	465
Qualification and additional duties	1690, 1691	481
Not to charge for oath to claim and may retain certain fees	1613, 1614	465
PUBLIC ADMINISTRATORS		
Election, qualification, duties, powers	1615–1627	466
COUNTY RECORDERS		
Qualification, powers, duties, deputies	1628–1642	469
May take acknowledgments	1629	469
Records to impart notice	1635	470
Certified copies are evidence	1636	471
County recorders to subscribe for and preserve newspapers	1639, 1640	471
SHERIFFS		
Election, qualification, duties, deputies	1643–1663, 1692	472
Successor may execute deed	1662, 1663	476
COUNTY SURVEYORS		
Election, qualification, duties, deputies	1664–1674	476
COUNTY TREASURERS		
Qualification, duties, deputies	1675–1686	478
Placing funds in bank, restrictions, responsibility	1687, 1688	480
JUSTICES OF THE PEACE		
Conservators of the peace	1689	481

CONSTABLES

	SECTIONS	PAGE
Service of process, duties	1692	481

COUNTY OFFICERS

Office hours	1564, 1565	455
Deputies, jailers, compensation, fees and salaries	1693–1701	482
Salaried officers to pay fees to county treasurer	1696–1700	482
Fees payable in advance, liability of bondsmen	1699	483
State to allow part compensation of revenue officers	1701	484

DEAF, DUMB, AND BLIND

Support and education	1702–1704	485

ELECTIONS

REGISTRATION

Act to provide for the registration of electors	1705–1719	487
Act supplemental to act to provide for registration of voters, and allowing county commissioners to publish list of voters	1720	496
Act to provide for registration of voters in case of death or resignation of registry agent	1721–1725	496
Act to provide for registration of electors in certain incorporated cities	1726–1732	497
Separate registration for out-of-town voters in precincts containing cities and towns	1866, 1867	540
Act providing that registration at the primary will be sufficient for voting at general election	1733	500
Act requiring registry agents to file list of registered voters with county clerk and secretary of state	1734, 1735	500

PRIMARY ELECTION

Act to provide for direct nomination of candidates for public office by electors	1736–1766	501

GENERAL ELECTION

General act relating to elections	1767–1832	515
Act relating to elections and to more fully secure the secrecy of the ballot (Australian ballot law)	1833–1862	531
Act requiring rejected ballots to be canvassed on separate sheet	1863	539
Act prohibiting officers from marking ballots except to indorse reasons for rejection	1864	540
Act relating to elections, requiring that no precinct shall have more than 400 voters	1865	540
Act concerning election of town and city officers	1866–1871	540
Act providing for closing of polls when all votes of precinct have been cast	1872	541
Act to provide for transmission of ballots, poll books and tally lists by mail in certain cases	1873–1877	542
Act providing for manner of submitting constitutional amendments to the voters of the state	1878–1881	542
Act to provide for submitting certain acts of the legislature to the electors under the referendum provisions of the constitution	1882–1886	543
Act to provide for the taking of the votes of electors of the state who may be in the military service of the United States	1887–1893	544
Act limiting the time in which proceedings for contesting the election of any officer may be begun	1894, 1895	546

ELECTION OF UNITED STATES SENATOR

Act to secure the election of United States senators in accordance with the will of the people and the choice of the electors	1896–1900	546
Statutes of the United States relative to election of United States senators by the legislature	1901–1906	547
Act prescribing manner of electing United States senators	1907–1914	549

EMPLOYER AND EMPLOYEE	SECTIONS	PAGE
Employers' liability act	1915–1928	550
Act to provide for arbitration of differences between employers and employees	1929–1935	565
Act to prohibit false advertising or deception in procuring employees to work	1936–1938	557
Act prohibiting the issuance of non-negotiable acknowledgments of indebtedness in payment for wages	1939, 1940	558
Act specifying that men working on the surface of underground mines shall not labor more than eight hours in one day	1941, 1942	558
Other eight-hour laws	3597–3599	1037
	6554–6560	1869
Act making it a misdemeanor to collect hospital fees in certain cases	1943–1945	559
EXPLOSIVES		
Restriction on storage	1946–1948	560
FEDERAL JURISDICTION		
Act ceding jurisdiction over certain lands owned by the United States	1949, 1950	561
Act ceding jurisdiction over certain lands to be acquired by the United States	1951, 1952	561
FEDERAL TOWNSITES		
United States statutes relating to townsites	1953–1979	562
Act prescribing regulations for the execution of the trust under the act of Congress of March 2, 1867, providing for the patenting of townsites and the relief of inhabitants of cities and towns upon the public lands	1980–1988	573
Act amendatory of that act	1989–1991	577
Act supplementary to the first-named act	1992, 1993	577
FEES		
Fees in compensation for official and other services	1994–2044	578
Fees for certified copies of records or documents	2045	594
Fees for recording certificates of labor	2046	594
FISH AND GAME		
Act to provide for the preservation of fish	2047–2051	595
Act to provide for appointment and defining duties and compensation of fish and game wardens	2052–2055	597
Act giving authority to county commissioners to extend close season for fishing	2056–2058	597
Act to provide for the preservation of fish	2059–2075	598
Act to provide for the establishment of private fish hatcheries	2076–2084	601
Act for protection of game, beaver, plume and song birds	2085–2100	603
Act to regulate and license hunting of game birds and animals and catching fish	2101–2112	606
Act to prevent shipment of wild game	2113	608
FORESTRY		
Act to provide for protection of timbered lands	2114–2117	608
Act to preserve young forest trees	2118–2120	609
FRANCHISES		
Act to provide for the sale of street railway franchises in towns	2121–2128	610
Act concerning the granting of franchises by boards of county commissioners	2129–2141	611
HOMESTEADS		
Act to exempt the homestead and other property from forced sale in certain cases	2142–2150	615

HOTELS AND LODGING-HOUSES

	SECTIONS	PAGE
Act for protection of proprietors of hotels and lodging-houses	2151–2154	619

HUSBAND AND WIFE

Act defining rights of husband and wife	2155–2189	621
Act to authorize married women to transact business as sole traders	2190–2194	627

INSANE

Act concerning insane; location of asylum	2195	629
Act to fix legal name of institution for care of indigent insane	2196, 2197	629
Act creating board of commissioners for care of indigent insane	2198, 2199	629
Acts relating to care of insane	2200–2207	630
Act to provide for transfer of insane convicts	2208, 2209	632
Act to provide for commitment of insane persons	2210	633
Act to provide for admission of certain persons into insane asylum	2211, 2212	633

LIENS

Act to secure liens to mechanics and others	2213–2231	634
Act to secure liens to ranchmen and other persons	2232	642

LIVE STOCK

Act to regulate marks and brands	2233–2242	643
Act regulating use of marks and brands	2243–2248	645
Act concerning unlawful stock	2249–2260	646
Act to prohibit certain live stock from running at large	2261–2265	648
Act to protect live stock from disease	2266–2268	649
Act to prevent the spread of contagious diseases among live stock	2269–2271	650
Act to provide for immediate destruction of animals dying of contagious diseases	2272, 2273	650
Act concerning estray animals	2274–2284	651
Act to provide for appointment of inspectors of hides	2285, 2286	653
Act to protect horse growers	2287, 2288	654
Act providing for inspection of horses	2289–2296	654
Act authorizing destruction of wild unbranded stallions	2297	656
Acts to prevent dissemination of contagious diseases among sheep	2298–2316	657
Act to prohibit herding or grazing of sheep within three miles of any town or village	2317, 2318	662
Act in relation to herding, grazing and driving of sheep	2319–2321	662
Act to prohibit swine from running at large	2322–2324	662
Act to make it unlawful for the owner of swine or goats to allow them to run at large during a certain period of the year	2325–2327	663
Act relating to trespass of swine, sheep and goats	2328–2331	663
Act to prevent trespassing of animals upon private property	2332–2334	664
Act to prevent trespass upon real estate by live stock	2335–2337	665

MARRIAGE

Part of marriage and divorce act relating to marriage	2338–2357	666
Part of this act relative to divorce	5838–5845	1700

MEDICINE, SURGERY AND OBSTETRICS

Act relating to practice	2358–2374	670

MINES AND MINING

FEDERAL LAWS

General mining laws of United States relating to lode and placer claims, tunnels and millsites, appearing in U. S. Revised Statutes	2375–2391	677
	2396–2407	702

MINING—FEDERAL LAWS—Continued	SECTIONS	PAGE
Amendment of 1875, providing that money expended on tunnel shall be considered as expended on claim	2382	684
Amendment of 1882, providing that adverse claims may be verified by agents and affidavits of citizenship of applicants for mineral patents may be made out of district	2384	694
Act extending to saline lands the laws relating to placer locations	2392	701
Act authorizing entry of land valuable for building-stone, under the placer mining laws	2393	702
Act authorizing entry of lands containing petroleum and other mineral oils under the laws relating to placer locations	2394	702
Act providing that annual assessment work on oil lands may be done on any one of a group of not more than five claims	2395	702
United States laws relating to coal lands	2408–2413	706
Act authorizing use of timber on public domain for mining and domestic purposes	2414–2416	707
Act restricting entry under all land laws to 320 acres and reserving right of way for government canals	2417	708
Act modifying the last-named act so as to allow the acquiring of mines in addition to 320 acres of other land, and regarding townsite entries on mineral lands	2418, 2419	708
Act relating to forest reserves, mineral and agricultural lands therein and the use of timber and stone thereon	2420	709
Act for refunding certain payments made by applicants for mineral surveys	2421	710
GENERAL LAND OFFICE		
Regulations relating to mining claims		711
STATE LAWS		
General act relating to location and holding of mining claims, millsites and tunnel rights	2422–2446	730
Act to provide for location of lands containing salt	2447–2450	739
Act for the better protection of the rights of locators of mining claims, relating to certificates of location, receipts, and seal of district mining recorder	2451–2455	740
Act to encourage mining, allowing prospecting for minerals upon lands held or patented by the state	2456, 2457	740
Act authorizing prospecting on unfenced and unimproved land in private ownership, and for acquiring title thereto	2458–2462	741
Acts providing for the better preservation of mining records	2463–2474	742
Act to provide for the recording of grub-stake contracts	2475	744
Act regarding suit for expenditure by company owning majority interest in mine	2476–2482	744
Act to facilitate the recovery of ores and metals taken by theft or trespass	2483–2486	746
Act to regulate the purchase of ore	2487–2491	748
Act relating to inspection of mines by stockholders	2492–2496	749
MONEY AND INTEREST		
Act in relation to money of account and interest	2497–2500	751
Act concerning payment in money of debts and other obligations	2501	752
NAMES AND EMBLEMS		
Unlawful to use corporate or other names or wear military, lodge or other insignia	2502–2505	752
NATURALIZATION		
United States statutes relating to naturalization	2506–2513	754
Federal act establishing bureau of immigration and naturalization	2514–2544	755

	SECTIONS	PAGE
NEVADA HISTORICAL SOCIETY		
Act to create and encourage	2545–2547	768
NEGOTIABLE INSTRUMENTS		
Negotiable instruments law	2548–2743	771
Act designating holidays to be observed in acceptance and payment of bills and notes	2744	796
NOTARIES PUBLIC		
Act relating to appointment and duties of notaries public	2745–2761	796
Act regarding appointment, terms of office and enlarged territory in which they may act	2762–2764	799
OFFICERS GENERALLY		
Act relating to officers, their qualifications, times of election, terms, duties, resignations, removals, vacancies, misconduct in office, and to enforce official duty	2765–2847	801
Act authorizing officers to appoint deputies	2848–2850	816
Act providing for removal from office	2851–2854	817
Act providing for examination and auditing of books and accounts of certain officers	2855–2860	818
Act to prevent drunkenness in office	2861–2863	819
Act to authorize fees and salaries of officers to be taken in attachment and execution, and to prohibit assignments to defraud creditors	2864–2866	819
OFFICIAL ADVERTISING		
Rates for state and county advertising	2867	820
OFFICIAL BONDS		
General act concerning official bonds	2868–2879	821
Act providing for release of sureties	2880–2884	823
Act concerning sureties on	2885, 2886	824
Bond of county clerk when he is ex officio county recorder to be deposited with county treasurer	2887	825
Act allowing bonds of surety companies for officers	2888–2890	825
OFFICIAL OATH		
Form of	2891	826
OPTOMETRY		
Act to regulate practice and fix license	2892–2896	827
PARTNERSHIP		
Act to authorize the formation of limited partnerships	2897–2909	828
Act requiring partners transacting business to file certificate of partnership	2910–2914	830
POOR AND POOR LAWS		
Act relating to support of the poor	2915–2925	833
Act concerning bringing of indigent, incompetent or incapacitated persons into the state or from one county into another	2926–2928	835
PUBLIC DOCUMENTS AND REPORTS		
Act relating to public reports	2929–2931	836
Act authorizing secretary of state to furnish printed public documents, statutes and reports to certain parties	2932	837
Act to provide for free distribution of statutes and legislative journals to publishers of newspapers furnished state library	2933	837
Act relating to distribution of law books	2934–2936	837

PUBLIC DOCUMENTS AND REPORTS—Continued SECTIONS PAGE

Act to regulate the sale of state law books ... 2937 838
Act to provide for the preservation and sale of certain Nevada Reports ... 2938–2940 838
Act to provide for the republication and stereotyping of certain volumes of the decisions of the supreme court ... 2941–2946 838
Act to provide for publication and distribution of Nevada Reports ... 2947–2951 840

PUBLIC HEALTH

Act to create a state board of health, defining duties, prescribing manner of appointments of officers, fixing their compensation, and establishing county boards of health ... 2952–2980 842
Act to create county boards of health ... 2981, 2982 850
Act to provide for recording of births and deaths ... 2983–2987 850
Act to prohibit bringing of diseased animals within this state and to prevent selling of same ... 2988–2995 852
Act to provide for preventing the spread of contagious diseases ... 2996–3003 853

PUBLIC HIGHWAYS

General act in relation to public highways ... 3004–3010 855
Act concerning road districts, road funds and opening of roads ... 3011–3016 857
Act in relation to erection and maintenance of bridges ... 3017–3021 860
Act requiring water-users to construct bridges and culverts ... 3022–3025 861
Act to provide for erection of guideboards on ... 3026–3028 862
Act to create office of road inspector and provide for work on public roads ... 3029–3036 862
Act providing for election of road supervisors ... 3037–3040 864
Act providing for appointment of road supervisors in certain counties ... 3041–3044 864
Act to protect public highways from damage by water ... 3045, 3046 865
Act relating to toll roads and bridges ... 3047, 3048 865
Act to compel owners of toll roads to keep same in repair ... 3049 865
Act to provide for constructing and maintaining toll roads and bridges ... 3050–3062 866

PUBLIC LANDS

Carey act and state legislation in relation thereto ... 3063–3097 872
Reclamation act and state legislation in relation thereto ... 3098–3114 890
Homestead entries ... 3115–3149 896
Regarding canceled, relinquished, contested and invalid homestead entries on forest reserves ... 3134, 3135 902
Concerning entries on withdrawn lands and segregation of reservoir sites, see act of Congress of August 30, 1890 ... 1336
Regarding right and preference of homestead and additional homestead in forest reserves on lands settled upon before and since January 1, 1906, see act of Congress of June 11, 1906, 34 U. S. Stats. L., p. 233, and National Forest Reserve Use Book.
Desert entries ... 3150–3162 906
Timber and stone entries ... 3163–3167 910
Act abolishing distinction between offered and unoffered lands ... 3168 912
Rights of way for canals ... 3169 912
320-acre limitation ... 3169, 3170 912
Rights of way for canals, tramways, reservoirs and electric power lines ... 3171, 3172 914
4672 1335
Unlawful inclosure of public lands ... 3173–3177 914
Act to protect locators of oil and gas lands ... 3178 916
Grants of lands to the state ... 3179–3195 916
State land laws ... 3196–3226 922

PUBLIC LIBRARIES

Act to provide for free public libraries ... 3227–3231 835

PUBLIC RECORDS

	SECTIONS	PAGE
Act empowering all persons to copy or abstract all books and records of state and county officers	3232	936

PUBLIC SAFETY

Act to secure persons and animals from danger arising from mining and other excavations	3233–3238	937

PUBLIC SCHOOLS

General act concerning public schools	3239–3461	940
Chapter 1—State board of education	3239–3242	940
Chapter 2—Superintendent of public instruction	3243, 3244	940
Chapter 3—Deputy superintendents of public instruction	3245–3254	943
Chapter 4—Teachers' certificates	3255–3273	945
Chapter 5—Powers and duties of teachers	3274–3277	949
Chapter 6—School trustees	3278–3313	951
Chapter 7—School districts	3314–3339	961
Chapter 8—General provisions	3340–3360	966
Chapter 9—Census marshals	3361–3372	970
Chapter 10—School funds	3373–3392	973
Chapter 11—District school libraries	3393–3397	980
Chapter 12—School books	3398–3412	981
Chapter 13—County high schools	3413–3424	985
Chapter 14—Normal training schools	3425–3430	987
Chapter 15—School district bonds	3431–3442	989
Chapter 16—Compulsory education	3443–3451	992
Chapter 17—Protection of school children	3452–3454	994
Chapter 18—Protection of school property	3455, 3456	994
Chapter 19—Location of houses of ill-fame	3457–3459	995
Chapter 20—Construction of act	3460, 3461	995
Act to provide books, equipment and materials, and to encourage the economic use thereof by pupils	3462–3472	997
Act to authorize the issuance of interest-bearing school warrants in emergencies	3473–3477	999
Act providing that percentage of fees from national forest reserves be paid into county school fund	3478	1000

PUBLIC SUPPLIES

Act relating to the purchase of supplies for the state and counties	3479, 3480	1000

PUBLIC WORK

Act fixing rate for unskilled labor on buildings erected for state	3481, 3482	1001
Act to prohibit employment of Chinese and Mongolians	3483–3485	1001

PURE FOOD LAW

Act for preventing the manufacture, sale or transportation of adulterated, mislabeled, poisonous or deleterious foods, drugs, medicines and liquors, and for regulating the traffic therein	3486–3510	1002

RAILROADS

Act to provide for incorporation of railroad companies and management of affairs thereof	3511–3570	1009
Act concerning petitions of taxpayers in aid of construction of railroads	3571	1030
Act to provide for proper care of live stock by transportation companies	3572, 3573	1030
Act authorizing sale by any railroad of its property and franchises to any other railroad corporation; operation, extension, eminent domain	3574	1031
Act to prevent discrimination in rates and fares	3575–3584	1031
Act regulating transportation of live stock	3585–3587	1035

RAILROADS—Continued

	SECTIONS	PAGE
Acts to promote public safety by requiring adequate train crews	3588–3596	1036
Act regulating number of hours of telegraph operators engaged in handling or dispatching trains	3597–3599	1037
Act requiring railroads to give public notice of live stock killed or injured	3600, 3601	1038

REAL ESTATE

Act to authorize aliens and nonresident persons to acquire and hold real estate	3602, 3603	1038
Act to provide for erection and maintenance of partition fences	3604–3608	1039

RESIDENCE

Act defining what shall constitute legal residence	3609	1040
Act prescribing what shall constitute actual residence	3610–3616	1040

REVENUE

Act to fix the tax levy	3617	1044
Act to provide revenue for the support of the State of Nevada, and to repeal certain acts relating thereto	3618–3766	1045
Acts supplementary to above	3767–3792	1104
Act defining certain duties of county assessors and other officers	3793–3796	1111
Act to provide for more uniform valuation and assessment of property	3797–3813	1112
Act in relation to assessment of railroads	3814–3817	1116
Act in relation to the levy, raise or reduction of the tax rate by county commissioners	3818	1118
Act regulating assessment and taxation of banks and shares of stock therein	3819–3825	1119
Act relating to county government and reduction of rate of taxation	3826–3836	1120
Act in relation to fixing the tax rate in certain counties	3837	1122
Act requiring a minimum valuation to be placed upon lands	3838–3840	1123
Act providing for disposition of poll-tax collections	3841	1123
Act to exempt from taxation Young Men's Christian Association buildings	3842	1124
Act in relation to assessment of live stock running at large	3843, 3844	1124
Act defining and classifying transient stock and providing for assessment, collection, and distribution of taxes on same	3845–3861	1125
Act in relation to delinquent taxes; adjustment between county treasurer and auditor	3862, 3863	1128
Act allowing payment of taxes in semiannual installments	3864–3866	1129

LICENSES

Act empowering certain officers to revoke and discontinue business licenses	3867–3871	1130
Act licensing sale of cigarettes and cigarette paper	3872–3876	1131
Act fixing and regulating licenses on automobiles	3877, 3878	1132
Act forbidding collection of licenses from drummers and traveling salesmen	3879, 3880	1132
Act to restrict and license glove contests	3881–3889	1132
Act to provide for licensing itinerant and unsettled merchants	3890–3895	1133
Act to provide for issuance of license as peddler or auctioneer to honorably discharged soldiers, sailors and marines	3896, 3897	1134
Act authorizing county commissioners to regulate, issue licenses to and revoke licenses of stationary engineers	3898–3904	1135

REWARDS

Act to authorize and require the payment of rewards in certain cases	3905	1139
Act to authorize county commissioners to offer and pay rewards in certain cases	3906, 3907	1139
Governor shall offer reward for violation of election laws, and for escapes or murderers	1831	531
	2831	813
Bank examiner may offer reward for larceny from bank	646	199

SALES OF MERCHANDISE	SECTIONS	PAGE
Act to regulate the purchase, sale, transfer, and encumbrance of a stock of goods, wares, or merchandise in bulk, and for protection of creditors	3908–3912	1140
SIGNATURE BY MARK		
Act to provide for marks instead of signatures	3913	1142
SOLDIERS		
No fee to be charged for administering oath or certifying papers for pensioners	3914	1142
Act to provide for payment of funeral expenses of indigent ex-soldiers	3915	1142
STATE AGRICULTURAL SOCIETY		
Act to incorporate	3916–3920	1143
Act to provide for management and control of	3921–3931	1144
Act for the aid and benefit of	3932	1146
STATE ARMORY BUILDING		
Act relating to custody and grounds	3933	1146
STATE BOUNDARY		
Act to define a portion of the western boundary of the State of Nevada	3934	1146
STATE EXHIBITS		
Act empowering county commissioners to levy special tax to cover expenses of displaying products of county at expositions	3935, 3936	1147
Act to encourage the exhibition of Nevada products	3937–3940	1147
STATE HYGIENIC LABORATORY		
Act to establish and maintain at the University of Nevada, and providing for the appointment of a director and assistants	3941–3945	1148
STATE LIBRARY		
General act in relation to	3946–3953	1149
Act prescribing office hours for state library	3954–3959	1151
Act to authorize state librarian to appoint assistant	3960	1152
Act to provide for disposal and sale of duplicate copies of books	3961	1152
Act authorizing employment of engineer and janitor for state library building	3962–3964	1153
STATE MILITIA		
Act relating to the national guard and enrolled militia	3965–4020	1154
Acts relating to Nevada national guard	4021, 4027–4035	1163
Act relative to military affairs	4022, 4023	1163
Act to prohibit and punish retention of state and company property of the national guard	4024–4026	1164
Act relating to military encampment	4036, 4037	1166
Act to provide for organizing and disciplining the militia	4038–4086	1167
STATE ORPHANS' HOME		
Act for the erection of a state orphans' home and to provide for the same	4087, 4088	1176
Act for the government and maintenance of the state orphans' home	4089–4103	1177
Act granting certain powers to the board of directors	4104	1180
Act fixing the salary of the superintendent and matron	4105	1181
Act to provide educational facilities for children of	4106–4108	1181
STATE OFFICERS		
Act providing for leave of absence for state employees	4109	1183
Act to consolidate certain state offices	4110	1184

	SECTIONS	PAGE
LEGISLATURE		
Reapportioning senators and assemblymen	4111	1184
Act to provide for organization of assembly at commencement of each session	4112, 4113	1185
Act fixing number of officers and attaches, and to define their duties and specify their pay	4114–4117	1185
Act to provide chaplains for the legislature	4118, 4119	1186
Act providing for the printing of legislative bills and resolutions	4120–4124	1186
Act providing for copying, engrossing and enrolling	4125, 4126	1187
Act fixing time when laws and joint resolutions shall take effect	4127	1188
ATTORNEY-GENERAL		
Act defining duties of attorney-general	4128–4134	1188
Act to authorize attorney-general to employ deputies	4135, 4136	1190
Act to further define powers and duties of attorney-general	4137	1190
Act to authorize attorney-general to employ stenographic clerk	4138, 4139	1191
Act relating to commencement of suits to maintain flow of Truckee river	4140	1191
Act constituting attorney-general ex officio mineral land commissioner	4141–4147	1191
AUDITOR		
Act to provide for appointment of, fixing his compensation and prescribing his duties	4148–4153	1193
CONTROLLER		
Act defining the duties of state controller	4154–4178	1195
Act to provide for appointment of deputy state controller, and to fix his compensation	4179	1201
Act to create a fire insurance fund	4180–4182	1201
Act authorizing canceling of old unpaid warrants	4183–4185	1202
Act making it unlawful for any public officer to accept relief from the state for loss of tax receipts unless affidavits are filed	4186, 4187	1203
Act authorizing controller and ex officio commissioner of insurance to employ a stenographic clerk	4188, 4189	1203
GOVERNOR		
Act authorizing the governor to appoint a private secretary	4190, 4191	1205
Act fixing salary of private secretary	4192, 4193	1205
Act authorizing governor, secretary of state and state treasurer to employ clerks and typists	4194–4197	1206
INSPECTOR OF MINES		
Act creating office of inspector of mines and fixing duties and powers	4198–4238	1207
Act extending tenure of office	4239	1216
LICENSE AND BULLION TAX AGENT		
Act providing for appointment of, fixing compensation and prescribing duties	4240–4248	1216
LIEUTENANT-GOVERNOR		
Act concerning residence of	4249	1218
Act defining duties of when acting as an ex officio officer, and fixing salary therefor	4250	1218
SECRETARY OF STATE		
Act concerning office of	4251–4261	1219
Act relating to duties of	4262, 4263	1222
Act to provide for preservation of the manuscript laws	4264, 4265	1223
Act to provide for recording of all state contracts and agreements	4266, 4267	1223
Act relating to preparing and printing biennial report	4268	1223
Act authorizing employment of clerk and typists	4195, 4269	1206
Act authorizing employment of stenographer	4270	1224

STATE POLICE	SECTIONS	PAGE
Act to provide for the creation, organization and maintenance of, and prescribing the powers and duties of the officers and members	4271–4293	1224
Act creating office of commissary of state police and prescribing duties	4294–4298	1229
Act to authorize appointment of state detectives	4299–4304	1229
SUPERINTENDENT OF STATE PRINTING		
Act fixing salary of superintendent of state printing	4305	1230
Act in relation to message of governor and reports of certain state officers	4306	1230
Act authorizing copyright of all state publications	4307, 4308	1231
Act authorizing use of union label on all public printing	4309, 4310	1231
Act authorizing superintendent to employ bookkeeper and typist	4311, 4312	1231
Act designating and authorizing work to be done in state printing office	4313–4326	1232
STATE PRINTING OFFICE		
Act establishing and creating office of superintendent of state printing	4327–4340	1234
SUPERINTENDENT OF PUBLIC INSTRUCTION		
Act authorizing employment of stenographic clerk	4341, 4342	1238
Act fixing salary of superintendent of public instruction	4343	1238
Act abolishing office of state mineralogist, and making superintendent of public instruction curator of museum and defining duties	4344–4346	1239
SURVEYOR-GENERAL		
Act concerning office of	4347–4354	1239
Act relative to maps of state and county boundaries	4355	1241
Act to provide for paying cost of printing and stationery	4356–4359	1241
TREASURER		
Act defining duties of state treasurer	4360–4369	1242
Act supplementary to above	4370–4372	1244
Act to prevent persons having claims against the state from presenting same a second time	4373	1245
Acts concerning employment of clerk	4196, 4374, 4375	1246
VETERINARIAN		
Act providing for appointment of, defining duties and fixing compensation	4376–4389	1246
Act for establishment of bureau of animal industry	4390	1249
SALARIES		
Salary of private secretary to the governor	4192, 4193	1205
Acts reducing and regulating salaries of certain state officers	4391–4394	1250
Act fixing salaries of certain deputies in state offices	4395–4397	1252
Act fixing salaries of certain attaches and deputies	4398, 4401	1252
Act authorizing payment of salaries of officers fixed by law	4399, 4400	1253
State engineer	4679	1340
Justices of supreme court	4893	1404
State boards, bureaus and commissions		1255
Schedule of sections fixing salaries of other state officers	4391	1250
STATE SEAL		
Act to provide a seal of state	4402	1254
Act in relation to procurement and use of the great seal	4403, 4404	1254
STATE BOARDS, BUREAUS AND COMMISSIONS		
STATE WEATHER SERVICE BUREAU		
Act to establish weather service station and provide for appointment of a director thereof	4405–4410	1256
CAPITOL COMMISSIONERS		
Act providing for state board of capitol commissioners	4411–4421	1257
Act in relation to keeping and preservation of state capitol decorations	4422, 4423	1258
Act to provide supply of water for capitol and state orphans' home	4424–4426	1259

	SECTIONS	PAGE
BOARD OF DENTAL EXAMINERS		
Act to insure the better education of practitioners of dental surgery	4427–4444	1260
EMBALMERS		
Act to establish state board of embalmers	4445–4454	1265
BOARD OF EXAMINERS		
Act relating to board of examiners, to define their duties and powers	4455–4464	1267
Accounts against state to be itemized and filed in duplicate	4465	1269
No deficiency to be created or warrants issued unless authorized by the board of examiners	4466, 4467	1269
Act to provide for the purchase of certain supplies for state officers and attaches of the legislature; board of examiners ex officio furnishing board	4468–4477	1270
Act relating to claims of ex-soldiers of the Spanish war	4478–4480	1272
Official advertising and publication of supreme court decisions	4481	1272
FISH COMMISSIONERS		
Act to provide for appointment of a board of fish commissioners	4482, 4483	1273
Act to provide for establishment and maintenance of a state fish hatchery	4484, 4485	1274
BUREAU OF INDUSTRY, AGRICULTURE AND IRRIGATION		
Act establishing bureau, providing for a commission in charge, and creating the office of commissioner	4486–4494	1274
BOARD OF PHARMACY		
Act to provide for creation of a state board of pharmacy and to regulate the practice of pharmacy	4495–4514	1278
PUBLIC SERVICE COMMISSION		
Act making railroad commission ex officio a public service commission for the regulation and control of certain public utilities	4515–4548	1283
STATE RAILROAD COMMISSION		
Act to regulate railroads, telegraph and telephone companies and other common carriers, and creating a railroad commission	4549–4585	1293
SHEEP COMMISSION		
Act regulating the sheep industry and creating a state board of sheep commissioners	4586–4602	1310
TELEGRAPH		
Act for the regulation of the telegraph, and to secure secrecy and fidelity in the transmission of telegraphic messages	4603–4623	1314
Act to provide for constructing and maintaining telegraph lines	4624–4630	1319
TELEPHONE		
Act to define rights and responsibilities of owners of telephone lines	4631, 4632	1322
Authorizing county commissioners to purchase or construct telephone lines	4633, 4634	1322
TRADEMARKS		
Act to protect persons, associations and unions of workingmen and others in their labels, trademarks and forms of advertising	4635–4637	1322
UNIVERSITY OF NEVADA		
Act to fix the name of the State University of Nevada	4638	1324
General act relating to the state university	4639–4650	1324
Act to provide for the election of a board of regents	4651	1327
Act to locate the state university and to provide for its control	4652–4654	1327
Act of Congress in aid of agricultural colleges and establishing agricultural experiment stations	4655	1328

UNIVERSITY OF NEVADA—Continued SECTIONS PAGE
Act in relation to the agricultural, mining and mechanical college....4656–4659 1330
Act relating to assays and analyses of minerals....4660–4663 1331
Act to commission officers of cadets of the state university....4664, 4665 1332
Act creating honorary board of visitors of the state university....4666–4670 1332

VIRGINIA CITY SCHOOL OF MINES

Act creating Virginia City School of Mines.... 4671 1333

WATER

ACTS OF CONGRESS

Act of July 26, 1866, Rev. Stats. U. S., section 2339, confirming water rights for mining and other purposes, and rights of way for ditches.... 2401 704
Act of June 17, 1902, recognizing vested rights and state legislation.... 3105 893
Act authorizing secretary of interior to permit use of right of way upon public lands for canals, reservoirs, tramways and power lines, as amended and supplemented May 14, 1896, and May 11, 1898....3171, 3172 914
Act of 1870, Rev. Stats. U. S., section 2340, providing for reservation from U. S. patents of water rights, reservoirs, and rights to ditches.... 2402 705
Act of August 30, 1890, 26 Fed. 391, providing for reservation from patents of the right of way for canals constructed by the United States.... 3169 912
Act of Congress of March 3, 1891, relating to rights of way through public lands for ditches and canals.... 1335
Act of February 1, 1905, relating to rights of way for dams, reservoirs, water plants, ditches, flumes, pipes, tunnels and canals across forest reserves.... 1335
Other acts of Congress relating to reservoirs, ditches, canals, and entries on the public lands.... 1336

STATE STATUTES

General act in relation to water....4672–4705 1339
Act creating state board of irrigation.... 4706 1352
Act requiring water users to install headgates and measuring weirs....4707–4709 1353
Act to allow the running of water through any ditch or flume and to provide for right of way....4710–4713 1354
Act relating to construction of waste ditches and to provide right of way.... 4714 1355
Act to provide for turning stored water into channels or streams and for reclaiming the same.... 4715 1356
Act authorizing boards of county commissioners to institute and maintain suits against parties depositing sawdust in rivers or streams, and providing for a tax to pay the expense of same....4716, 4717 1356
Act to provide for protection of agricultural lands and relating to the obstruction and pollution of waters and streams....4718–4720 1356
Act defining and prohibiting unlawful diversion and waste of water....4721, 4722 1357
Act to provide for drainage, irrigation, and water storage districts for the acquisition of water and property, and relating to other matters connected therewith....4723–4791 1357

WEIGHTS AND MEASURES

Act concerning and fixing standard weights and measures and to regulate the sale of commodities or articles of merchandise according to such standards, and to provide for the inspection of weights, measures and weighing and measuring devices....4792–4823 1381
Act to regulate measurement of charcoal....4824–4827 1387

VOLUME 2

PART III

COURTS AND COURT OFFICERS

	SECTIONS	PAGE
General act concerning courts and judicial officers	4828–4885	1389
Courts of the state	4828	1391
Supreme court	4829–4839	1392
District courts	4840–4850	1394
Justices' courts	4851, 4852	1397
Recorders' courts	4853–4860	1398
General provisions	4861–4885	1399
Act to prevent delay in rendering judicial decisions	4886, 4887	1403
SUPREME COURT		
Act making sheriff of Ormsby County bailiff of the supreme court, and fixing his compensation	4888	1404
Act authorizing the supreme court to appoint an official reporter	4889–4890	1404
Act authorizing the supreme court to employ stenographic clerks	4891, 4892	1404
Act fixing salaries of justices of the supreme court	4893	1404
Act fixing compensation of clerk of the supreme court	4894–4896	1405
Act for the reporting of the decisions of the supreme court	4897–4899	1405
Act authorizing clerk of the supreme court to appoint a deputy	4900	1405
DISTRICT COURTS		
Act creating judicial districts, and relating to district judges, their residences and salaries	4901–4905	1406
Act providing that district courts shall always be open, and for traveling expenses of district judge	4906–4907	1408
Act relating to the appointment, duties and compensation of official reporters for the district courts	4908–4913	1409
Act relating to the appointment, powers and duties of bailiffs in district courts	4914–4920	1410
Act providing offices for district judges	4921	1411
Act concerning the concurrent power of district judges	4922	1411
Act authorizing district judges to sign records of their predecessors	4923	1412
Act making it the duty of district judges to charge grand juries regarding duties of officers	4924	1412
Act making it the duty of district judges to charge grand juries regarding erection of guideposts and recording of births, deaths and marriages	4925	1413
JUSTICES OF THE PEACE AND CONSTABLES		
Act providing when one justice of the peace may act for another	4926	1413
Bond and oath of justice of the peace and constable	4927, 4928	1413
JURORS AND JURIES		
General act concerning juries	4929–4935	1414
Act supplementary thereto	4936	1418
Act regulating manner of drawing juries in district courts	4937–4940	1418
Act to exempt from jury duty persons over 65 years of age	4941	1419
Act relating to expenses of juries in civil cases	4942	1419
COURT RULES		
Of the supreme court		1421
Of the district court		1425

CIVIL PRACTICE

	SECTIONS	PAGE
Main civil practice act	4943–5821	1433
Chapter 1—Preliminary provisions	4943–4945	1435
Chapter 2—Limitations in general	4946, 4947	1436
Chapter 3—Limitations—Real property	4948–4966	1436
Chapter 4—Limitations other than real property	4967–4973	1441
Chapter 5—Limitations—Miscellaneous	4974–4985	1444
Chapter 6—Parties	4986–5010	1447
Chapter 7—Place of trial	5011–5015	1454
Chapter 8—Manner of commencing action	5016–5034	1457
Chapter 9—Pleadings	5035–5037	1465
Chapter 10—Complaint	5038, 5039	1466
Chapter 11—Demurrer to complaint	5040–5045	1469
Chapter 12—Answer	5046–5052	1471
Chapter 13—Demurrer to answer	5053–5056	1473
Chapter 14—Reply	5057–5059	1474
Chapter 15—Verification	5060–5064	1475
Chapter 16—General rules of pleading	5065–5079	1476
Chapter 17—Variance, mistakes in pleadings, and amendments	5080–5086	1480
Chapter 18—Arrest and bail	5087–5113	1483
Chapter 19—Discharge from arrest	5114–5123	1488
Chapter 20—Claim and delivery	5124–5135	1490
Chapter 21—Injunction	5136–5146	1493
Chapter 22—Attachment	5147–5168	1497
Chapter 23—Garnishment	5169–5191	1505
Chapter 24—Deposit in court	5192	1511
Chapter 25—Receivers	5193	1511
Chapter 26—Provisional remedies on behalf of defendant	5194	1512
Chapter 27—Issues, mode of trial, and postponement	5195–5203	1512
Chapter 28—Drawing of jury, number upon consent, examination of	5204–5220	1514
Chapter 29—The verdict	5221–5225	1520
Chapter 30—Trial by the court	5226–5229	1521
Chapter 31—Reference and trials by referees	5230–5235	1523
Chapter 32—Judgment by default	5236	1524
Chapter 33—Judgment on dismissal or nonsuit	5237	1525
Chapter 34—Judgment in general	5238–5242	1526
Chapter 35—Parties not originally summoned	5243–5248	1530
Chapter 36—Judgment by confession	5249–5251	1531
Chapter 37—Substituting controversy without action	5252–5254	1531
Chapter 38—Arbitration	5255–5264	1532
Chapter 39—Offer of compromise	5265	1534
Chapter 40—Manner of giving and entering judgment	5266–5278	1534
Chapter 41—Satisfaction of judgment	5279	1538
Chapter 42—Execution	5280–5306	1538
Chapter 43—Proceedings supplementary to execution	5307–5314	1549
Chapter 44—Exceptions	5315–5318	1551
Chapter 45—New trials	5319–5324	1553
Chapter 46—Appeals	5325–5361	1558
Chapter 47—Motions and orders	5362–5366	1578
Chapter 48—Notices—Filing and serving of papers	5367–5375	1579
Chapter 49—Costs	5376–5393	1581
Chapter 50—Contempt	5394–5407	1585
Chapter 51—Public writings	5408–5413	1589
Chapter 52—Private writings	5414, 5415	1590
Chapter 53—Admission or inspection of writings	5416–5418	1591
Chapter 54—Witnesses—Competency	5419–5449	1592
Chapter 55—Affidavits	5450–5453	1599

CIVIL PRACTICE ACT—Continued	SECTIONS	PAGE
Chapter 56—Depositions taken within the state	5454–5457	1600
Chapter 57—Depositions taken out of the state	5458–5463	1601
Chapter 58—Perpetuating testimony	5464–5473	1602
Chapter 59—Common law—Definitions—Defective titles to papers—Successive and consolidated actions—Action between sureties—Clerk's register—Seal—Computation of time—Oath—General provisions relating to undertakings and sureties—Majority of referees and arbitrators—Acts of judge after his term—Lien on bullion—Preferred claim for wages—Elisors—Lien on animals	5474–5500	1604
Chapter 60—Foreclosure of mortgages	5501–5503	1612
Chapter 61—Actions for nuisance, waste, trespass, entering mine, damages	5504–5513	1613
Chapter 62—Actions to quiet title, for foreclosure, regarding real property, and mines	5514–5526	1616
Chapter 63—Partition	5527–5583	1621
Chapter 64—Termination of life estate	5584	1632
Chapter 65—Forcible entry and detainer	5585–5605	1633
Chapter 66—Eminent domain	5606–5629	1638
Chapter 67—Lost records affecting real property—Restoration	5630–5646	1646
Chapter 68—Death by wrongful act, action for	5647, 5648	1650
Chapter 69—Personal injuries, action for	5649–5652	1652
Chapter 70—Actions against the state	5653–5655	1653
Chapter 71—Quo warranto	5656–5682	1653
Chapter 72—Certiorari	5683–5693	1658
Chapter 73—Mandamus	5694–5707	1662
Chapter 74—Prohibition	5708–5710	1668
Chapter 75—General provisions as to certiorari, mandamus and prohibition	5711–5713	1669
Chapter 76—Justices' courts—Jurisdiction	5714	1670
Chapter 77—Justices' courts—Place of trial	5715–5721	1671
Chapter 78—Manner of commencing actions in justices' courts	5722–5733	1673
Chapter 79—Pleadings in justices' courts	5734–5743	1677
Chapter 80—Provisional remedies in justices' courts	5744–5753	1678
Chapter 81—Trials and judgments in justices' courts	5754–5782	1681
Chapter 82—Executions from justices' courts	5783–5787	1686
Chapter 83—New trials and appeals from justices' courts	5788–5794	1687
Chapter 84—Justices' courts—Contempts and general provisions	5795–5816	1690
Chapter 85—Repeal of certain provisions of the civil practice act and acts in relation thereto	5817–5821	1694
Act to encourage the collection of mineral specimens and to exempt same from sale under execution	5822–5824	1696
Adoption of children	5825–5834	1697
Changing names of individuals	5835–5837	1699
Liabilities of joint debtors	5846–5848	1705
Act prescribing mode of maintaining and defending possessory actions on public lands	5849–5856	1705
DIVORCE		
Sections of marriage and divorce act relating to divorce	5838–5845	1700
ESTATES OF DECEASED PERSONS		
General act to regulate the settlement of estates of deceased persons	5857–6139	1713
Act relating to descent of estates of widow and widower	6140–6142	1770
Act relating to notices, objections, and duties of clerk	6143, 6144	1770
Act making wages preferred claims against estate of deceased person	6145	1770
Act authorizing the court to order the mortgaging of the property of estates by the executor or administrator	6146	1771

CIVIL PRACTICE—Continued SECTIONS PAGE

Act providing for execution of conveyances of property in compliance with the contracts of deceased persons 6147, 6148 1771

GUARDIANS

General act regarding appointment and duties of guardians 6149–6197 1772
Act providing for removal of property of nonresident ward 6198–6201 1782

WILLS

General act concerning wills 6202–6222 1783
Holographic wills 6223–6225 1786

HABEAS CORPUS

General act concerning the writ of habeas corpus 6226–6265 1787

PART IV

CRIMES AND PUNISHMENTS

General act concerning crimes and punishments 6266–6835 1804
Chapter 1—Classification of crimes 6266 1804
Chapter 2—Persons liable to punishment 6267–6272 1805
Chapter 3—Parties to crimes 6273–6276 1807
Chapter 4—Rights and privileges of defendants 6277–6282 1809
Chapter 5—Punishments for offenses not otherwise fixed 6283–6289 1810
Chapter 6—Convictions for attempts and lesser degrees 6290, 6291 1811
Chapter 7—Habitual criminals—Prevention of procreation 6292, 6293 1811
Chapter 8—Definitions—Construction—Impeachments—Common law—Contempts—Miscellaneous 6294–6302 1812
Chapter 9—Imprisonment on more than one conviction—Acts punishable under foreign law—Contempts punishable as crimes—Sending letter, when complete, and venue 6303–6307 1815
Chapter 10—Crimes against the sovereignty of the state 6308–6310 1815
Chapter 11—Crimes by or against public officers—Jurors—Witnesses—Records 6311–6349 1816
Chapter 12—Crimes and offenses against public justice 6350–6378 1824
Chapter 13—Crimes against the person 6379–6441 1829
Chapter 14—Crimes against morality and decency 6442–6528 1844
Chapter 15—Crimes against public health 6529–6560 1863
Chapter 16—Crimes against public safety 6561–6591 1870
Chapter 17—Crimes against public peace 6592–6618 1876
Chapter 18—Vagrancy 6619–6623 1880
Chapter 19—Arson—Forest and negligent fires 6624–6633 1882
Chapter 20—Burglary 6634–6637 1884
Chapter 21—Larceny—Altering brands—Driving away animals 6638–6652 1885
Chapter 22—Embezzlement—Retention or payment of public money 6653–6662 1892
Chapter 23—Forgery and counterfeiting 6663–6694 1895
Chapter 24—Fraudulent and kindred crimes 6695–6740 1902
Chapter 25—Miscellaneous crimes against property 6741–6777 1913
Chapter 26—Crimes by or against employer or employee 6778–6801 1922
Chapter 27—Corrupting electors — Wrongful exercise of power — Obstructing officer — Oppression under color of office — Vending without license — Killing birds — Cruelty to animals — Offenses by imprisoned persons — Extortion — Employment of children — Common-law and miscellaneous crimes 6802–6830 1927
Chapter 28—On repeal 6831–6834 1933
Act making criminal the selling of liquor to habitual drunkards or dipsomaniacs 6836–6838 1939
Act prohibiting sale of liquor within five miles of construction camps 6839–6841 1940

CRIMES AND PUNISHMENTS—Continued SECTIONS PAGE

Act making it unlawful to allow minors to remain in saloons 6842 1941
Act making keepers of saloons and gambling houses liable in damages for giving liquor to minors or allowing minors to gamble 6843 1941
Act making superintendents and managers of electric light and water companies liable in damages for refusal to connect main wires and pipes 6844–6846 1941
Act to prevent slavery or involuntary servitude except for the punishment of crime 6847–6850 1942

CRIMINAL PRACTICE

General act regulating criminal practice 6851–7529 1945
Chapter 1—Preliminary provisions 6851–6858 1945
Chapter 2—Lawful resistance 6859–6861 1947
Chapter 3—Intervention of the officers of justice 6862, 6863 1947
Chapter 4—Security to keep the peace 6864–6877 1948
Chapter 5—Impeachments 6878–6893 1949
Chapter 6—Removal of civil officers otherwise than by impeachment 6894–6907 1952
Chapter 7—Local jurisdiction of public offenses 6908–6920 1953
Chapter 8—Time of commencing criminal actions 6921–6926 1956
Chapter 9—Magistrates and complaint 6927–6929 1957
Chapter 10—Warrant of arrest—Release on bail 6930–6950 1957
Chapter 11—Arrest, by whom and how made 6951–6967 1962
Chapter 12—Retaking prisoner after escape or rescue 6968, 6969 1964
Chapter 13—Examination, discharge of, or holding defendant to answer 6970–6998 1964
Chapter 14—Prosecution by indictment or accusation 6999–7001 1971
Chapter 15—Formation of grand jury 7002–7019 1971
Chapter 16—Powers and duties of grand jury 7020–7033 1974
Chapter 17—Presentment and proceedings thereon—Bench warrant 7034–7041 1977
Chapter 18—The indictment—Finding, presentation and filing 7042–7047 1978
Chapter 19—Rules of pleading and form of the indictment 7048–7073 1979
Chapter 20—Bench warrant and bail 7074–7089 1988
Chapter 21—Setting aside the indictment 7090–7094 1991
Chapter 22—Demurrer 7095–7105 1993
Chapter 23—The plea 7106–7114 1996
Chapter 24—Removal of action before trial 7115–7120 1998
Chapter 25—Mode of trial 7121–7123 2000
Chapter 26—Formation of trial jury—Calendar 7124–7127 2000
Chapter 27—Postponement of trial 7128 2001
Chapter 28—Challenging the jury 7129–7158 2002
Chapter 29—The trial 7159–7203 2009
Chapter 30—Conduct of jury 7204–7212 2022
Chapter 31—The verdict 7213–7226 2024
Chapter 32—Exceptions 7227–7231 2027
Chapter 33—New trial 7232–7237 2028
Chapter 34—Arrest of judgment 7238–7241 2030
Chapter 35—The judgment 7242–7263 2030
Chapter 36—The execution 7264–7282 2036
Chapter 37—Bill of exceptions—Appeal without, on errors in record 7283–7285 2039
Chapter 38—Appeal 7286–7307 2041
Chapter 39—Bail 7308–7347 2046
Chapter 40—Compelling attendance of witnesses 7348–7364 2054
Chapter 41—Examination of witnesses on commission 7365–7384 2056
Chapter 42—Inquiry into sanity of defendant 7385–7394 2060
Chapter 43—Dismissal of action 7395–7401 2061
Chapter 44—Proceedings against corporations 7402–7410 2063
Chapter 45—Compromising public offenses 7411–7413 2064

CRIMINAL PRACTICE ACT—Continued	SECTIONS	PAGE
Chapter 46—Entitling affidavits	7414	2065
Chapter 47—Search warrants	7415–7434	2065
Chapter 48—Fugitives from justice	7435–7444	2068
Chapter 49—Disposal of property stolen or embezzled	7445–7450	2070
Chapter 50—Witnesses	7451–7456	2071
Chapter 51—General provisions	7457–7469	2073
Chapter 52—Justices' courts	7470–7524	2075
Chapter 53—Repeal and continuance of certain acts relating to criminal practice	7525–7529	2084
Act to prohibit sale of ardent spirits to Indians, making Indians competent witnesses	7530–7531	2085
Act to detect and punish incendiarism	7532–7539	2085
Act to provide for payment of attorneys appointed by the court to defend in criminal cases	7540, 7541	2087
Act creating coroner districts, making justices of the peace ex officio coroners, and defining their duties	7542–7560	2087

STATE PRISON AND JAILS

STATE PRISON

Acts relating to the government of the state prison	7561–7585, 7588, 7589	2091
Act to provide for the release of certain prisoners in the state prison	7586, 7587	2098
Act relating to the expenses for the transportation of indigent insane persons and convicts	7590–7592	2099
Act fixing the salary of the warden of the state prison	7593	2099
Act relating to the recapture of escaped prisoners from the state prison	7594, 7595	2100
Act relating to payment to prisoners discharged from state prison	7596	2100
Act of 1911 relating to employment of convicts on public highways and providing a fund therefor	7597–7602	2100

JAILS

Act of 1861 in relation to common jails	7603–7613	2102
Act of 1907 in relation to branch county jails	7614–7616	2104
Act authorizing the employment of criminals confined in jails	7617–7622	2105

PARDONS AND PAROLES

Constitution	307	89
Act of 1867 to make effective power of governor, justices of supreme court and attorney-general to remit fines and forfeitures, commute punishments, and grant pardons after conviction	7623–7630	2107
Rules of board of pardons, following	7630	2109
Act to establish a board of parole commissioners for the parole of and government of paroled prisoners	7631–7634	2110
Rules of board of parole, following	7634	2111

APPENDIX AND INDEX 2113

ABBREVIATIONS

Cite this work: Rev. Laws.

Ann. Cases	American and English Annotated Cases.
A. D.	American Decisions.
A. R.	American Reports.
A. S.	American State Reports.
Cent. Dig.	Century Digest.
Colo. Mills An. C.	Mills's Colorado Annotated Code.
Const.	Constitution of Nevada.
Dec. Dig.	Decennial Digest.
F. or Fed.	Federal Reporter.
Fed. St. Ann.	Federal Statutes Annotated.
Iowa	McClain's Annotated Code (Iowa).
Kansas	General Statutes of Kansas, 1889.
Kerr C. C. P.	Kerr's (California) Code of Civil Procedure.
Kerr Pen. C.	Kerr's (California) Penal Code.
Mont. Civ. P.	Montana Civil Practice.
N. Dak.	Revised Codes of North Dakota, 1899.
P. or Pac.	Pacific Reporter.
Rev. Laws	Revised Laws of Nevada, 1912.
Rev. Stats.	United States Revised Statutes.
Sec.	When not otherwise designated, refers to the general section numbers of this book in black-face type.
S. C. R.	Supreme Court Reporter.
T. C. C.	Treadwell's California Constitution (Annotated).
U. S. Const.	Constitution of the United States.
Utah	Utah Compiled Laws, 1907.

COURTS AND COURT OFFICERS

General act concerning courts and judicial officers, approved January 26, 1865, sections 4828–4885.

Courts of the state....4828
Supreme court....4829–4839
District courts....4840–4850
Justices' courts....4851, 4852
Recorders' courts....4853–4860
General provisions....4861–4885

Act of March 5, 1891, to prevent delay in rendering judicial decisions, sections 4886, 4887.

Act making sheriff of Ormsby County bailiff of the supreme court, and fixing his compensation, approved March 20, 1901, section 4888.

Act authorizing the supreme court to appoint an official reporter, approved March 13, 1907, sections 4889, 4890.

Act authorizing the supreme court to employ stenographic clerks, approved February 1, 1909, sections 4891, 4892.

Act fixing salaries of justices of the supreme court, approved February 14, 1907, section 4893.

Act fixing compensation of clerk of the supreme court, approved February 24, 1875, sections 4894–4896.

Act for the reporting of the decisions of the supreme court, approved March 26, 1909, sections 4897–4899.

Act authorizing clerk of the supreme court to appoint a deputy, approved March 15, 1911, section 4900.

RELATING TO DISTRICT COURTS

Act creating judicial districts, and relating to district judges, their residences and salaries, approved March 23, 1909, sections 4901–4905.

Act providing that district courts shall always be open, and for traveling expenses of district judge, approved March 4, 1885, sections 4906, 4907.

Act relating to the appointment, duties and compensation of official reporters for the district courts, approved March 12, 1907, sections 4908–4913.

Act relating to the appointment, powers and duties of bailiffs in district courts, approved February 24, 1909, sections 4914–4920.

Act of March 3, 1869, providing offices for district judges, section 4921.

Act approved March 13, 1895, concerning the concurrent power of the district judges, section 4922.

Act authorizing district judges to sign records of their predecessors, approved March 22, 1911, section 4923.

Act making it the duty of district judges to charge grand juries regarding duties of officers, approved February 12, 1879, section 4924.

Act making it the duty of district judges to charge grand juries regarding erection of guide posts and recording of births, deaths, and marriages, approved March 6, 1903, section 4925.

JUSTICES OF THE PEACE AND CONSTABLES

Act of March 4, 1881, providing when one justice of the peace may act for another, section 4926.

Act of February 10, 1873, relating to bond and oath of justice of the peace and constable, sections 4927, 4928.

OTHER STATUTORY PROVISIONS

Apprentices, justice of peace to act in regard to, section 490, et seq.
Attorneys at law, sections 498–524.
Cities, change in class of, courts to take judicial notice of, section 775.
Cities and towns, district court act in incorporation of, section 768, et seq.
Civil practice act, sections 4943–5821.
Civil practice schedule and cross-references, section 4993.
Contested election for city offices, section 801.
Contested election for county and township offices, section 1803, et seq.
Contested election for district judge, section 1813.
Contested election for state offices, section 1823, et seq.
Contested election for members of legislature, section 1818.
County commissioners, removal, suspension, section 3753.
District attorney, court may appoint temporary, section 1597.

District court may enjoin bank examiner from retaining possession of closed bank, section 675.
District court may make order regarding election of directors of corporations, section 1130.
District court to decide land contests, section 3208.
District court to decree execution of contracts of deceased persons for deed of real estate, section 6147.
District judge may make order for removal of directors of corporations, section 1179.
Divorce, sections 5838–5845.
Election returns, canvass by district judge for legislative officers and county commissioners, section 1513.
Judge must be attorney, section 525.
Judicial notice, courts to take in change of class and organization of cities, section 775.
Justice of the peace may issue subpena in contest for election for members of legislature, section 1819
Juvenile court law under jurisdiction of district court, section 729, et seq.
Municipal courts, powers of, section 822.
Probate practice act, estates of deceased persons, sections 5857–6144.
Proceedings for removal from office, section 2851, et seq.
Proceedings to remove or suspend county commissioners, section 3753.
Railroad rates, proceedings relating to regulation of, sections 4548–4585.
Revisory power over corporate elections, section 1123, et seq.
Sale of real property of religious and charitable corporations, order for, section 1369.
Veterinarian, order for service of, section 4379.

CONSTITUTIONAL PROVISIONS

Counsel, right of accused to have, section 237; U. S. Const., section 178.
Court fees to be charged, section 331.
Courts of record, what are—Appeals, section 323.
Federal judges, terms and compensation, U. S. Const., section 153.
Fees, court, to be advanced, section 331.
Fees, no judicial officers except justice of peace and city recorder to receive, section 325.
Fines, governor may suspend collection of, not exceeding sixty days, section 306.
Impeachment, powers of, conferred upon legislature, section 334.
Judicial power of state in supreme court, district courts, justices of the peace and municipal courts, section 316.
Judicial power of the United States, U. S. Const., sections 119, 154.
Juries, persons convicted of crime, or not electors, not to serve on, section 285.
Jury trial secured, section 232; U. S. Const., sections 156, 176.
Leave of absence, legislature not to grant to judicial officer—Ninety days' absence from state forfeits office, section 332.

Supreme Court

Board of pardons, justices members of, section 307.
Chief justice is justice having shortest term, section 318.
Compensation of justices to be set apart by law and not to be increased or diminished during term, sections 330, 331.
Decision, concurrence of majority necessary, section 317.
Decisions to be published, section 3765.
Election and term of justices, section 318.
Election returns, justices to canvass for state officers and declare persons elected, section 297.
Fees, justices not to receive, section 325.
How constituted, section 317.
Impeachment, chief justice and associate justices liable to, sections 335, 336.
Impeachment proceedings in senate, chief justice to preside over, section 334.
Jurisdiction, section 319.
Justices ineligible to office other than a judicial one during term, section 326.
Terms, section 322.
Vacancies in office of, how filled, section 406.

District Court

Compensation of district judges to be set apart by law and not to be increased or diminished during term, sections 330, 331.
Concurrent jurisdiction with justices' courts, section 323.
District judges not eligible to any office other than a judicial one during term, section 326.
Impeachment, district judges subject to, sections 335, 336.
Judges not to charge juries regarding matters of fact, but may state testimony and declare the law, section 327.
Judicial districts, section 320.
Jurisdiction of district courts and district judges, section 321.
Terms to be as fixed by law and to be held at county-seats—Exceptions, section 322.
Vacancies in office of district judge, how filled, section 406.

Justices of the Peace

Appeals, legislature may determine regarding, section 323.
Concurrent jurisdiction with district courts, section 323.
Fees, justices may receive, section 323.
Jurisdiction and powers to be fixed by law, section 323.
Number of, legislature to determine, section 323.

Municipal Courts

May receive fees, section 323.
Powers of, section 316.

An Act concerning the courts of justice of this state, and judicial officers.

Approved January 26, 1865. 110

4828. Courts of justice of the state.

Supreme Court

4829. Justices of the supreme court—Commissioned by governor—Oath.
4830. Election—Senior justice to be chief justice.
4831. Governor to fill vacancies—Election.
4832. Appellate jurisdiction.
4833. Jurisdiction to review on appeal.
4834. Original writs, what may issue.
4835. Power of court on appeal.
4836. Terms of court—Length of.
4837. Two justices may pronounce judgment—Reargument, when—Chamber business.
4838. Sessions shall be held at capitol—Power to provide necessaries.
4839. Opinions in writing—Record to be kept.

District Courts

4840. Original and appellate jurisdiction.
4841. Court, where held—May provide necessities.
4842. Terms of district court—Judgments and orders, when may be entered.
4843. Business at chambers—What may be heard.
4844. May hold court in any district upon request—Governor may direct.
4845. Court may make rules—When to take effect—Certain rules prohibited.
4846. Judges not to charge as to matters of fact.
4847. May be required to reduce decision to writing—Exception noted.
4848 Jurisdiction of public offenses—Indictments—Appeals from inferior courts.
4849. Powers over estates, minors and guardians—Probate of wills—Orders generally.
4850. Powers of court in vacation.

Justices' Courts

4851. Jurisdiction of public offenses.
4852. Justice of peace—Terms of office and election—Vacancies—Commissioners to fill—Oath and bond.

Recorders' Courts

4853. Recorders' courts in incorporated cities—Jurisdiction.
4854. Idem—Further jurisdiction—Public offenses.
4855. Idem—Where court to be held.
4856. Election of recorder—Term—Oath.
4857. Compensation—Fixed by charter—No increase or decrease during term.
4858. Powers and duties—Committing magistrates.
4859. May issue process.
4860. Recorders' courts always open.

General Provisions

4861. Courts of record.
4862. Proceedings public—Exception.
4863. Idem—Divorce proceedings—Public may be excluded.
4864. Powers of court—Enforce order—Obedience to judgments and orders—Control conduct of its ministerial officers.
4865. When judge disqualified—Not applicable to arrangement of calendar or order of business.
4866. Not to act as attorney or counsel except when party.
4867. Judge or justice of peace not to have partner in practice.
4868. Absence from state in excess of 90 days, forfeiture of office.
4869. Judicial days.
4870. Nonjudicial days enumerated—What business allowed—Falling on Sunday, Monday following observed.
4871. Courts, where held.
4872. Adjournment of court in certain cases—Powers of sheriff or clerk in absence of judge—Judge may order adjournment by letter or telegram.
4873. Place of holding court may be changed, when, notice of.
4874. Idem—Parties to appear.
4875. Supreme and district courts to have seals.
4876. Clerk to procure seal upon order of judge or court—Form of seal.
4877. Clerk's private seal may be used, when.
4878. Clerk to keep seal.
4879. Seal to be affixed, to what papers.
4880. Seal, how impressed.
4881. Orders, when refused—Orders refused or granted conditionally by one judge, no application to be made to other judge except of higher court—Rule not to apply to informalities.
4882. Idem—Violation a contempt—Order, by whom may be vacated.
4883. Judicial officers may take acknowledgment and affidavits.
4884. Vacancy in office or failure of term not to affect action.
4885. English language to be used—Abbreviations—Numbers.

4828. Courts of justice of the state.

SECTION 1. The following shall be the courts of justice for this state: First, the supreme court; second, the district courts; third, justices' courts; and, fourth, such municipal courts as may from time to time be established by the legislature in incorporated cities or towns.

See Const., sec. 316.

SUPREME COURT

4829. Supreme court, how composed—Justices commissioned by governor—Oath.

SEC. 2. The supreme court shall consist of a chief justice and two associates. Each justice hereafter elected or appointed shall be commissioned by the governor, and before entering upon the discharge of his duties, shall take the constitutional oath of office.

See Const., sec. 317.
Justice must be an attorney, sec. 525.

4830. Election—Senior justice to be chief justice.

SEC. 3. The justices of the supreme court shall be chosen at general elections by the qualified voters of the state; one of the justices shall be chosen at the general election of the year one thousand eight hundred and sixty-six (1866), and at the general election every second year thereafter, and shall hold his office for the term of six years from the first day of January next after his election. The senior justice in commission shall be the chief justice, and in case the commission of any two or more of said justices shall bear the same date, they shall determine by lot who shall be chief justice.

See Const., sec. 318.

4831. Governor to fill vacancies—Election.

SEC. 4. When, from any cause, a vacancy shall occur in the office of a justice of the supreme court, the governor shall fill the same by granting a commission, which shall continue until the election and qualification of a justice to fill such vacancy. A justice to fill a vacancy shall be chosen at the first general election subsequent to the occurrence of the vacancy.

See Const., sec. 406.

4832. Appellate jurisdiction.

SEC. 5. The supreme court shall have appellate jurisdiction in all cases in equity, and also in all cases at law in which is involved the title or right of possession to, or the possession of, real estate or mining claims, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest or the value of the property in controversy, exceeds three hundred (300) dollars; also, in all other civil cases not included in the general subdivisions of law and equity, and also on questions of law alone, in all criminal cases in which the offense charged amounts to a felony.

See Const., sec. 319.

An order of a justice's court imposing costs against a garnishee that had refused to make a statement is not a "tax, impost, assessment or municipal fine," within the meaning of those words as used in Const., sec. 319, ante. Wearne v. Haynes, 13 Nev. 103, 104.

Where the case as made in a court of law is one of which the supreme court might have appellate jurisdiction, it has jurisdiction of an appeal from an order retaxing costs, made subsequent to judgment, though the case was dismissed by the plaintiff in the court below, and although the amount involved is less than three hundred dollars. Comstock M. and M. Co. v. Allen, 21 Nev. 325, 328 (31 P. 434).

4833. Jurisdiction to review on appeal.

SEC. 6. The supreme court shall have jurisdiction to review upon appeal: First, a judgment in an action or proceeding, commenced in a district court,

when the matter in dispute is embraced in the general jurisdiction of the supreme court, and to review upon appeal from such judgment any intermediate order or decision involving the merits and necessarily affecting the judgment; second, an order granting or refusing a new trial in such cases; an order granting or refusing to change the place of trial of an action or proceeding after motion is made therefor in the cases in which that court has appellate jurisdiction, and from an order granting or refusing to grant an injunction or mandamus in the case provided for by law.

See secs. 319, 5329, 5340.

As the provision of this section, expressly authorizing an appeal from an order granting or refusing a change of venue, was omitted from section 327, Stats. 1869, 196, which enumerates the judgments and orders appealable, no appeal will lie upon such an order. (Fitzgerald, J., dissenting.) Peters v. Jones, 26 Nev. 259, 262–269 (66 P. 743).

This, however, has been changed by statute. See sec. 5329.

Under this section and section 8 of this act, the court on reversing an order denying a new trial demanded for insufficiency of evidence to support the verdict may remand the case, with directions to the trial court to consider and pass upon such ground anew. Goldfield-Mohawk M. Co. v. Frances-Mohawk M. and L. Co., 33 Nev. — (112 P. 42, 47).

The refusal of the judge to pass upon the insufficiency of the evidence to support the verdict, when urged in support of a motion for new trial, is error. Idem.

4834. Original writs, what may issue.

SEC. 7. This court, and each of the justices thereof, shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus, and also all writs and process necessary to the complete exercise of its appellate jurisdiction; such writs may be issued to any part of the state, and in granting writs of habeas corpus, such court, or a judge thereof, may issue the writ upon application by or on behalf of any person held in actual custody in any part of the state, and may make such writs returnable before the court, or either of the justices thereof, or before any district court of the state, or any judge of said courts.

Section 4 of article 6 of the constitution (sec. 319, ante) provides that the supreme court shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus, and all writs necessary to the complete exercise of its appellate jurisdiction, and confers upon each of the justices power to issue writs of habeas corpus to any part of the state.

4835. Power of court on appeal.

SEC. 8. This court may reverse, affirm, or modify the judgment or order appealed from as to any or all of the parties, and may, if necessary, order a new trial, or the place of trial to be changed. When the judgment or order appealed from is reversed or modified, this court may make, or direct the inferior court to make, complete restitution of all property and rights lost by the erroneous judgment or order.

See sec. 5359.

Even if the supreme court on appeal from a judgment might order an execution and sale made before appeal to be set aside, yet it is clear that the district court after case reversed has concurrent jurisdiction to do the same thing. Hastings v. Am. G. and S. M. Co., 2 Nev. 100, 103, 104.

It is the proper practice after a judgment has been reversed in the supreme court, to move the court below, when the facts justify such proceedings, to set aside a sale made on execution under an erroneous judgment. Idem.

4836. Terms of court, length of.

SEC. 9. There shall be four terms of this court in each year, to commence on the first Mondays of January, April, July, and October. Such terms shall continue until the business before the court is determined, or for such length of time as, in the opinion of the court, the public interest may require.

See Const., sec. 322.

Cited, State v. Jackman, 31 Nev. 516 (104 P. 13).

4837. Two justices may pronounce judgment—Reargument, when—Chamber business.

SEC. 10. Two justices shall constitute a quorum for the transaction of business, excepting such business as may be done at chambers, and the concurrence of two justices who heard the argument shall be necessary to pronounce any judgment, except in chamber business; and if two justices who have heard the argument do not agree, the case shall be reargued.

The constitution provides that a concurrence of a majority of the justices shall be necessary to render a decision, sec. 317.

4838. Sessions shall be held at capital—Power to provide necessaries.

SEC. 11. The supreme court shall hold its sessions at the capital of the state. If a room in which to hold the court, together with attendants, fuel, lights, and stationery, suitable and sufficient for the transaction of business, be not provided by the state, the court may direct the sheriff of the county in which it is held to provide such room, attendants, fuel, lights, and stationery, and the expense thereof shall be paid out of the state treasury.

Const., sec. 322.

The supreme court has the power to procure, at the expense of the state, furniture for the court-room when the capitol commissioners had refused to procure the same. State ex rel. Kitzmeyer v. Davis, 26 Nev. 373, 378 (68 P. 689).

4839. Opinions in writing—Record to be kept.

SEC. 12. All opinions and decisions rendered by the supreme court shall be in writing, signed by the justices concurring therein, and shall be spread at large on the records of the court kept for that purpose.

See Const., sec. 376.
See secs. 4847, 5315.

DISTRICT COURT

[Secs. 13, 14 and 15 superseded by following acts.]

[Sec. 16 is obsolete.]

4840. Original and appellate jurisdiction.

SEC. 17. The district courts shall, severally, have original jurisdiction in all cases in equity; also, in all cases at law which involve the title, or the right of possession to, or the possession of, real property or mining claims, or the legality of any tax, impost, assessment, toll, or municipal fine; also, in all actions to foreclose mechanics' liens; and in all cases in which the demand, exclusive of interest, or the value of the property in controversy, exceeds three hundred dollars; also, in all cases relating to the estates of deceased persons, and the person and estates of minors, idiots, and insane persons, and of the action of forcible entry and unlawful detainer; and, also, in all criminal cases not otherwise provided for by law; they shall also have final appellate jurisdiction in cases arising in justices' courts, and such other inferior tribunals as may be established by law. The district courts and the judges thereof, shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction; and also shall have power to issue writs of habeas corpus, on petition by, or on behalf of, any person held in actual custody in their respective districts. *As amended, Stats. 1866, 59.*

See Const., sec. 321.
May appoint temporary district attorney, sec. 1597.
Revisory power over corporate elections, secs. 1130–1223.
May order sale of real property of religious or charitable corporations, sec. 1369.
Proceedings for removal of officers of corporations, secs. 1180–1183.
Proceedings to remove revenue officers (revenue act), judge may suspend commissioners, sec. 3753.
See juvenile court law, secs. 728–756.
See act in relation to contributory dependency and delinquency, secs. 757–764.

Proceedings to require new certificate of stock of incorporated company in case of lost certificate, sec. 1165.

Awards to dissatisfied stockholders under merger provisions of corporation act, may be contested, secs. 1147, 1148.

Proceedings for disincorporation under act of 1865, sec. 1240.

District judge to canvass returns of election of legislative officers and county commissioners, sec. 1513.

May require services of veterinarian, when, sec. 4379.

See cross-references before sec. 4828.

Under similar powers (Stats. 1861, 418, sec. 608) it was held that the probate court had the power to issue a writ of restitution, in an action of forcible entry and unlawful detainer, brought before it on certiorari. Paul v. Armstrong, 1 Nev. 82, 103.

The district court, on appeal from a justice's judgment, has the same jurisdiction as existed in the justice's court and a judgment of a justice's court which is void because for a greater amount than the justice has jurisdiction to render, is not appealable. Fitchett v. Henley, 31 Nev. 327, 338 (102 P. 865).

Certiorari lies to annul such a justice court judgment, since there is no right of appeal. Idem.

4841. Court, where held—May provide necessities.

SEC. 18. The terms of the district court shall be held at the county-seat of the several counties. If a room for holding the court be not provided by the county, together with attendants, fuel, lights, and stationery, suitable and sufficient for the transaction of business, the court may direct the sheriff to provide such room, attendants, fuel, lights, and stationery, and the expenses thereof shall be a county charge.

See sec. 4921.

It is indispensable to the validity of a judgment that it be rendered at the time and place prescribed by law.

The intention of the legislature in prescribing the times for the commencement and the place for holding the terms of the district court is to attain certainty. State v. Roberts, 8 Nev. 240, 241.

4842. Terms of district court—Judgments and orders, when may be entered.

SEC. 19. The terms of holding these courts shall be as provided by law in such districts, and such terms shall continue so long as the business may require, or until the day fixed for the commencement of another term in the same district. The court may adjourn from time to time during the term, and may, when the public convenience requires, adjourn the term over the time fixed by law for the commencement of another term in the same district. Judgments and orders of the district court may be entered either in term or vacation, in civil cases. *As amended, Stats. 1875, 119.*

See sec. 4906.

A court may amend its orders of record concerning the extension of time given to file a statement so as to conform with the truth, at any time during the term in which they are entered. Marshall v. G. F. G. and S. M. Co., 16 Nev. 156, 170.

4843. Business at chambers—What may be heard.

SEC. 20. The district judges shall, at all reasonable times, when not engaged in holding courts, transact such business at chambers as may be done out of court. At chambers they may try and determine writs of mandamus, certiorari, quo warranto, hear and dispose of motions for new trials, and all applications for writs which are usually granted, in the first instance, upon ex parte application, and may also, in their discretion, hear and determine applications to discharge such orders and writs. They may also hear and determine applications for writs of assistance at chambers.

4844. May hold court in any district upon request—Governor may direct.

SEC. 21. A district judge may hold a term in any judicial district in this state, upon the request of the judge of the district in which such term is to be held; and when, by reason of sickness or absence from the state, or from any other cause, a term cannot be held in a district by the judge thereof, a

certificate of that fact shall be transmitted by the clerk to the governor, who shall thereupon direct some other district judge to hold such term. It shall be the duty of the judge thus directed to hold such term; *provided*, it will not conflict with his duties in his own district.

See sec. 4906, 4922.

4845. Court may make rules—When to take effect—Certain rules prohibited.

SEC. 22. Each district court shall have power to make rules not inconsistent with the constitution and laws of this state, for its own government and the government of its officers; but such rules shall not be in force until thirty days after their adoption and publication, except for the first terms held under the constitution of the state; and no rule shall be made imposing any tax or charge upon any legal proceeding, except as a penalty upon overruling a demurrer, or making an allowance to any officer for services.

Rules of supreme and district courts will be found under sec. 4928.

A rule of the district court relative to the settlement of a statement on motion for a new trial will not be considered by the supreme court unless it is embodied in the statement. Marshall v. Golden Fleece G. and S. M. Co., 16 Nev. 156.

(This case was decided before adoption and approval of district court rules. For which rules see under sec. 4928.)

The rules adopted by the district court and by the supreme court were intended to be supplemental to the provisions of the statute as rules for the government in all proceedings in the district court and have the same force and effect as if incorporated in their statutory provisions. Haley v. Eureka Co. Bank, 20 Nev. 410 (22 P. 1098).

Evidence of an oral agreement by plaintiff's attorney not to take any default against defendants is inadmissible on the application to set aside the default, as this would be in effect an enforcement of such agreement in violation of the district court rules. Idem.

4846. Judges not to charge as to matters of fact.

SEC. 23. District judges shall not charge juries upon matters of fact, but may state the evidence and declare the law. In stating the evidence, the judge should not comment upon the probability or improbability of its truth, nor the credibility thereof. If the judge state the evidence, he must also inform the jury that they are not to be governed by his statement upon matters of fact.

See sec. 327.

4847. May be required to reduce decision to writing—Exception noted.

SEC. 24. A district judge may be required, in deciding any question of law, to reduce his decision to writing at the time such decision is made, and note any exception thereto, which may be taken by either party, to a trial or proceeding before him.

See secs. 4839, 5315.

4848. Jurisdiction of public offenses—Indictments—Appeals from inferior courts.

SEC. 25. The district courts shall have jurisdiction to inquire, by the intervention of a grand jury, of all public offenses, committed or triable in their respective districts, to try and determine all indictments found therein, and to hear and determine appeals from justices' or other inferior courts in all cases of a criminal nature.

See secs. 237, 321, 323.

Certiorari does not lie from the supreme court to review a conviction before a justice of the peace on the ground that the statute authorizing the conviction is unconstitutional, since the constitutional question may be raised before the justice and an appeal taken from any judgment rendered by him. Chapman v. District Court, 29 Nev. 154, 158 (86 P. 552).

4849. Powers over estates minors and guardians—Probate of wills—Orders generally.

SEC. 26. The district courts shall have power to open and receive the proofs

of last wills and testaments, and to admit them to probate; to grant letters testamentary of administration and guardianship, and to revoke the same for cause shown, according to law; to compel executors, administrators, and guardians to render an account when required, or at the period fixed by law; to order the sale of property of estates, or belonging to minors; to order the payment of debts due by estates; to order and regulate all partitions of property or estates of deceased persons; to compel the attendance of witnesses; to appoint appraisers or arbitrators; to compel the production of title papers or other property of an estate or of a minor, and to make such other orders as may be necessary and proper in the exercise of the jurisdiction conferred upon them by law.

4850. Powers of court in vacation.

SEC. 27. The district judge shall have power, in vacation, to appoint appraisers, to receive inventories and accounts to be filed in his court; to suspend the powers of executors, administrators, or guardians, in cases allowed by law; to grant special letters of administration or guardianship, to approve claims and bonds, and to direct the issuance from his court of all writs and process necessary to the exercise of his powers over the estates of deceased persons, and over the property and persons of minors, idiots, and insane persons.

Cited, F. S. W. Co. v. Rivers, 14 Nev. 434.

JUSTICES' COURTS

[Secs. 28, 29, and 30 repealed, Stats. 1866, 125, and the act of 1866 was repealed, 1869, 288.]

4851. Jurisdiction of public offenses.

SEC. 31. Justices' courts shall also have jurisdiction of the following public offenses, committed within the respective counties in which courts are established: First, petit larceny; second, assault and battery, not charged to have been committed upon a public officer in the discharge of his duties, or with intent to kill; third, breaches of the peace, riots, affrays, committing a wilful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment.

Regarding jurisdiction of justices of the peace, see Const., sec. 323. Jurisdiction in civil cases, sec. 5714; extends to limits of the county, sec. 7470.
Trials before justice of the peace for misdemeanors, sec. 7470, et seq.
Duties of as committing magistrate, sec. 6929, et seq.
In case of illness or absence may call another, sec. 4926.
Ex officio registry agent, and as such may appoint deputy, sec. 1705.
Violation of town ordinances, see sec. 886.
Proceedings for sale of personal property for taxes, sec. 3679.
See "Children," secs. 741, 742,
Official bond and oath, sec. 4927.
Duties of regarding apprentices, sec. 490, et seq.
Corresponding to sec. 612 (Stats. 1861, 419).
Cited, Moore v. Orr, 30 Nev. 470 (98 P. 398).

If the district court did not have the power to proceed originally by indictment in a criminal case prohibition is the proper remedy to prevent it from taking jurisdiction. Moore v. Orr, 30 Nev. 458, 461 (98 P. 398).

Relator was indicted in the district court for a misdemeanor punishable by a fine not exceeding $200 or by imprisonment not exceeding three months, or both, and brings prohibition to prevent the district court from taking original jurisdiction of the offense, claiming that it has only appellate jurisdiction. It was held that under Const., sec. 321, ante, where the legislature gave justices' courts jurisdiction of misdemeanors of the class mentioned, the district court was deprived of original jurisdiction in such cases and had only appellate jurisdiction so that it could not try such a case by indictment. Idem.

4852. Justice of peace—Terms of office and election—Vacancies—Commissioners to fill—Oath and bond.

SEC. 32. Justices of the peace shall hold their offices for two years, and

until their successors are elected and qualified. They shall be chosen by the electors of their respective townships or cities, at the general election in the year one thousand eight hundred and sixty-five (1865), and the general election every two years thereafter, and shall enter upon their duties on the first Monday of January succeeding their election. Whenever a vacancy shall occur in the office of a justice by death, resignation, or otherwise, such vacancy shall be filled by appointment of the board of county commissioners of the proper county. The justice appointed to supply a vacancy shall hold his office for the unexpired term of his immediate predecessor. Each justice, before entering upon the discharge of his duties, shall take the constitutional oath of office, and shall execute a bond to the state in the sum of five thousand (5,000) dollars, conditioned for the faithful performance of his duties, and file the same with the county clerk.

MUNICIPAL COURTS

4853. Recorders' courts in incorporated cities—Jurisdiction.

SEC. 33. Recorders' courts, which are already established, or which may hereafter be established in any incorporated city of this state, shall have jurisdiction: First—Of an action or proceeding for the violation of any ordinance of their respective cities. Second—Of an action or proceeding to prevent or abate a nuisance within the limits of their respective cities. Third—Of proceedings respecting vagrants and disorderly persons.

See secs. 316, 323, 324, 325.

4854. Idem—Further jurisdiction—Public offenses.

SEC. 34. The recorders' courts already established, or which may hereafter be established, shall also have jurisdiction of the following public offenses, committed in their respective cities: First, petit larceny; second, assault and battery, not charged to have been committed upon a public officer in the execution of his duties, or with intent to kill; third, breaches of peace, riots, affrays, committing a wilful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding three months, or by both such fine and imprisonment.

See secs. 323, 324, 4851.
Cited, State v. Rising, 10 Nev. 100.

4855. Idem—Where court to be held.

SEC. 35. A recorder's court shall be held by a judge who shall be designated as the "Recorder of the City," and said court shall be held at such place in the city within which it is established as the government of such city may by ordinance direct.

4856. Election of recorder—Term—Oath.

SEC. 36. The recorders shall be chosen by the electors of their respective cities, on a day to be fixed by the government of such cities, and shall hold their offices for one year, unless a longer period be fixed in the acts incorporating such cities; in which case, for such period fixed. Before entering upon their duties, they shall take the constitutional oath of office.

4857. Compensation fixed by charter—No increase or decrease during term.

SEC. 37. The recorders shall receive compensation, to be fixed by the charter, or when not so fixed by the government of their respective cities, to be paid by such cities quarterly, in equal proportions. Such compensations shall not be increased or diminished during the period for which they are elected.

4858. Powers and duties—Committing magistrates.

SEC. 38. The recorders shall possess the powers and exercise the duties

of committing magistrates, in the criminal causes in which the courts held by them have no jurisdiction by this act; and as such magistrates, they may examine, commit or discharge all persons brought before them, as the justice and law of the case may require.

The power sought to be conferred upon city and town recorders by this section, "to exercise the duties of committing magistrates," is completely judicial in its character. Meagher v. Storey Co., 5 Nev. 244, 245, 248–250.

The words "municipal purposes only," as used in Const., sec. 316, restrict the jurisdiction to be exercised by municipal courts to such matters as relate to the affairs of the incorporated cities or towns where alone they are authorized to be established. Idem.

This section, in so far as it authorized city and town recorders "to possess the powers and exercise the duties of committing magistrates," is unconstitutional and void.

4859. May issue process.

SEC. 39. Recorders and recorders' courts may issue all legal process, writs, and warrants necessary and proper to the complete exercise of their powers.

4860. Recorders' courts always open.

SEC. 40. There shall be no terms in recorders' courts. These courts shall always be open.

GENERAL PROVISIONS RESPECTING COURTS AND COURT OFFICERS

ARTICLE I

4861. Courts of record.

SEC. 41. The supreme court, the several district courts, and such other courts as the legislature shall designate, shall be courts of record.

4862. Proceedings public—Exception.

SEC. 42. The sittings of every court of justice shall be public, except as provided in the next section.

4863. Idem—Divorce proceedings—Public may be excluded.

SEC. 43. In an action for divorce the court may direct the trial of any issue of fact joined therein to be private, and upon such directions all persons may be excluded, except the officers of the court, the parties, their witnesses, and counsel.

4864. Powers of court—Enforce order—Obedience to judgments and orders—Control conduct of its ministerial officers.

SEC. 44. Every court shall have power to preserve and enforce order in its immediate presence; to enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority; to compel obedience to its lawful judgments, orders, and process, and to the lawful orders of its judge out of court in an action or proceeding pending therein; to control, in furtherance of justice, the conduct of its ministerial officers.

ARTICLE II

4865. When judge disqualified—Not applicable to arrangement of calendar or order of business.

SEC. 45. A judge shall not act as such in an action or proceeding to which he is a party, or in which he is interested. Second, when he is related to either party by consanguinity or affinity within the third degree. Third, when he has been attorney or counsel for either party in the action or proceeding. Fourth, when he is related to any attorney or counselor, for either of the parties, by consanguinity or affinity within the fourth degree, but this section shall not apply to the arrangement of the calendar, or the regulation of the order of business. *As amended, Stats. 1907, 25.*

Bias or prejudice on the part of a judge constitutes no legal incapacity to sit on the trial of a cause, and is not sufficient ground to authorize the change of the place of trial. Allen v. Reilly, 15 Nev. 452, 455.

Acts of a judge, involving the exercise of judicial discretion, in a case where he is disqualified from acting, are not voidable only, but void. Frevert v. Swift, 19 Nev. 363, 364 (11 P. 273).

A judge who is disqualified from hearing the case cannot extend the time within which to file a statement on motion for a new trial. Idem.

This section does not disqualify a judge, who is a property owner and taxpayer in the city of Reno, from sitting in a cause to enjoin the city from executing a contract for the construction of water-works, to be paid for with municipal bonds since, under the act incorporating the city, the council is not expressly authorized to tax property within the city to pay the interest and ultimately redeem the bonds, and it may not be necessary for it to do so under any implied power, for the reason that the council is authorized to impose rates for the consumption of water. State ex rel. Schaw v. Noyes, 25 Nev. 32, 49 (56 P. 946).

A judge who is a stockholder of a corporation presenting a claim against the state is disqualified from passing thereon, and should call in another judge to act. State ex rel. Bullion and Exchange Bank v. Mack, 26 Nev. 430, 442 (69 P. 862).

No formal application for the calling of a qualified judge was necessary where the record disclosed that the acting judge was disqualified. Idem.

Under this section it is the duty of a judge who has been of counsel for a party to change the place of trial to some other judicial district. Gamble v. District Court, 27 Nev. 233, 242 (74 P. 530).

Mandamus will lie to compel a judge who was of counsel in an action previous to his appointment as judge to change the place of trial of such action to some other judicial district, although no motion for that purpose was ever made in open court where the application for the change, signed by the petitioner's attorneys, was presented to the judge, the originals being later properly filed, and the motion for removal was informally made, and a list of authorities forwarded to him, he being engaged in judicial duties in another county, and from his reasons for refusal it was evident he would not have granted a motion, had it been formally made. (Talbot, J., dissenting.) Idem.

4866. Not to act as attorney or counsel except when party.

SEC. 46. A judge of the supreme court, or of the district courts, shall not act as attorney or counsel in any court, except in an action or proceeding to which he is a party on the record.

4867. Judge or justice of peace not to have partner in practice.

SEC. 47. A judge or justice of the peace shall not have a partner acting as attorney or counsel in any court in this state.

4868. Absence from state in excess of 90 days forfeiture of office.

SEC. 48. A judge of the supreme court, or of the district court, shall not absent himself from this state for more than ninety consecutive days. A violation of the provisions of this section shall work a forfeiture of such office. *As amended, Stats. 1865, 185.*

See sec. 332.

ARTICLE III

4869. Judicial days.

SEC. 49. The courts of justice may be held, and judicial business may be transacted, on any day except as provided in the next section.

4870. Nonjudicial days enumerated—What business allowed—Falling on Sunday, Monday following observed.

SEC. 50. No court shall be open, nor shall any judicial business be transacted on Sunday, on the 1st day of January (New Year Day), on the 12th day of February (Lincoln's birthday), on the 22d day of February (Washington's birthday), on the 30th day of May, commonly known as Memorial Day, on the 4th day of July, on the 1st Monday of September of each year (Labor Day), on the 31st day of October, to be known as Admission Day, on Thanksgiving Day, on the 25th day of December (Christmas Day), on a day on which the primary election is held throughout the state, on a day on which the general election is held, or on any day that may be appointed by the president of the

United States, or by the governor of this state, for public fast, thanksgiving or holiday, except for the following purposes:

First—To give, upon their request, instructions to a jury then deliberating on their verdict.

Second—To receive a verdict or discharge a jury.

Third—For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.

Fourth—For the issue of a writ of attachment, which may be issued on each and all of the days above enumerated upon the plaintiff, of some person in his behalf, setting forth in the affidavit required by law for obtaining said writ, the additional averment as follows: That the affiant has good reason to believe, and does believe, that it will be too late for the purpose of acquiring a lien by said writ to wait till a subsequent day for the issuance of the same. And all proceedings instituted, and all writs issued and all official acts done on any of the days above specified, under and by virtue of this section, shall have all the validity, force and effect of proceedings commenced on other days, whether a lien be obtained or a levy made, under and by virtue of said writ.

If the 1st day of January, 12th day of February, 22d day of February, 30th day of May, 4th day of July, 31st day of October, or the 25th day of December fall upon Sunday, all business transactions shall be suspended on the following Monday. *As amended, Stats. 1911, 22.*

The board of county commissioners is not a court. Such bodies may lawfully meet and transact business on the first day of January. Brumfield v. Douglas Co., 2 Nev. 65, 66.

The provisions of this section authorizing the court "to receive a verdict or discharge a jury" carries with it the power to have the verdict recorded, and authorizes the court to make such other orders as may be incident to the power given, such as designating a day when it will pronounce judgment upon the verdict. State v. Rover, 13 Nev. 18, 23.

An undertaking on appeal executed on Sunday is valid. The execution of such a bond is not "transacting judicial business," and is not prohibited by the statute. State v. Cal. M. Co., 13 Nev. 203.

An attachment suit can be commenced and the writ served on Sunday whenever the plaintiff, or some person in his behalf, makes the affidavit required by this section. Levy v. Elliott, 14 Nev. 435, 437.

The use of the word "upon" instead of "by" in the affidavit, held to be a clerical mistake which did not destroy its sufficiency. Idem.

A judgment of a justice of the peace rendered upon the trial of a criminal case on Sunday is null and void. Ex Parte White, 15 Nev. 146 (37 A. R. 466).

Sec. 5 of the act to redistrict the state (Stats. 1865, 60), providing that "the district court shall always be open for the transaction of business," does not abolish the existing nonjudicial days and even if it did, would not be beyond the powers of the legislature. State ex rel. Coffin v. Atherton, 19 Nev. 333, 346 (10 P. 901).

4871. Courts, where held.

SEC. 51. Every court of justice, except justice's or recorder's court, shall sit at the county-seat of the county in which it is held; justices' courts shall be held in their respective townships, precincts, or cities, and recorders' courts in their respective cities.

4872. Adjournment of court in certain cases—Powers of sheriff or clerk in absence of judge—Judge may order adjournment by letter or telegram.

SEC. 52. If no judge attend on the day appointed, or to which court may have been adjourned before noon, the sheriff or clerk shall adjourn the court until the next day at 10 o'clock, and if no judge attend on that day before noon, the sheriff or clerk shall adjourn the court until the following day, and so on from day to day for one week; if no judge attend for one week, the sheriff or clerk shall adjourn the court for the term; *provided*, that at any time before or during the week which the sheriff or clerk is authorized to adjourn the court, the judge, while in or out of the state, shall order by letter or telegram to adjourn the court to any day within the term, the sheriff or

clerk shall adjourn the court to the day so ordered. *As amended, Stats. 1869, 136; 1881, 165.*

The purpose of this section is to prevent the loss of a term in case of the failure of a judge to attend on the first day of the term. State v. Roberts, 8 Nev. 239, 241.

4873. Place of holding court may be changed, when—Notice of.

SEC. 53. A judge authorized to hold or preside at a court appointed to be held in a city, precinct, or town, may, by an order filed with the county clerk, and published as he may prescribe, direct that the court be held or continued at any other place in the city or county than that appointed, when war, pestilence, or other public calamity, or the dangers thereof, or the destruction of the building appointed for holding the court, may render it necessary; and may, in the same manner, revoke the order, and, in his discretion, appoint another place in the same city or county for holding the court.

4874. Idem—Parties to appear.

SEC. 54. When the court is held at a place appointed as provided in the last section, every person held to appear at the court shall appear at the place so appointed.

4875. Supreme and district courts to have seals.

SEC. 55. Each of the following courts, and no other, shall have a seal: First, the supreme court; second, the district courts.

4876. Clerk to procure seal upon order of judge or court—Form of seal.

SEC. 56. The several district courts for which separate seals have not been heretofore provided, or the respective judges thereof, by an order, in writing, filed with the respective clerks of such courts, shall direct such clerks to procure such seals, and shall have the following inscriptions surrounding the same: For the district courts: "District Court, _____ District, County of _____," inserting the number of the district and the name of the county, and any such order that may have been made by any judge of a district court, shall have the same effect as if it had been made in open court. *As amended, Stats. 1879, 36.*

4877. Clerk's private seal may be used, when.

SEC. 57. Until the seals, devised as provided in the last section, are procured, the clerk of each court may use his private seal whenever a seal is required.

4878. Clerk to keep seal.

SEC. 58. The clerk of each court shall keep the seal thereof.

4879. Seal to be affixed to what papers.

SEC. 59. The seal of the court need not be affixed to any proceedings therein, except: First, to a summons, writ, or commission to take testimony; second, to the proof of a will, or the appointment of an executor, administrator, or guardian; third, to the authentication of a copy of a record or other proceeding of the court, or an officer thereof; fourth, to certificates of acknowledgment, and all final process.

4880. Seal, how impressed.

SEC. 60. The seal may be affixed by impressing it on the paper, or on a substance attached to the paper and capable of receiving the impression.

ARTICLE V

4881. Orders refused or granted conditionally by one judge, no application to be made to other judge except of higher court—Rule not to apply to informalities.

SEC. 61. If an application for an order made to a judge of a court in

which the action or proceeding is pending be refused, in whole or in part, or be granted conditionally, no subsequent application for the same order shall be made to any other judge, except of a higher court; *provided*, that nothing in this section be so construed as to apply to motions refused for any informality in the papers or proceedings necessary to obtain an order.

4882. Idem—Violation a contempt—Order, by whom may be vacated.

SEC. 62. A violation of the last section may be punished as a contempt; and an order made contrary thereto may be revoked by the judge who made it, or vacated by a judge of the court in which the action or proceeding is pending.

See sec. 5394.

4883. Judicial officers may take acknowledgment and affidavits.

SEC. 63. The judges and clerks of the supreme court, and of the district courts, shall have power in any part of the state; and justices of the peace and recorders, within their respective cities, precincts, or townships, shall have power to take and certify: First, the acknowledgment of conveyances and the satisfaction of a judgment of any court; second, an affidavit to be used in any court of justice in this state.

The fact that this section authorizes judicial recorders to take acknowledgments of conveyances does not take away a like power conferred on county recorders by the act of 1861, 422. State ex rel. Ford v. Hoover, 5 Nev. 141, 144.

4884. Vacancy in office or failure of term not to affect action.

SEC. 64. No action or proceeding in a court of justice shall be affected by a vacancy in the office of all or any of the judges, or by the failure of a term thereof.

4885. English language to be used—Abbreviations—Numbers.

SEC. 65. Every written proceeding in a court of justice in this state, or before a judicial officer, shall be in the English language; but such abbreviations as are now commonly used in that language may be used, and numbers may be expressed by figures or numerals, in the customary manner.

An Act to prevent unnecessary delay in rendering judicial decisions by the courts of this state.

Approved March 5, 1891, 28

4886. Not to receive monthly salary unless affidavit filed—Ninety-day limitation for decisions.

SECTION 1. No justice of the supreme court nor judge of the district court in this state shall, after the first day of July, A. D. one thousand eight hundred and ninety-one, be allowed to draw or receive any monthly salary unless he shall take and subscribe an affidavit before an officer authorized to administer oaths that no cause in his court remains undecided that has been submitted for the period of ninety days.

See secs. 258, 330.

4887. To be filed with controller—Authority for warrant.

SEC. 2. The said affidavit shall be filed with the state controller, and shall constitute his authority for drawing and delivering the monthly salary warrant for any such justice or judge.

R. 13 514
Nas. '13 313

SUPREME COURT

An Act to determine who shall perform the duties of bailiff of the supreme court of the State of Nevada, and fixing the compensation for his services, and to repeal an act entitled "An Act to regulate the appointment and compensation of bailiff of the supreme court," approved March 6, 1899.

Approved March 20, 1901, 96

4888. Bailiff of supreme court, sheriff of Ormsby County is—Compensation.

SECTION 1. Hereafter the sheriff of Ormsby County, Nevada, shall act as bailiff of the supreme court of the State of Nevada, and for his services as such bailiff, either in person or by deputy, he shall receive from the state, the sum of four dollars per day, when actually in attendance upon said court, such sum to be paid by the state treasurer out of the biennial appropriation therefor; and said sheriff, as such bailiff, shall retain to his own use all moneys received by him under the provisions of this act.

An Act to provide a reporter for the supreme court of the State of Nevada, and fix his compensation.

Approved February 13, 1907, 24

4889. Official reporter—Qualifications—Compensation.

SECTION 1. The supreme court of the State of Nevada is hereby authorized to appoint an official reporter who shall be a competent stenographer and who shall perform such duties as may be required of him by said court, and whose compensation shall be one hundred and twenty-five dollars per month.

4890. Compensation, how paid.

SEC. 2. The controller of the state shall, at the end of each month, draw his warrant upon the state treasurer in favor of such reporter for the amount of his compensation then due, and the state treasurer shall pay the same out of any moneys in the state treasury not otherwise specially appropriated.

An Act authorizing the supreme court of the State of Nevada to employ two stenographic clerks, and fixing their compensation.

Approved February 1, 1909, 5

4891. Two stenographers—Compensation.

SECTION 1. The supreme court of the State of Nevada or a majority thereof is hereby authorized to employ two stenographic clerks, whose compensation shall be the sum of one hundred and twenty-five (125) dollars per month each.

4892. Compensation, how paid.

SEC. 2. The controller of the state shall, at the end of each month, draw his warrant upon the state treasurer for the amounts of their compensation then due, and the state treasurer shall pay the same out of any moneys in the state treasury not otherwise appropriated.

An Act fixing the salaries of the justices of the supreme court of the State of Nevada.

Approved February 14, 1907, 26

4893. Salary of justices of supreme court.

SECTION 1. From and after the expiration of the terms of the present incumbents each justice of the supreme court of the State of Nevada shall receive a salary of six thousand dollars a year, payable in the manner and at the times now prescribed by law.

An Act to fix the compensation of the clerk of the supreme court.

Approved February 24, 1875, 84

[Section 1 superseded, sec. 4391.]

Under the constitution, the office of clerk of the supreme court cannot be abolished by the legislature. State ex rel. Josephs v. Douglass, 33 Nev.—(110 P. 177).

4894. Fees collected—How disposed of.

SEC. 2. All fees hereafter collected by the clerk of the supreme court as provided by law, shall be paid into the state treasury at the end of every quarter, and shall be apportioned to the general fund.

For fees, see secs. 2006, 2032.

Court fee to go into supreme judges' salary fund and used for no other purpose, sec. 2034. Cited, State ex rel. Howell v. La Grave, 23 Nev. 373, 380 (48 P. 674).

4895. Official bond—Examiners to approve—Where filed.

SEC. 3. Said clerk of the supreme court shall execute an official bond, with two or more sureties, made payable to the State of Nevada, in the penal sum of ten thousand dollars; which bond shall be approved by the board of examiners, and filed with the secretary of state.

4896. Clerk to report to legislature.

SEC. 4. The clerk of the supreme court shall make a full statement of all his proceedings under this act to each succeeding legislature.

An Act to provide for compiling and reporting the decisions of the supreme court of the State of Nevada.

Approved March 26, 1909, 314

4897. Justices of supreme court to engage attorney to compile Nevada Reports.

SECTION 1. Whenever there are decisions rendered by the supreme court of the State of Nevada which will make a volume of not less than five hundred pages it shall be the duty of the justices of the supreme court to engage some competent attorney to compile and report said decisions, making also a synopsis of the various points decided in said decisions, and to have them properly printed, indexed and bound, as now provided by law for the Nevada Reports, and the laws as passed by the Nevada legislature.

See sec. 2950.

4898. Idem—Compensation.

SEC. 2. The person so employed to compile and report said decisions shall receive for his services in so preparing and compiling said report, the sum of seven hundred dollars for each volume so prepared.

4899. Number to be printed—State printer to hold unbound copies subject to order of secretary of state.

SEC. 3. To provide against any deficiency in the number of said reports, the superintendent of state printing shall cause to be printed, in addition to the six hundred copies of said decisions now directed by law to be transferred to the secretary of state for distribution, five hundred extra copies of each report of the decisions of the supreme court hereafter published, and store the same unbound subject to the order of the secretary of state.

An Act giving the clerk of the supreme court authority to appoint a deputy in his office.

Approved March 15, 1911, 72

4900. Deputy clerk of supreme court—Salary—How apportioned.

SECTION 1. The clerk of the supreme court shall have power, under his

hand and seal, to appoint one deputy in his office; the deputy so appointed may, during the absence or inability of the clerk of the supreme court, perform all the duties of a ministerial nature requisite and pertaining to the office. The salary of such deputy shall be $1,800 per annum. Said salary shall be payable as the salaries of other state officers are paid.

DISTRICT COURT

An Act to amend an act entitled "An act to amend an act entitled 'An act to create judicial districts in the State of Nevada, provide for the election of district judges therein, and to fix their residences and salary, and to repeal all other acts in relation thereto,' approved March 27, 1907," approved February 8, 1908.

Approved March 23, 1909, 289

4901. Judicial districts established.
4902. Salary of district judges—How paid—"District judges' salary fund"—Counties to contribute to—County commissioners to order quota—May make transfers—County treasurers to forward—State treasurer to pay.
4903. Judges to have concurrent and coextensive jurisdiction—May make rules for the transaction of judicial business.
4904. Judges seventh judicial district.
4905. Mineral county, part of seventh judicial district.

4901. Judicial districts established.

SECTION 1. The State of Nevada is hereby divided into nine judicial districts. The counties of Storey, Douglas, Ormsby, and Lyon shall constitute the first judicial district; the county of Washoe shall constitute the second judicial district; the counties of Eureka and Lander shall constitute the third judicial district; the counties of Elko, Lincoln, and Clark shall, except as hereinafter provided, constitute the fourth judicial district; the county of Nye shall constitute the fifth judicial district; the county of Humboldt shall constitute the sixth judicial district; the county of Esmeralda shall constitute the seventh judicial district; the county of Churchill shall constitute the eighth judicial district, and the county of White Pine shall constitute the ninth judicial district. For each of said districts judges shall be elected by the qualified electors thereof at the general election in the year 1910, and every four years thereafter, except as otherwise provided in this act, as follows: For each of said districts, except the second judicial district and the seventh judicial district, there shall be elected one judge. For the second judicial district there shall be two judges elected, and for the seventh judicial district there shall be two judges elected.

[Sec. 2 provided that after January 1, 1911, there should be but one district judge in the seventh judicial district. Provisions of this section now obsolete; see, also, sec. 4904.]

Mineral county, carved out of Esmeralda county by Stats. 1911, p. 10, remains part of seventh judicial district, sec. 4905.

4902. Salary of district judges—How paid—"District judges' salary fund"—Counties to contribute to—County commissioners to order quota—May make transfers—County treasurer to forward—State treasurer to pay.

SEC. 3. The salary of each judge herein elected, or appointed to fill vacancies whenever such vacancies shall occur, shall be four thousand dollars per annum, except the judge of the fourth judicial district whose salary shall be five thousand dollars per annum, and the judge of the fifth judicial district whose salary shall be seven thousand dollars per annum, and the judge or judges of the seventh judicial district whose salary shall be seven thousand dollars per annum, and the judge of the eighth judicial district whose salary shall be three thousand dollars per annum, all of said salaries to be paid in equal monthly installments out of the district judges' salary fund, hereby created in the state treasury, which fund shall be supplied in the manner following, to wit:

Each county in each district in the state shall contribute annually to the

said fund its proportionate share of the money necessary to pay the judge or judges of its district their respective salaries monthly for such year, based upon the assessment roll of each county for the previous year; and it is hereby made the duty of the county commissioners of each county to make such arrangements and orders as may be necessary to insure the forwarding of their county's quota of said district judges' salary fund to the state treasurer, at such times and in such installments as will enable the state treasurer to pay each district judge one-twelfth of his annual salary on the first Monday of each and every month, and to cause such money to be forwarded by the county treasurers, and if necessary in order to render certain the forwarding of such money in ample time to prevent any default in said monthly installments, said board of county commissioners shall transfer and use any moneys in the county treasuries except those belonging to the public school fund. No salary of any district judge shall be paid in advance.

4903. Judges to have concurrent and coextensive jurisdiction—May make rules for transaction of judicial business.

SEC. 4. The second judicial district shall be entitled to, and shall have two district judges * * *.

The said district judges shall have concurrent and coextensive jurisdiction within said district, under such rules and regulations as may be prescribed by law, and they shall have power to make such rules and regulations as will enable them to transact judicial business of said district in a convenient and lawful manner * * *. *As amended, Stats. 1909, 298.*

Portion of section omitted was rendered obsolete upon the establishment of the sixth and eighth judicial districts, which were carved out of the second judicial district. See sec. 4901.

4904. Judges, seventh judicial district.

SEC. 5. The seventh judicial district shall be entitled to and shall have two district judges to hold office until the first Monday in January, one thousand nine hundred and eleven, and after the said first Monday in January, one thousand nine hundred and eleven, the seventh judicial district shall be entitled to but one district judge, and at the general election of 1910, and every four years thereafter, except as otherwise provided in this act, there shall be but one district judge elected for the seventh judicial district. * * *

Portion of section omitted because obsolete.

NOTE—The acts referred to in the title of this act are not amended, but are superseded by it.

[*From Act creating and organizing the county of Mineral, Stats. 1911, 10.*]

[Sections 1 and 2, relating to boundaries and county-seat, will be found under Mineral County, secs. 1479, 1480.]

4905. Mineral County part of seventh judicial district—Court, when held—Commissioners to pay traveling expenses.

SEC. 12. Said Mineral County shall be attached to and become a part of the seventh judicial district in which said Mineral County court shall be held at least twice in each calendar year, at dates to be fixed by the judge of said district court, and the board of county commissioners of said Mineral County are hereby authorized and directed to pay the necessary traveling expenses of the judge of said district court from the county-seat of Esmeralda County to the county-seat of Mineral County and return.

Remainder of act omitted as not being of a general nature.

See sec. 4901.

Other acts concerning judicial districts have been cited as follows:

Act of 1861, 287: Cited, Evans v. Job, 8 Nev. 341.

Act of 1861, 289: Cited, Sadler v. Tatti, 17 Nev. 431–433 (30 P. 1082); State v. Buralli, 27 Nev. 41, 47 (71 P. 532).

Act of 1866, 139: Cited, Leake v. Blasdel, 6 Nev. 40, 41, 43; State ex rel. Aude v. Kinkead, 14 Nev. 117, 119.

Act of 1869, 86: Cited, State ex rel. Flack v. Rogers, 10 Nev. 321–323.

Act of 1869, 133: Cited, State ex rel. Flack v. Rogers, 10 Nev. 319, 321.

Act of 1873, 145: A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law as well as in reason and common sense, operate to repeal the former. State ex rel. Flack v. Rogers, 10 Nev. 319–322.

The act of 1873, 145, redistricting the state, embraces the whole subject-matter of the act of 1869, 133, including all the amendments thereto, and was evidently designed, upon taking effect, to be a substitute therefor. Idem.

Where there are several statutes relating to the same subject-matter they are to be taken together and, if possible, to be so construed as to give each a reasonable effect agreeable to the intention of the legislature which passed them. Idem.

Act of 1873, 170: Cited, State ex rel. Flack v. Rogers, 10 Nev. 320–322.

Act of 1877, 164: Cited, Sadler v. Tatti, 17 Nev. 429 (30 P. 1082).

Act of 1879, 62: Cited, Lang Syne M. Co. v. Ross, 20 Nev. 136 (19 A. S. 334, 18 P. 358).

Section 1 of the act of 1889, 122: The question of the constitutionality of this statute and the right of respondent to hold the office of district judge under it can only be raised by direct proceeding of quo warranto, and is not properly before the court by a proceeding for a writ of prohibition. (Belknap, J., dissenting.) Walcott v. Wells, 21 Nev. 48, 53, 54, 64 (37 A. S. 478, 9 L. R. A. 59, 24 P. 367).

Act of 1907, 289: Cited, Jennett v. Stevens, 33 Nev. — (111 P. 1025). See citation of this case under sec. 1986, ante.

An Act to redistrict the State of Nevada, prescribe the number and salaries of district judges, and fix the places of holding courts.

Approved March 4, 1885, 60

[Sections 1, 2, 3, 6 and 8 of this act are superseded, secs. 4901–4905.]

[Sections 4 and 10 superseded by sec. 4922.]

[Section 9 repealed.]

4906. District court always open.

SEC. 5. The district court shall always be open for the transaction of business.

See secs. 4842, 4844, 4922.

There are no terms of the district court, the courts being always open and sessions held at the convenience of the judges and as the business may require. State v. Jackman, 31 Nev. 511, 516 (104 P. 13).

4907. Expenses of judges incurred in traveling to be allowed—How paid—Amount limited.

SEC. 7. In addition to the salary provided by law, each district judge shall be entitled to receive his necessary expenses in going to and returning from the place of holding court, his traveling expenses when traveling by private conveyance, to be estimated at the usual amounts charged by public conveyance, and also his necessary expenses at the place of holding court when holding court in any county other than that of his residence, said expenses to be allowed and paid as other claims against the state, but in no case shall such expenses exceed the amount of one thousand ($1,000) dollars per annum for each judge. *As amended, Stats. 1907, 62.*

[Secs. 4 and 10 are superseded, and sec. 9 is repealed by Stats. 1895, 56.]

This act has been further cited as follows:

The prohibition contained in Const., sec. 325, ante, does not apply to the "necessary expenses" in this section. State ex rel. Coffin v. Atherton, 19 Nev. 332, 346 (10 P. 901).

Sec. 9 cited in above case on pages 333, 347.
Secs. 1, 2, 3 cited, in same case, on page 336.
Sec. 4 cited in same case on pages 345, 346.
Sec. 5 cited in same case on pages 333, 346.

Cited, Walcott v. Wells, 21 Nev. 47, 54 (37 A. S. 478, 9 L. R. A. 59, 24 P. 367).

An Act to provide for the appointment of official reporters for the district courts, their duties, qualifications and compensation, and to repeal all former acts in relation thereto.

Approved March 12, 1907, 99

4908. District court judges to appoint official reporters—Removable at pleasure—Duties.

4909. Idem — Qualifications — Examined by bar committee—Test of competency —Certificate of.

4910. Duty to attend office—When may be excused—Reporter pro tempore.
4911. Must take oath.
4912. Transcript prima facie evidence.
4913. Reporter's fees — County to pay in criminal cases — Parties in civil cases—May be taxed as costs.

4908. District court judges to appoint official reporters—Removable at pleasure—Duties.

SECTION 1. The judge or judges of any district court in the state may appoint a competent phonographic reporter, or as many such reporters as there are judges, to be known as official reporter or reporters of such court, and to hold office during the pleasure of the judge or judges appointing them. Such reporter, or any one of them, where there are two or more, must, at the request of either party, or of the court in a civil action or proceeding, and on the order of the court, the district attorney or the attorney for the defendant in a criminal action or proceeding, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, all arraignments, pleas and sentences of defendants in criminal cases, and all statements and remarks made and oral instructions given by the judge; and if directed by the court, or requested by either party, must, within such reasonable time after the trial of such case as the court may designate, write out the same, or such specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify to the same as being correctly reported and transcribed, and when directed by the court file the same with the clerk of the court.

4909. Idem—Qualifications—Examined by bar committee—Test of competency—Certificate of.

SEC. 2. No person shall be appointed to the position of official reporter of any court in this state except upon satisfactory evidence of good moral character and without being first examined as to his competency by at least three members of the bar practicing in said court, such members to be designated by the judge or judges of said court. The committee of members of the bar so designated shall, upon the request of the judge or judges of said court, examine any person as to his qualifications whom said judge or judges may wish to appoint as official reporter; and no person shall be appointed to such position upon whose qualifications such committee shall not have reported favorably. The test of competency before such committee shall be as follows: The party examined must write in the presence of such committee at the rate of at least one hundred and fifty words per minute for five consecutive minutes, upon matter not previously written by or known to him, immediately read the same back to the committee, and transcribe the same into longhand writing, plainly and with accuracy. If he pass such test satisfactorily, the committee shall furnish him with a written certificate of that fact, signed by at least a majority of the members of the committee, which certificate shall be filed among the records of the court.

4910. Duty to attend to office—When may be excused—Reporter pro tempore.

SEC. 3. The official reporter of any district court shall attend to the duties of his office in person, except when excused for good and sufficient reason by order of the court, which order shall be entered upon the minutes of the court. Employment in his professional capacity elsewhere shall not be deemed a good and sufficient reason for such excuse. When the official reporter of any court has been excused in the manner provided in this section, the court may designate an official reporter pro tempore, who shall perform the same duties and receive the same compensation during the term of his employment as the official reporter.

4911. Must take oath.

SEC. 4. The official reporter of any court, or official reporter pro tempore, shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office.

4912. Transcript prima facie evidence.

SEC. 5. The report of the official reporter, or official reporter pro tempore, of any court, duly appointed and sworn, when transcribed and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie evidence of such testimony and proceedings.

4913. Reporter's fees—County to pay in criminal cases—Parties in civil cases—May be taxed as costs.

SEC. 6. For his services the official reporter shall receive the following fees:

For reporting testimony and proceedings, ten dollars per day, which amount, when more than one case is reported in one day, must be apportioned by the court between the several cases.

For transcription, he shall receive ten cents per hundred words for the first copy, and five cents per hundred words for each additional copy.

In criminal cases the fees for reporting and for transcripts ordered by the court to be made must be paid out of the county treasury upon the order of the court; *provided*, that when there is no official reporter in attendance, and a reporter pro tempore is appointed, his reasonable expenses for traveling and detention must be fixed and allowed by the court and paid in like manner.

In civil cases the fees for reporting and for transcripts ordered by the court to be made must be paid by the parties in equal proportions, and either party may, at his option, pay the whole thereof; and in either case, all amounts so paid by the party to whom costs are awarded must be taxed as costs in the case. The fees for transcripts and copies ordered by the parties must be paid by the party ordering the same. No reporter must be required to perform any service in a civil case until his fees therefor have been paid to him or deposited with the clerk of the court.

An Act to provide for the appointment of bailiffs for the district courts of the several judicial districts of this state in the counties polling forty-five hundred or more votes; defining the powers and duties of such bailiffs; fixing their compensation and repealing all acts or parts of acts in conflict with this act.

Approved February 24, 1909, 36

4914. Judge may appoint bailiff in certain counties.
4915. Idem—Where more than one judge—Each may appoint.
4916. Duty of bailiff.
4917. Qualifications—Bond—Powers of peace officer.
4918. Compensation—How paid.
4919. Limitation of powers—Sheriff not relieved.
4920. Commissioners to allow salary—Auditor and treasurer to pay.

4914. Judge may appoint bailiff in certain counties.

SECTION 1. The judge of each district court of this state may appoint a bailiff for such court in counties polling forty-five hundred or more votes; such bailiff to be appointed and removed at the pleasure of the judge appointing him.

4915. Idem—Where more than one judge, each may appoint.

SEC. 2. In all judicial districts where there are more than one judge, each judge may appoint a bailiff to attend upon the division of the court presided over by him in counties polling forty-five hundred or more votes.

4916. Duty of bailiff.

SEC. 3. It shall be the duty of each bailiff to preserve order in the court, or the division to which he may be appointed; to attend upon the jury; to open and close court, and to perform such other duties as may be required of him by the judge of the court.

4917. Qualifications—Bond—Powers of peace officer.

SEC. 4. The said bailiff shall be a qualified elector of the county, and shall give a bond in the sum of two thousand ($2,000) dollars, conditioned for the faithful performance of his duty, said bond to be approved by the district judge. The bailiff shall have all the powers of a peace officer.

4918. Compensation, how paid.

SEC. 5. The compensation of each bailiff for his services shall be one hundred and fifty ($150) dollars per month, and shall be paid by the county wherein he is appointed, the same as the salaries of other county officers are paid.

4919. Limitation of powers—Sheriff not relieved.

SEC. 6. The provisions of this act shall not be construed to authorize the bailiff to serve any civil or criminal process, except such orders of the court which shall be specially directed by the court, or the presiding judge thereof, to him for service. Nor shall it be construed as relieving the sheriff of any duty required of him by law to maintain order in the said court-room.

4920. Commissioners to allow salary—Auditor and treasurer to pay.

SEC. 7. The board of county commissioners of the respective counties shall allow the salary named in section 5 of this act, as other salaries are allowed to county officers, and the auditor shall draw his warrant for the same, and the county treasurer shall pay the same.

An Act providing offices for the district judges in this state.

Approved March 3, 1869. 115

4921. Offices for district judges—Failure of commissioners to furnish—Court may direct sheriff—Charge against county.

SECTION 1. Offices shall be provided and furnished by, and at the expense of the several counties in this state, for the several district judges therein; and whenever the county commissioners of any county in this state shall neglect or refuse to provide and furnish an office for the use of the district judge, it shall be lawful for such district judge to make an order (which shall be entered upon the minutes of the court), requiring the sheriff to provide and furnish such office; and the necessary expenses incurred therein shall become a legal and valid claim against said county.

See sec. 4841.
Cited, Owen v. Nye Co., 10 Nev. 345.

An Act concerning the district courts of the State of Nevada and the judges thereof.

Approved March 13, 1895. 56

4922. District judges—Equal, coextensive and concurrent jurisdiction—Functions of court and judges at chambers—Decision signed any part of state—Clerk to enter—Several may hold court in one county at one time—Court held in each county, how often—Judge to control business in his district.

SECTION 1. The district judges of the State of Nevada shall possess equal

coextensive and concurrent jurisdiction and power. They shall each have power to hold court in any county of this state. They shall each exercise and perform the powers, duties and functions of the court, and of judges thereof, and of judges at chambers. The decision in an action or proceeding may be written or signed at any place in the state, by the judge who acted on the trial and may be forwarded to, and filed by the clerk, who shall thereupon enter judgment as directed to in the decision, or judgment may be rendered in open court, and, if so rendered, shall be entered by the clerk accordingly. If the public business requires, each judge may try causes and transact judicial business in the same county at the same time. Each judge shall have power to transact business which may be done in chambers at any point within the state, and court shall be held in each county at least once in every six months, and as often and as long as the business of the county requires. All of this section is subject to the provision that each judge may direct and control the business in his own district, and shall see that it is properly performed.

See sec. 4844.

Where, on the determination of a cause, the court entered an order that all further business not completed and all new business brought before the court during the absence of such judge should be referred to the judge of another district, the judge of such other district had jurisdiction in chambers within his own district to grant an ex parte order extending the time for the preparation of statement on motion for new trial in a cause tried by the absent judge without an affidavit that the latter was still absent at the time the order was granted. Twaddle v. Winters, 29 Nev. 88, 97, 99 (85 P. 280).

Cited, Young v. Updike, 29 Nev. 305 (89 P. 457); State v. Jackman, 31 Nev. 511, 516, 517 (104 P. 13).

An Act making it lawful for the district judge for each judicial district of this state, to sign any and all minutes and records of the district court for which he is incumbent, left unsigned by his predecessor in office, or by any district judge previously sitting in the district or county, and making such minutes and records when thus signed of the same force and effect, as if they had been signed by such predecessor or such district judge previously sitting.

Approved March 22, 1911, 321

4923. District judge may sign records left unsigned by predecessor—Effect of.

SECTION 1. At any time after the passage and approval of this act, it shall be lawful for the district judge of each judicial district of this state, during his continuance in office, to sign any and all minutes and records of the court of the district for which he is incumbent, in whatsoever district or county the same may be, left unsigned by his predecessor in office or by any district judge previously sitting in the said district or county, and such minutes and records, when thus signed, shall have the same force and effect, to which they would have been entitled, had they been signed by such predecessor in office, or by such district judge previously sitting in the said district or the said county.

An Act concerning the duties of district judges in this state.

Approved February 12, 1879, 32

4924. District judges to instruct grand juries text of statutes relative to duties of military, civil and peace officers.

SECTION 1. It shall be and it is hereby made the special duty of all district judges in this state to give in charge to the grand juries, at the commencement of each term of their respective courts, the full text of the statutes of this state, in reference to the duties, conduct, responsibilities, and penalties of military, civil, and peace officers in this state.

See sec. 7014.

An Act to amend section one of an act entitled "An act concerning the duties of district judges in the state," approved February 23, 1901.

Approved March 6, 1903, 50

4925. To instruct grand juries relative to statutes requiring erection of guide-boards.

SECTION 1. It shall be and is hereby made the special duty of all district judges in this state to give in charge to the grand juries, whenever grand juries are impaneled in their respective courts, the full text of the statutes of this state in reference to the erection of guide-boards on public roads and highways, also to give in charge to said grand juries, the full text of the statutes of this state in reference to the record of births, deaths and marriages.

Original act, consisting of but one section, was superseded by above, and is therefore omitted.

See sec. 7014 regarding charging of grand jury.

JUSTICES OF THE PEACE

An Act concerning justices of the peace.

Approved March 4, 1881, 141

4926. One justice may act for another—Time limited—Registry agent.

SECTION 1. Whenever any justice of the peace, in consequence of ill health, absence from his township, or other cause, shall be prevented from attending to his official duties, it shall be lawful for him to invite any other duly qualified justice of the peace of the same county to attend to his official duties, including that of registry agent, instead of such absent or disqualified justice of the peace; *provided*, such temporary vacancy, resulting from absence or disqualification, shall not be so filled for more than thirty days at any one time. *As amended, Stats. 1885, 20.*

See secs. 1705, 4851.

A 139

An Act concerning official bonds of justices of the peace and constables.

Approved February 10, 1873, 51

4927. Justices of the peace, oath and bond—Approval and filing.

SECTION 1. Each justice of the peace hereafter elected or appointed in this state shall, before entering upon the duties of his office, take the oath prescribed by law, and execute a bond to the State of Nevada, to be approved by the board of county commissioners, in the penal sum of not less than one thousand dollars nor more than five thousand dollars, as may be designated by such board of county commissioners; which bond shall be conditioned for the faithful performance of the duties of his office, and shall be filed in the county clerk's office.

4928. Constable, oath and bond—Approval and filing.

SEC. 2. Each constable hereafter elected or appointed in this state shall, before entering upon the duties of his office, take the oath prescribed by law, and execute a bond to the State of Nevada, to be approved by the board of county commissioners, in the penal sum of not less than one thousand dollars nor more than three thousand dollars, as may be designated by such board of county commissioners; which bond shall be conditioned for the faithful performance of the duties of his office, and shall be filed in the county clerk's office.

Official bonds and duties in general. State v. Kruttschnitt, 4 Nev. 178; King v. Grannis, 3 Nev. 548; McDonald v. Prescott, 2 Nev. 109; Kruttschnitt v. Hauck, 6 Nev. 163; State v. Rhoades, 6 Nev. 352, and 7 Nev. 434; State v. Wells, 8 Nev. 105; State v. Nevin, 19 Nev. 162; Jeffree v. Walsh, 14 Nev. 143; White Pine Co. v. Herrick, 19 Nev. 34; Alderson v. Mendes, 16 Nev. 298.

Other acts concerning this general subject

have been cited as follows: Act of 1861, 39: State v. Cal. M. Co., 13 Nev. 203, 212, 214, 215. Act of 1865, 98, sec. 3: Beatty v. Rhoades, 3 Nev. 253, 354.

Act of 1865, 406: The statute requiring the payment of a docket fee on the commencement of every action or proceeding in a district court, does not apply to actions commenced by the state. State v. Rhoades, 6 Nev. 353, 373.

The fact that the docket fee was paid by the clerk instead of the plaintiff cannot be taken advantage of by defendant. Rose v. Richmond Mining Co., 17 Nev. 25, 47, 54 (affirmed, 114 U. S. 576, 37 P. 1105); Harris v. Helena M. Co., 29 Nev. 515 (92 P. 1).

Act of 1866, 101: See Cavanaugh v. Wright, 2 Nev. 166, 167, under Const., sec. 323, ante.

JURORS AND JURIES

General act concerning juries, approved March 5, 1873, section 4929–4935.

Act supplementary thereto, approved March 5, 1875, section 4936.

Act regulating the manner of drawing juries in district courts, approved February 20, 1885, sections 4937–4940.

Act to exempt from jury duty persons over sixty-five years of age, approved January 30, 1889, section 4941.

Act relating to expenses of juries in civil cases, approved March 5, 1869, section 4942.

Other Statutory Provisions

Grand jury, formation, sections 7002–7019; powers and duties, sections 7020–7041.
Jury in civil trials in district court, section 5204, et seq.
Jury in criminal trials in district court, formation, section 7124; challenging, section 7129, et seq.; verdict, section 7213, et seq.
Jury in justices' courts, civil cases, section 5764, et seq., section 5799, et seq.
Jury in justices' courts, criminal cases, section 7483, et seq.
Jury in probate contests, similar to civil cases, section 6138.

Constitutional Provisions

Charges to jury, how made, section 327.
Crimes which disqualify from serving on jury, section 285.
Electors not convicted of crime to serve on juries, section 285.
Grand jury, indictment or presentment by, section 237.
Jury trial secured, Nev. Const., section 232, U. S. Const., sections 156, 176.
Jury trial may be waived in certain cases, section 232.
Verdict in civil cases, three-fourths of jurors may find, section 232.
Verdict in civil cases, legislature may require unanimous, section 232.

An Act concerning juries.

Approved March 5, 1873, 126

4929. Who are qualified jurors.
4930. Regular panel of trial jurors—How, when and where drawn—Sheriff to serve and return venire.
4931. Grand jury — Number of — Judge or clerk and commissioners to select.
4932. Exemption from jury duty, who entitled to—Proof of, required—When residence sixty miles or more from county-seat.
4933. Court may excuse juror for cause.
4934. Penalty for nonattendance.
4935. Per diem and mileage.

4929. Who are qualified jurors.

SECTION 1. Every qualified elector of the state, whether registered or not, who has sufficient knowledge of the English language, and who has not been convicted of treason, felony, or other infamous crime, and who is not rendered incapable by reason of physical or mental infirmity, is a qualified juror of the county in which he resides, or the county to which it is attached for judicial purposes. *As amended, Stats. 1881, 23.*

[Secs. 2 and 3 superseded by following act.]

As to who are electors under constitution, see sec. 250.
Person convicted of crime not to serve on juries, Const., sec. 285.
Kerr, C. C. P., 198–199.

The privilege, or duty of being a juror is not always an incident of citizenship. State v. Ah Chew, 16 Nev. 58 (48 A. R. 488).

The state has the right to prescribe the qualifications of its jurors, provided it does not discriminate against persons because of their race or color. A mixed jury in a particular case is not essential to the equal protection of the law and is not guaranteed by the fourteenth amendment to the United States constitution. Idem.

See Philips v. Eureka Co., 19 Nev. 351 (11 P. 32).

4930. Regular panel of trial jurors, how, when and where drawn—Discretion to exclude certain names drawn—List subject to inspection—Venire to issue—Sheriff to serve and return—Inspection of.

SEC. 4. To constitute the regular panel of trial jurors for any term of the district court such number of names as the judge may direct shall be drawn from the jury box. The regular panel of trial jurors may be drawn before the commencement of the term of court, and, if so drawn, the judge thereof must make and file with the county clerk an order that one be drawn, and the number of jurors to be drawn must be named in the order. The drawing shall take place in the office of the county clerk, during regular office hours, in the presence of all persons who may choose to witness it. If the panel be drawn before the commencement of the term it shall be drawn by the judge and clerk, or, if the judge so directs, by any one of the county commissioners of the county and the clerk, and if the judge directs that the panel be drawn by one of the county commissioners of the county and the clerk, the judge must make and file with the clerk an order designating the name of such county commissioner, and fixing the number of names to be drawn as trial jurors and the time at which the persons whose names are so drawn shall be required to attend in court. The drawing shall be conducted as follows: The number to be drawn having been previously determined by the judge, the box containing the names of the jurors shall first be thoroughly shaken; it shall then be opened and the judge and clerk, or one of the county commissioners of the county and the clerk, if the judge has so ordered, shall alternately draw therefrom one ballot until of nonexempt jurors the number determined upon is obtained; *provided,* that if the officers drawing such jury deem that the attendance of any juror whose name is so drawn cannot be conveniently and cheaply to the county obtained, by reason of the distance of the residence of such juror from the court or other cause, his name may, in the discretion of such officers, be returned to the box and in its place the name of another juror drawn whose attendance said officers may deem can be conveniently and cheaply to the county obtained. A list of the names so obtained shall be made out and certified by the officers drawing the jury, which list shall remain in the clerk's office subject to inspection by any officer or attorney of the court, and the clerk shall immediately issue a venire, directed to the sheriff of the county, commanding him to summon the persons so drawn as trial jurors to attend in court at such time as the judge may have directed, and the sheriff shall make return of the venire at least the day before the day named for their appearance, after which the venire shall be subject to inspection by any officer or attorney of the court. *As amended, Stats. 1879, 33; 1881, 26.*

[Secs. 5, 6 and 7, superseded by following act.]

Kerr, C. C. P., 214–221, 225.

Sec. 5: The question as to the necessity of selecting additional trial jurors by an open venire is within the discretion of the court. State v. Angelo, 18 Nev. 425, 428 (4 P. 1080).

The form of oath as prescribed by statute should always be followed; its substance cannot be dispensed with. Idem.

4931. Grand jury—Number of—Judge or clerk and commissioners to select—Judge to make order concerning—Venire to sheriff—Judge to select seventeen—Additional selections.

SEC. 8. It shall be the duty of the district judge and any one of the county commissioners of the county, at least once in each year and as much oftener as the public interest may require, to select from the jury list twenty-four persons who shall be summoned to appear as grand jurors at such time as the judge may order; *provided,* that if the district judge deems

proper he may direct any one of the county commissioners of the county and the clerk to select the grand jurors, and such county commissioner and clerk, if the judge so directs, shall select from the jury list twenty-four persons as grand jurors. If the judge directs the grand jurors to be selected by one of the county commissioners of the county and the clerk, the judge must make and file with the clerk, an order designating the name of such county commissioner, and the judge shall in said order fix the time during the term of court when said grand jurors shall be required to appear; and if from any cause, such county commissioner and clerk should fail to select the grand jurors, the judge and any one of the county commissioners may, at any time, select the same. A list of the names so selected as grand jurors shall be made out and certified by the officers making such selection and be filed in the clerk's office, and the clerk shall immediately issue a venire, directed to the sheriff of the county, commanding him to summon the persons so drawn as grand jurors to attend in court at such time as the judge may have directed; and the sheriff shall summon such grand jurors, and out of the number so summoned the court shall select seventeen persons to constitute the grand jury. If from any cause a sufficient number do not appear, or those who appear are excused or discharged, an additional number, sufficient to complete the grand jury, shall be selected from the jury list by the judge and clerk and summoned to appear in court at such time as the court may direct. *As amended, Stats. 1879, 34; 1881, 27.*

[Section 8 repealed, Stats. 1893, 32. Repealing act unconstitutional, State v. Hartley, 22 Nev. 342.]

See sec. 4940.

Kerr, C. C. P., 241–243.

Regarding indictments and proceedings before grand juries, see secs. 6999, 7002, et seq.

The statutory causes of challenge to the panel of a grand jury specified in Stats. 1861, 454, sec. 179, do not apply to the changed method of drawing grand jurors according to this section. State v. Williams, 31 Nev. 360–363 (102 P. 974).

It is not necessary to have the full venire of twenty-four present before a grand jury of seventeen is selected; the provisions for a larger venire than the grand jury selected being directory. Idem.

4932. Exemption from jury duty, who entitled to—Proof of required—When residence sixty miles or more from county-seat.

SEC. 9. Upon satisfactory proof, made by affidavit or otherwise, the following-named persons, and no other shall be exempted from service as grand or trial jurors: Any federal or state officer, judge, justice of the peace, county clerk, sheriff, constable, assessor, recorder, attorney at law, physician, minister of the gospel, telegraph operator, locomotive or stationary engineer, mail carrier, engaged in the actual carrying of the United States mail, on a regular mail route, and one-half of all members of each regularly enrolled fire company in the state, said half to be determined by the several fire companies respectively, and all officers of such fire companies, not exceeding ten for each company, and also in all cities and towns wherein there is a paid fire department, after such paid fire department shall have been organized and put in operation, all members of said paid fire department, and all persons who are now or may hereafter become members of any exempt firemen's association, society or organization within this state; but such exemption shall not extend to any member of such association, society or organization, unless prior to becoming a member of the same, such member shall have served as an active fireman, in some regularly organized fire department in this state, for the period of three years, and also, in all cities and towns in this state, wherein there are volunteer fire departments, after such volunteer departments shall have been organized and put in operation all members thereof; and also, all members thereof,

who may hereafter become members of any exempt fireman's association, society or organization, within this state; but such exemption shall not extend to any member of such association, society or organization, unless prior to becoming a member of the same, such member shall have served as an active fireman in some regularly organized volunteer fire department in this state, for the period of five years; *provided,* that the entire exemption of such exempt firemen, where there is a paid fire department, shall not exceed in one town or city, one hundred and fifty; and where there is a volunteer fire department, the entire exemption shall not exceed, in any one town or city, fifty; *and further provided,* that any person liable to grand or trial jury duty residing sixty or more miles distant from the county-seat of his county, shall be exempted from service on either grand or trial juries for the period of one year upon making affidavit to the fact that he so resides and filing the same with the clerk of the district court of the district in which his county is situated and paying to such clerk the sum of twenty-five dollars. Upon the receipt of such affidavit and such sum, the said clerk shall deliver to such person a certificate stating the fact of such receipts, and thereafter, for the period of one year from the date of such payment, the name of such person shall not be placed in the jury box, nor shall such person be selected as a grand or trial juror. It shall be the duty of said clerk, upon the receipt of said sum, to deliver the same to the county treasurer of his county, and the said treasurer shall immediately place the same to the credit of the general fund of said county. *As amended, Stats. 1875, 137; 1877, 176; 1881, 155; 1895, 51.*

(SEC. 2.) All portions of the act of which this act is amendatory, relative to the prescribing of bounds by the judges of the several district courts, in their several counties, and the exemption of persons from serving on juries by payment for such exemption, are hereby repealed.

See sec. 4612, telegraph employee.
See sec. 4941, persons over 65 exempt.
See sec. 3356, teachers exempt, when.
Kerr, C. C. P., 200.

Where in a criminal case it was objected that the accused was unconstitutionally deprived of a common-law jury by operation of this section allowing bounds to be fixed by judges and exempting persons residing outside thereof from jury duty on the payment of a fee, it was held, that this was but the exercise of a legitimate legislative power of exemption and therefore not unconstitutional. State v. Cohn, 9 Nev. 180, 182, 189.

The clerk is not entitled to any fees from the county for issuing time checks or certificates to each individual juror. Washoe Co. v. Humboldt Co., 14 Nev. 124, 129, 132.

4933. Court may excuse juror for cause.

SEC. 10. At any time during the term the court may, in its discretion, excuse temporarily, or for the term, any juror on account of sickness or physical disability, or serious illness or death of a member of his immediate family.

See sec. 4936.
Kerr, C. C. P., 201.

4934. Penalty for nonattendance.

SEC. 11. Any person summoned as provided in this act to serve as a juror, who shall fail to attend and serve as such juror, shall, unless excused by the court, be fined in any sum not exceeding five hundred dollars, in the discretion of the court, and be imprisoned in the county jail until such fine be paid, at the rate of two dollars per day.

Kerr, C. C. P., 238.

4935. Per diem and mileage.

SEC. 12. Each person summoned to serve as grand jurors, and each trial juror summoned as provided in this act, unless said trial juror be excused by

the court from serving on the day he is summoned to attend, shall receive three dollars per day for each and every day he may be in attendance, and fifteen cents per mile in traveling to and returning from court, to be paid as hereinbefore provided. *As amended, Stats. 1877, 185.*

See secs. 2001, 2013.

Cited, Philips v. Eureka Co., 19 Nev. 350, 354, 355 (11 P. 32).

An Act amendatory of and supplementary to an act entitled "An act concerning juries," approved March fifth, eighteen hundred and seventy-three.

Approved March 5, 1875, 139

4936. Discharge of excess trial jurors.

SECTION 1. When at any time there shall be a larger number of trial jurors in attendance upon any court than are required for the business of the term, or for the time being, the court may excuse, temporarily, or discharge for the term, a sufficient number of those who have served longest, to reduce the panel to the number required.

See sec. 4933.

An Act regulating the manner of drawing juries in the district courts of this state.

Approved February 20, 1885, 32

4937. County commissioners to estimate number of trial jurors required and select names—Residence and occupation entered on minutes.
4938. Names to be written on slips and deposited in jury box—How kept.
4939. Juror not serving may be drawn again—Jurors who serve not to be drawn following year—Exception.
4940. Manner of drawing juries after box exhausted—Commissioners to make additional selection — Grand jury, how selected—Open venire, when.

4937. County commissioners to estimate number of trial jurors required and select names—Residence and occupation entered on minutes.

SECTION 1. The board of county commissioners in each county of the State of Nevada, shall, at its first meeting after the approval of this act, and thereafter at its first regular meeting in each year, by an order duly made and entered on its minutes, estimate as nearly as possible, the number of trial jurors that will be required for attendance on the district court of said county until the next annual selection of trial jurors under this act. The said board shall thereupon select from the qualified electors of the county, whether registered or unregistered, not exempt by law from jury duty, such number of qualified electors as it has been estimated to be necessary. The names of the electors so selected, shall be entered upon the minutes of said board, together with the occupation and place of residence of each of such electors so selected. *As amended, Stats. 1895, 51.*

It is within the discretion of the court to vacate an order under which a venire has issued before the return day thereof and if it is so vacated the names thereon should be returned to the jury box under the provisions of this section. State v. Jackman, 31 Nev. 512, 520 (104 P. 13).

4938. Names to be written on slips and deposited in jury box—How kept.

SEC. 2. The names so selected shall at the same time be written on separate slips of paper, and deposited in a box, to be provided and kept for that purpose, and known as the jury box; said box, when not in use as herein provided, shall be kept securely locked by the county clerk.

4939. Juror not serving may be drawn again—Jurors who serve not to be drawn following year—Exception.

SEC. 3. When a juror drawn is not summoned, or fails to appear, or after appearing is excused by the judge from serving, his name shall be returned

to the box to be drawn again. The board of commissioners shall not select the name of any person whose name was selected the previous year, and who actually served on the jury, unless there be not enough other suitable jurors in the county to do the required jury duty.

4940. Manner of drawing juries after box exhausted—Commissioners to make additional selection—Grand jury, how selected—Open venire, when.

SEC. 4. When all the names in the jury box have been exhausted, or there are not enough therein to complete the next panel that may be drawn, the district judge shall certify the same to the board of county commissioners, together with a statement of the number of additional names that will be required, and said board shall thereupon proceed and select such required number of jurors in the manner hereinbefore provided, and thereafter trial jurors may be drawn therefrom as before. Grand jurors may be selected from the qualified jurors of the county whether their names are or are not upon the list selected by the board of commissioners, and it shall at all times be in the discretion of the court, with the consent of all parties litigant to the action or actions to be tried thereby, either to draw the names of the jurors from the box, as in this act provided, or to issue an open venire directed to the sheriff, requiring him to summon, either immediately or for a day fixed, from the citizens of the county, but not from the bystanders, such number of persons having the qualifications of jurors as may be needed; the persons thus summoned shall be as competent trial jurors in all respects as if drawn from the jury box. *As amended, Stats. 1887, 121.*

The question as to the necessity of selecting additional trial jurors by an open venire is within the discretion of the district court. State v. Angelo, 18 Nev. 425.

Regarding grand jurors, see sec. 4931.

An Act to exempt certain persons from duty as jurors on account of age.

Approved January 30, 1889, 26

4941. Persons aged 65 years, or over, exempt.

SECTION 1. All persons of the age of sixty-five years, or over, are hereby exempt from serving as grand or trial jurors, and whenever it shall appear to the satisfaction of the court, by affidavit or otherwise, that a juror is over the age of sixty-five years, the court shall order said juror excused from all service as a grand or trial juror, if the juror so desires.

An Act concerning certain expenses relative to jurors in civil cases.

Approved March 5, 1869, 111

4942. Expense of board and lodging of jury, how paid—Charged as costs—Clerk to disburse.

SECTION 1. In all cases when a jury is kept together by reason of the requirements concerning special juries, or by failure to agree upon a verdict, the expenses of their board and lodging shall be taxed as other disbursements and expenses in favor of the prevailing party. No verdict shall be entered or judgment rendered thereon, until the same is paid or rendered. The clerk shall receive and properly disburse all money properly taxable under the provisions of this act.

See sec. 5208.

Former acts in relation to jurors have been cited as follows:

A defendant indicted for a misdemeanor may be tried by a jury of eleven men, if he consents to such a jury, and his consent is not a waiver of a jury trial. State v. Borowsky, 11 Nev. 119.

Act of 1861, 138: At common law, a grand juror was not precluded from finding an indictment because he was either a witness or a prosecutor. State v. Millain, 3 Nev. 409.

Our statute fixes distinctly what shall be the disqualification of a grand juror, and

nothing else than what the statute prescribes can disqualify one from acting as such. Idem.

A prosecutor is "one who prefers an accusation against a party whom he suspects to be guilty." A party who appears in response to a subpena is not a prosecutor, but only a witness. Idem.

A jury drawn while the court is in session, in the presence of the court and its officers must be held to have been drawn in open court, whether it was done in the room where the court usually sits or in any other room of the court-house building. Idem.

A mere suspicion on the mind of a juror that the defendant is guilty does not disqualify him from sitting on a petit jury, especially if that suspicion mainly arises from the examination to which he is subjected by the prisoner's counsel touching his qualifications as a juror. It is only an unqualified opinion that disqualifies. Idem.

"Unqualified opinion or belief" commented on. Idem.

As the law formerly stood, six grounds of challenge were allowed to grand jurors. The last three were as follows: "Fourth, that he is a prosecutor on a charge or charges against defendant; fifth, that he is a witness on the part of the prosecution and has been served with process, or bound by an undertaking as such; sixth, that he has expressed a decided opinion that defendant is guilty of the offense for which he is held to answer." The insertion of the fourth and fifth clauses shows a distinction was taken between witness and prosecutor. Idem.

A challenge to the panel of trial jurors must be in writing, specifically stating the grounds of challenge or other facts on which the challenge is based. Idem.

Cited, State v. Collyer, 17 Nev. 229.

Act of 1865, 137, secs. 2 and 3: A judgment will not be reversed for failure to comply strictly with these sections, unless it shall appear that the defendant may have been injured by such failure. State v. Squaires, 2 Nev. 226–229.

It was not the intention of the legislature to require the judge and assessor to pass on the qualifications of each person in selecting names out of which to form a jury. Idem.

The names should be selected from the assessment roll. As to the qualifications of those selected, that could not be passed on at the time of selection. Idem.

The failure to return the panel at the time required could not prejudice the defendant if he had ample time after the return to inspect the panel. Idem.

It is error to allow a jury to disperse after an impanelment without the consent of the prisoner. But a jury is not properly impaneled until they are sworn and charged with the case. Idem.

This court cannot review the action of the court below in disallowing a challenge for cause when the party objecting makes no specification as to the nature of the objection upon which he interposes the challenge. The party challenging should specify the grounds of his challenge. Idem.

Cited, State v. Collyer, 17 Nev. 279.

Act of 1866, 191: The selection of grand jurors during a term of the court must be by the same officers, or it will not be a legal grand jury. State v. McNamara, 3 Nev. 71–75.

An indictment found by a grand jury not legally selected, is invalid. Idem.

Under section 8 of this act, a grand jury may be selected and impaneled after the commencement of a term, whenever one is wanted. State v. Lawry, 4 Nev. 161, 165.

The discharge of a jury impaneled in a criminal case after they have been sworn might operate as a bar to a subsequent prosecution; but not so when they have not been charged with the case. Idem.

Cited, State v. Collyer, 17 Nev. 279.

Act of 1869, 138, cited, Gillette v. Sharp, 7 Nev. 245–248; Philips v. Eureka Co., 19 Nev. 349, 350.

Act of 1871, 56, cited, Gillette v. Sharp, 7 Nev. 245–248; Phillips v. Eureka Co., 19 Nev. 350.

Act 1877, 185, cited, Philips v. Eureka Co., 19 Nev. 350–355 (11 P. 32).

Act of 1879, 33, sec. 2, cited, State v. Williams, 31 Nev. 362 (102 P. 974).

Act of 1881, 26, sec 2: A motion to quash an indictment because the grand jurors were not selected acording to law, ought to be made before plea. State v. Collyer, 17 Nev. 275, 277–279 (30 P. 891).

If the plea has been entered, and the motion to quash thereafter made in good faith, before the trial commences, the court should allow the plea to be withdrawn, and give defendant an opportunity to be heard upon his motion. Idem.

This statute requiring grand jurors to be selected from the "jury list" was not intended simply as a protection to parties who might be brought before the grand jury. When the persons selected by the proper officers were qualified jurors, whose names ought to have been on the jury list, and the selection was made without fraud or collusion, the mere failure of the officers to keep the jury list reformed does not furnish a sufficient ground to authorize the court to set aside an indictment. Idem.

Cited, State v. Williams, 31 Nev. 362 (102 P. 974).

The acts of 1893, 31, 43, providing that ten persons shall constitute the grand jury and that eight of the number may find an indictment, are unconstitutional. State v. Hartley, 22 Nev. 342 (28 L. R. A. 33, 40 P. 372).

For fees of jurors, see secs. 2001, 2013.

RULES OF THE SUPREME COURT OF THE STATE OF NEVADA

Adopted September 1, 1879, with Amendments of October 25, 1911, Which Do Not Become Effective Until April 1, 1912

RULE I

1. Applicants for license to practice as attorneys and counselors will be examined in open court on the first day of the term.

2. **Examination for Attorney at Law**—The supreme court, upon application of the district judge of any judicial district, will appoint a committee to examine persons applying for admission to practice as attorneys and counselors at law. Such committee will consist of the district judge and at least two attorneys resident of the district.

The examination by the committee so appointed shall be conducted and certified according to the following rules:

Examination by Committee—The applicant shall be examined by the district judge and at least two others of the committee, and the questions and answers must be reduced to writing.

No intimation of the questions to be asked must be given to the applicant by any member of the committee previous to the examination.

Examination to Embrace—The examination shall embrace the following subjects:

1. The history of this state and of the United States;
2. The constitutional relations of the state and federal governments;
3. The jurisdiction of the various courts of this state and of the United States;
4. The various sources of our municipal law;
5. The general principles of the common law relating to property and personal rights and obligations;
6. The general grounds of equity jurisdiction and principles of equity jurisprudence;
7. Rules and principles of pleadings and evidence;
8. Practice under the civil and criminal codes of Nevada;
9. Remedies in hypothetical cases;
10. The course and duration of the applicant's studies.

3. The examiners will not be expected to go very much at large into the details of these subjects, but only sufficiently so fairly to test the extent of the applicant's knowledge and the accuracy of his understanding of those subjects and books which he has studied.

4. **Examination by Committee**—When the examination is completed and reduced to writing, the examiners will return it to this court, accompanied by their certificate showing whether or not the applicant is of good moral character and has attained his majority, and is a bona fide resident of this state. Such certificate shall also contain the facts that the applicant was examined in the presence of the committee; that he had no knowledge or intimation of the nature of any of the questions to be propounded to him before the same were asked by the committee, and that the answers to each and all the questions were taken down as given by the applicant without reference to any books or other outside aid.

5. **Fee To Be Deposited Before Examination**—The fee of thirty-five dollars for license must in all cases be deposited with the clerk of the court before the application is made, to be returned to the applicant in case of rejection.

6. **Oath of Attorney**—In addition to the constitutional oath or affirmation, attorneys, before being admitted to practice, shall take the following oath or affirmation:

1. That I will maintain the respect due to courts of justice and judicial officers;
2. That I will counsel and maintain such actions, proceedings, and defenses only, as appear to me legal and just; except the defense of a person charged with a public offense;
3. To employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never to seek to mislead the judge by any artifice or false statement of facts or law;
4. That I will maintain inviolate the confidence and, at every peril to myself, preserve the secrets of my client;
5. That I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;
6. That I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed. So help me God. (As amended, October 25, 1911.)

RULE II

Filing Transcript—The transcript of the record on appeal shall be filed within thirty (30) days after the appeal has been perfected and the statement settled, if there be one. (As amended, October 25, 1911.)

Cited, Lightle v. Ivancovich, 10 Nev. 41–43; Hayes v. Davis, 23 Nev. 235; Robinson v. Kind, 25 Nev. 272; Young v. Updike, 29 Nev. 303, 304; Adams v. Rogers, 31 Nev. 154; Western E. & C. Co. v. Nev. A. Co., 31 Nev. 238.

RULE III

1. **Appeal May Be Dismissed—Can Be Restored**—If the transcript of the record be not filed within the time prescribed by rule II, the appeal may be dismissed on motion without

notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and, upon good cause shown, on notice to the opposite party and, unless so restored, the dismissal shall be final and a bar to any other appeal from the same order or judgment.

2. **How Restored**—On such motion there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment; the date of its rendition; the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of the filing of the undertaking on appeal; and that the same is in due form; the fact and time of the settlement of the statement, if there be one; and also that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record; or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded. (As amended, October 25, 1911.)

Cited, Lightle v. Ivancovich, 10 Nev. 41; Young v. Updike, 29 Nev. 303, 304; Adams v. Rogers, 31 Nev. 152–160, 162; Western E. & C. Co. v. Nev. A. Co., 31 Nev. 338; Robinson v. Kind, 25 Nev. 261, 273; Hayes v. Davis, 23 Nev. 234; Collins v. Goodwin, 32 Nev. 342.

RULE IV

1. **Printed Transcripts**—All transcripts of record in civil cases, when printed, shall be printed on unruled white paper, ten inches long by seven inches wide, with a margin on the outer edge of not less than one inch. The printed page shall not be less than seven inches long and three and one-half inches wide. The folios, embracing ten lines each, shall be numbered from the commencement to the end, and the numbering of the folios shall be printed between lines or on the margin. Nothing smaller than minion type leaded shall be used in printing.

2. **Transcripts in Criminal Cases**—Transcripts in criminal cases may be printed in like manner as prescribed for civil cases; or, if not printed, shall be written on one side only of transcript paper, sixteen inches long by ten and one-half inches in width, with a margin of not less than one and one-half inches wide, fastened or bound together on the left sides of the pages by ribbon or tape, so that the same may be secured, and every part conveniently read. The transcript if written, shall be in a fair, legible hand, and each paper or order shall be separately inserted.

3. **To Be Indexed**—The pleadings, proceedings, and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover.

4. **Cannot Be Filed**—No record which fails to conform to these rules shall be received or filed by the clerk of the court. (As amended October 25, 1911.)

Cited, Robinson v. Kind, 25 Nev. 274.

RULE V

Printing Transcripts—The written transcript in civil causes, together with sufficient funds to pay for the printing of the same, may be transmitted to the clerk of this court. The clerk, upon the receipt thereof shall file the same and cause the transcript to be printed, and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party; and said certificate shall be prima facie evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in this court, subject to be corrected by reference to the written transcript on file.

RULE VI

1. **Cost of Typewriting or Printing Transcripts**—The expense of printing or typewriting transcripts, affidavits, briefs, or other papers on appeal in civil causes and pleadings, affidavits, briefs, or other papers constituting the record in original proceedings upon which the case is heard in this court, required by these rules to be printed or typewritten, shall be allowed as costs, and taxed in bills of costs in the usual mode; provided, that no greater amount than twenty-five cents per folio of one hundred words shall be taxed as costs for printing, and no greater amount than twelve and one-half cents per folio for one copy only shall be taxed as costs for typewriting. All other costs to be taxed by the clerk in accordance with the fee bill.

2. **To Serve Cost Bill, When**—Either party desiring to recover as costs his expenses for printing or typewriting in any cause in this court, shall, within five days after the decision of the cause, file with the clerk and serve upon the opposite party a verified cost bill, setting forth or stating the actual cost of such printing or typewriting, and no greater amount than such actual cost shall be taxed as costs.

3. **Mode of Objecting to Costs**—If either party desires to object to the costs claimed by the opposite party, he shall, within ten days after the service upon him of a copy of the cost bill, file with the clerk and serve his objections. Said objections shall be heard and settled and the costs taxed by the clerk. An appeal may be taken from the decision of the clerk,

either by written notice of five days, or orally and instanter, to the justices of this court, and the decision of such justices shall be final. If there be no objections to the costs claimed by the party entitled thereto, they shall be taxed as claimed in his cost bill.

4. **Indorsed Upon Remittitur**—In all cases where a remittitur or other final order is sent to a district court or other inferior tribunal, the costs of the party entitled thereto as taxed by the clerk shall be indorsed upon such remittitur or order, and shall be collected as other costs in such district court, or other inferior court or tribunal, and shall not be subject to retaxation in such district court or other tribunal. (As amended, October 25, 1911).

Cited, State ex rel. McMillan v. Sadler, 25 Nev. 154, 194, 196; Candler v. Washoe Lake Ditch Co., 28 Nev. 422, 423, 424; Brandon v. West, 28 Nev. 500, 509.

RULE VII

To Correct Error in Transcript—For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and, upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record as may be required, or may produce the same, duly certified, without such order. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion, except when a certified copy is produced at the time, must be accompanied by an affidavit showing the existence of the error or defect alleged.

Cited, State v. Bouton, 26 Nev. 34, 39; Christensen v. Floriston P. Co., 29 Nev. 552, 559; Kirman v. Johnson, 30 Nev. 150; State v. Hill, 32 Nev. 185, 187; Botsford v. Van Riper, 32 Nev. 214, 225.

RULE VIII

Exceptions—Diminution of Record—Exceptions or objections to the transcript, statement, the undertaking on appeal, notice of appeal or to its service or proof of service, or any technical exception or objection to the record affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken at the first term after the transcript is filed, and must be noted in the written or the printed points of the respondent, and filed at least one day before the argument, or they will not be regarded.

Cited, Alderson v. Gilmore, 13 Nev. 85; State v. Cal. M. Co., 13 Nev. 203, 209, 210; Truckee Lodge v. Wood, 14 Nev. 310; Brooks v. Nevada Nickel Syndicate, 24 Nev. 264, 271; State ex rel. Launiza v. Justice Court, 29 Nev. 192, 200; Smith v. Wells Estate Co., 29 Nev. 411, 416; Kirman v. Johnson, 30 Nev. 146, 150; State v. Hill, 32 Nev. 185, 187; Botsford v. Van Riper, 32 Nev. 214, 225.

RULE IX

Substitution in Case of Death—Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion in writing to the court on the part of such representative, or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made and the cause shall proceed as in other cases.

Cited, Robinson v. Kind, 25 Nev. 279; Twaddle v. Winters, 29 Nev. 89, 107.

RULE X

1. **Calendar to Consist of—Upon Motion**—The calendar of each term shall consist only of those cases in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties; provided, that all cases, both civil and criminal, in which the appeal has been perfected and the statement settled, as provided in rule II, and the transcript has not been filed before the first day of the term, may be placed on the calendar, on motion of either party, after ten days' written notice of such motion, and upon filing the transcript.

2. Causes shall be placed on the calendar in the order in which the transcripts are filed by the clerk.

3. The calendar shall be called on the first day of each term and cases set for oral argument upon a day certain, upon request of counsel upon either side of the case, or upon stipulation, subject to the approval of the court. Requests for settings may be made by counsel in open court or by written communication addressed to the clerk. Upon stipulation of counsel, subject to the approval of the court, cases may be submitted on briefs filed without oral argument. Where no request is made by stipulation or otherwise for the setting of a case the same may be passed or be set by the court of its own motion. (As amended, October 25, 1911.)

RULE XI

1. **Time for Appellant to Serve Brief—Respondent**—Within fifteen days after the filing of the transcript on appeal in any case, the appellant shall file and serve his points and authorities or brief; and within fifteen days after the service of appellant's points and authorities or brief, respondent shall file and serve his points and authorities or brief; and within fifteen days thereafter, appellant shall file and serve his points and authorities or brief in reply, after which the case may be argued orally.

2. The points and authorities shall contain such brief statement of the facts as may be necessary to explain the points made.

3. **Oral Argument**—The oral argument may, in the discretion of the court, be limited to the printed or typewritten points and authorities or briefs filed, and a failure by either party to file points and authorities or briefs under the provisions of this rule and within the time herein provided, shall be deemed a waiver by such party of the right to orally argue the case, and such party shall not recover cost for printing or typewriting any brief or points and authorities in the case. Counsel shall not read from decisions nor argue more than one hour on each side without permission of the court.

4. No more than two counsel on a side will be heard upon the oral argument, except by special permission of the court, but each defendant who has appeared separately in the court below may be heard through his own counsel.

5. **Optional in Criminal Cases**—In criminal cases it is left optional with counsel either to file written, printed, or typewritten points and authorities or briefs.

6. **When Submitted**—When the oral argument is concluded, the case shall be submitted for the decision of the court.

7. **Stipulation as to Time**—The times herein provided for may be shortened or extended by stipulation of parties or order of court, or a justice thereof. (As amended, October 25, 1911.)

Cited, Smith v. Wells Estate Co., 29 Nev. 411, 415, 416; Adams v. Rogers, 31 Nev. 161.

RULE XII

Printing and Paper To Be Uniform—In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper, and in the same style and form (except the numbering of the folios in the margin) as is prescribed for the printing of transcripts.

RULE XIII

Number of Copies To Be Filed—Besides the original, there shall be filed five copies of all printed transcripts, briefs, and points and authorities, which copies shall be distributed by the clerk. (As amended, October 25, 1911.)

RULE XIV

Opinions Recorded—All opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk.

RULE XV

Rehearing—Remittitur to Issue, When—Time May Be Shortened or Extended—All motions for a rehearing shall be upon petition in writing, and filed with the clerk within fifteen days after the final judgment is rendered, or order made by the court, and publication of its opinion and decision. Personal service or service by mail upon counsel of a copy of the opinion and decision shall be deemed the equivalent of publication. The party moving for a rehearing shall serve a copy of the petition upon opposing counsel, who within ten days thereafter may file a reply to the petition, and no other argument shall be heard thereon. No remittitur or mandate to the court below shall be issued until the expiration of the fifteen days herein provided, and decisions upon the petition, except upon special order. The times herein provided for may be shortened or extended, for good cause shown, by order of court.

RULE XVI

Opinion To Be Transmitted—Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the court below.

RULE XVII

No Paper To Be Taken Without Order—No paper shall be taken from the court room or clerk's office, except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the clerk.

RULE XVIII

Writ of Error, or Certiorari—No writ of error or certiorari shall be issued, except upon order of the court, upon petition, showing a proper case for issuing the same.

Rules 18–22 cited, State v. Preston, 30 Nev. 308.

RULE XIX

Writ of Error to Operate as Supersedeas—Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the clerk of the court below, and upon giving notice thereof to the opposite party or his attorney, and to the sheriff, it shall operate as a supersedeas. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX

When Returnable—The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI

To Apply—The rules and practice of this court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII

Time Concerning Writ—The writ shall not be allowed after the lapse of one year from the date of the judgment, order or decree which is sought to be reviewed, except under special circumstances.

RULE XXIII

Concerning Change of Venue—Additional Notice Given—Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. When the party served resides more than twenty miles from Carson, an additional day's notice will be required for each fifty miles, or fraction of fifty miles, from Carson.

Cited, Peters v. Jones, 26 Nev. 267.

RULE XXIV

Notice of Motion—In all cases where notice of a motion is necessary, unless, for good cause shown, the time is shortened by an order of one of the justices, the notice shall be five days.

RULE XXV

1. **Transcripts May Be Typewritten—To Be Bound in Boards with Flexible Backs**—All transcripts of the record in any action or proceeding may be typewritten. The typewriting shall be the first impression, clearly and legibly done, with best quality of black ink, in type not smaller than small pica, upon a good quality of typewriting paper, thirteen inches long by eight inches wide, bound in boards with flexible backs, in volumes of a size suitable for convenient handling and ready reference, and arranged and indexed as required by the rules of this court. When so typewritten such transcript, in the discretion of the party appealing, need not be printed, but, if printed, all the rules concerning the same shall still apply thereto.

2. **Briefs May Be Typewritten**—Briefs and points and authorities, instead of being printed, may be typewritten upon the same paper and in the same style and form as is prescribed for typewritten transcripts.

3. **Copy To Be Served—Two Copies To Be Filed**—When so typewritten, but one copy of such transcript need be filed in the case; but a copy thereof shall be served upon the opposite party. Two copies of the briefs and points and authorities—viz., the first impression and a copy thereof—shall be filed with the clerk, and a copy shall be served upon each opposite party who appeared separately in the court below. (As amended, October 25, 1911.)

RULE XXVI

Payment of Advance Fee Required—Clerk Prohibited from Filing—No transcript or original record shall be filed or cause registered, docketed, or entered until an advance fee of twenty-five dollars is paid into the clerk's office, to pay accruing costs of suit. The clerk of the court is prohibited from filing or registering any record without first having received as a deposit the aforesaid fee.

RULES OF THE DISTRICT COURT OF THE STATE OF NEVADA

The following rules were approved in 1887 by all the district judges and by the supreme court when the state was in one judicial district, under the act of March 4, 1885 (Stats. 1885, 60), and are still in force, excepting the amendments of October 25, 1911, which do not become effective until April 1, 1912.

RULE I

The hour of 10 o'clock a. m. is fixed for the opening of court, unless otherwise ordered.

RULE II

1. **Calendars**—The clerk of each county of the state shall make three calendars for the district court of his county, upon one of which he shall place all civil causes at issue upon questions of fact as soon as the issue is made; upon another he shall place all civil causes at issue upon a question of law, and all motions of every nature, except ex parte motions, as soon as the issue is made, or as soon as notice of motion is filed; and upon the third of which he shall place all criminal business of every kind. The names of the attorneys of the respective parties shall be appropriately placed on such calendars. The clerk shall on every Saturday, forward to the presiding judge of the court and also to the judge who is to sit in his county a full statement of all court matters filed with him during the preceding week.

2. In districts having more than one judge the judges shall, by special rules, provide for the division of the business in their district and the calendars of their courts shall be prepared and kept in accordance with such division.

3. On all law days the clerk shall deliver to the judge or judges holding court in his county the calendars showing the business before such judge or judges. All law matters on said calendars at issue shall be called by the court and disposed of in order of filing, where possible, unless continued for good cause.

4. Each judge shall fix at least one law day in each month for the setting of cases for trial on issues of fact, unless the business of his district or of any county thereof requires a different arrangement. (As amended, October 25, 1911.)

RULE III

The judge who is to hold court in any county, where court is not held continuously, shall give the clerk of such county notice of the time when court will sit. The clerk shall, immediately upon receiving such notice, give all the attorneys having business in said court, as shown by the calendar, and also all attorneys practicing in his county notice in writing of the time when court will be held. He shall also give notice of the time of holding court, in some newspaper published at the county-seat, provided it can be done without expense. (As amended, October 25, 1911.)

RULE IV

When Calendar Called—Order—Upon the meeting of the court, as provided in rule III, and on law days as elsewhere provided in these rules, the law calendar will be called and disposed of. The trial calendar will then be called in districts or counties where a trial calendar day is not otherwise fixed as provided in rule II and causes at issue on questions of fact be set for trial for a time certain or otherwise disposed of. Parties are expected to be ready to try their causes, whether at issue on questions of law or fact, when the calendar is called, and in the order in which they are set. They may fix the day of trial by stipulation, in writing or in open court, subject to the approval of the court or judge. The daily business of the court will be disposed of in the following order:

First—The minutes of the previous day's business shall be read, approved, and signed by the judge.

Second—Ex parte motions.

Third—Demurrers, motions and questions of law.

Fourth—Issues arising subsequent to the calendar shall be set.

Fifth—Probate business, when there is no contest on questions of fact.

Sixth—Trial of causes as previously set. (As amended, October 25, 1911.)

RULE V

Law Day—On each Saturday of any session of court held by any district judge, law questions shall take precedence, when at issue, and be heard without previous setting or notice, unless the court, for good cause, continue the consideration thereof. The absence of an attorney or party shall not in itself be sufficient ground for such continuance, where the opposing attorney or party, whether the moving party or not, has given at least five days' written notice that he will call up the law question sought to be determined on a law day specified in said notice. When it appears to the court that such written notice has been given, he shall not, unless the other business of his court requires such action, further continue the matter specified in said notice unless upon a showing by affidavit or oral testimony, that such continuance is reasonably necessary and is not sought merely for delay or by reason of neglect. (As amended, October 25, 1911.)

RULE VI

Relating to Motions—When any motion or proceeding has been noticed, or set for a time certain, and for any cause is not heard at the time appointed, the hearing of the same shall be continued without further order, and the motion or proceeding shall be placed upon the calendar and disposed of as other issues thereon.

RULE VII

Issues of Law—Decision—Any issue of law, and any motion of any nature or kind may be heard orally by stipulation of the parties, at any time or place agreed on in the state, with the consent of the judge first having jurisdiction of the cause, or such questions of law, or motions, as the case may be, may be submitted on briefs to such judge, with his consent, and the decision may be filed thereafter at any time, which decision shall fix the time when the decision of the court is to be complied with; and in all such cases the party who is required to act by such decision shall receive due written notice thereof from the opposite party. Time for complying with such decision shall commence to run from the time when service is made in the manner required by the statutes for service of pleadings in a case; provided, that when the parties are present by their respective attorneys when the decision is rendered, no notice shall be required.

RULE VIII

1. **Demurrers**—When a demurrer is interposed in any case, if it be made to appear to the satisfaction of the court that such demurrer has not been interposed in good faith, but merely for delay, the defendant shall only answer upon such terms as the court may prescribe, and upon the filing of the answer, the case shall be set down for trial for as early a day as the business of the court will permit.

2. In other cases, when a demurrer is sustained or overruled, the losing party shall be allowed to amend or plead, as the case may be, as of course, within ten days from the decision on the demurrer, if the losing party is present by his attorney when the decision is rendered, otherwise within ten days from the receipt of written notice of the decision from the clerk or the prevailing party. The court may, by its order, fix a different time.

3. Whenever a general demurrer is interposed counsel for the opposite party, by written notice served at least three days before the hearing of the demurrer, may require the counsel for demurrant to furnish him with a written statement of the points and authorities upon which he expects to rely in presenting the demurrer. This statement must be furnished at least one day before the argument. Upon failure to do so the court may, in its discretion, overrule the demurrer without permitting argument. (As amended, October 25, 1911.)

RULE IX

Documents and Pleadings—All documents and pleadings, intended for the files of this court, shall be on paper known as "legal cap," of good quality, and without interlineations, unless noted thereon by the clerk at the time of filing. No original pleading or paper shall be amended by making erasures or interlineations thereon, or by attaching slips thereto, except by leave of court. Copies of all papers issued from this court, or to be used therein, which are required by law or rule of court to be served, shall be upon legal cap paper in a legible hand, and in default of so doing, the party failing shall be compelled to renew the paper, or be precluded from using the original, as the court may deem proper.

RULE X

Motions—Motions in all cases, except ex parte motions, motions for continuance, and motions to amend pleadings pending a trial, shall be noticed at least five days before the day specified for a hearing, and a copy of all papers to be used by the moving party, except pleadings or other records of the court, shall be served with the notice of motion. The notice of motion shall be in writing, and shall specify the papers to be used and the names of witnesses to be examined by the moving party, and the grounds upon which the motion is made; provided, that the court may, upon good cause shown, shorten or enlarge the time for hearing. For a failure to comply with this rule the motion shall be denied.

Cited, Symons-Kraussman Co. v. Reno W. L. Co., 32 Nev. 241, 242.

RULE XI

1. **Hearing of Motions**—Upon reading and filing the notice of motion, with due proof of service of the same, and of the papers mentioned therein, if no one appears to oppose the motion, the moving party shall be entitled to have the motion decided. Upon the hearing, the affidavits to be used by either party shall be endorsed and filed before the affidavits shall be used. The manner of making motions shall be as follows:

First—The moving party shall read the moving papers, or state the contents thereof, or introduce his oral evidence.

Second—The party opposing shall then read or state the contents of his opposing papers, or introduce his oral evidence.

Third—The moving party may then read his rebutting papers, or introduce oral evidence, if admissible under the rules of practice in law or equity. The counsel for the moving party shall make his argument, to be followed by the counsel of the opposing party, and the counsel for the moving party may reply.

Fourth—No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties. (As amended, October 25, 1911.)

RULE XII

Hearing of Motions of Continuance—Testimony of Absentees—Counter-Affidavits—All motions for the continuance of causes shall be made on affidavit; and, when made on the ground of absence of witnesses, the affidavit shall state:

First—The names of the absent witnesses, and their present residence or abiding place, if known.

Second—What diligence has been used to procure their attendance, or depositions, and the causes of a failure to procure the same.

Third—What the affiant has been informed and believes will be the testimony of each of such absent witnesses, and whether or not the same facts can be proven by other witnesses than parties to the suit, whose attendance or depositions might have been obtained.

Fourth—At what time the applicant first learned that the attendance or depositions of such absent witnesses could not be obtained.

Fifth—That the application is made in good faith, and not for delay merely. And no continuance will be granted unless the affidavit upon which it is applied for conforms to this rule, except where the continuance is applied for in a mining case, upon the special ground provided by statute. A copy of the affidavits upon which a motion for a continuance is made, shall be served upon the opposing party as soon as practicable after the cause for the continuance shall be known to the moving party. Counter-affidavits may be used in opposition to the motion. No amendments or additions to affidavits for continuance will be allowed after they have been read, and no argument will be heard on motions for a continuance, except such as relate to the sufficiency of the affidavits read on the hearing.

RULE XIII

Attorneys as Witnesses—When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument or the like, he shall not argue the cause or sum it up to the jury without the permission of the court. In no event shall such lawyer be permitted to comment upon his own testimony before the court or a jury. (As amended, October 25, 1911.)

RULE XIV

Sureties—No attorney will be received as surety on any bond or recognizance to be filed or entered into in any action or proceeding in this court.

RULE XV

Depositions—Affidavit—Settling Interrogatories—A party making application for a commission to take the deposition of a witness, out of the state, shall serve, with the notice of such application, an affidavit setting forth the grounds for such application, and a copy of the direct interrogatories; and at least one day before the hearing of the application, the adverse party shall serve upon the moving party a copy of the cross-interrogatories. The direct and cross-interrogatories shall be settled at the time of hearing the application, unless the court or judge otherwise direct; provided, that the parties may agree to the interrogatories without submission to the court or judge, or may stipulate that the deposition may be taken without written interrogatories. (As amended, October 25, 1911.)

RULE XVI

Publication of Depositions—When a deposition is received by the clerk, he shall endorse upon the envelope the time of receiving it, and immediately file it with the papers of the case in which it was taken; and at any time afterward, upon the application of any attorney in the case, he shall open the same, and endorse upon the envelope the time of opening, and the name of the attorney upon whose application it was opened, and shall then file the deposition. (As amended, October 25, 1911.)

RULE XVII

Amended Pleadings—In cases where the right to amend any pleading is not of course, the party desiring to amend shall serve, with the notice of application to amend, an engrossed copy of the pleading, with the amendment incorporated therein, or a copy of the proposed amendment, referring to the page and line of the pleading where it is desired that the amendment be inserted, and, if the pleading were verified, shall verify such amended pleading, or such proposed amendment, before the application shall be heard.

Cited, Weir v. Washoe H. & S. Co., 31 Nev. 528, 529.

RULE XVIII

To Strike Out—The party moving to strike out any part of a pleading shall, in the notice of motion, distinctly specify the part asked to be stricken out.

RULE XIX

Withdrawal of Papers—No paper or record belonging to the files of the court shall be taken from the office and custody of the clerk, except upon the special order of the judge in writing, specifying the record or paper, and limiting the time the same may be retained; but in no case shall original documentary evidence be taken from the office of the clerk.

RULE XX

Additional Undertaking—Attachments—If the undertaking required before issuing a writ of attachment is shown to the satisfaction of the court or judge, upon proper notice, to be insufficient to secure the party whose property is attached, against damages, the court or judge may require an additional undertaking to be filed, and if not filed, the attachment shall be dissolved. No attachment shall be dissolved by reason of any defect in the attachment papers that can be amended without affecting the substantial rights of the parties.

RULE XXI

Trials—Upon a reference to try all the issues, both of fact and law, and to report a judgment thereon, the referee shall set forth in his report the facts found and conclusions of law separately, and shall, upon the day when his report is filed, serve upon the respective

parties, or their attorneys, notice that such report is filed; and the trial of the cause for the purpose of notice and motion for new trial shall not be deemed concluded until such notice is served.

RULE XXII

Appeals—Certificate of Appeal to State—Supersedeas—When an appeal is perfected and a proper undertaking to stay proceedings is filed, it shall stay all further proceedings in the court below, upon the judgment or order appealed from, or upon the matter embraced therein; and if an execution or other order shall have been issued to the sheriff, coroner, or elisor, he shall return the same, with the cause therefor, and his proceedings thereunder, endorsed thereon upon receiving from the clerk a certificate, under the seal of the court, of the perfecting of the appeal. The certificate shall state the title of the action, the filing and service of the notice of appeal and the date of such filing and service, together with the filing and approval of the undertaking staying all proceedings, and the date of such filing and approval; and such certificate shall operate as a supersedeas of the execution, or a vacation of the order.

RULE XXIII

Foreclosing Mortgage—Service by Publication—If, in an action to foreclose a mortgage, the defendant fails to answer within the time allowed for that purpose, or the right of plaintiff as stated in the complaint is admitted by the answer, the court may make an order referring it to some suitable person as referee, to compute the amount due to the plaintiff, and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due. If any of the defendants have been served by publication, the order of reference shall also direct the referee to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff, or his agent, on oath, as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for decree of foreclosure.

RULE XXIV

Further Time—When an order shall be made enlarging the time to file a statement or affidavits on motion for a new trial, the adverse party, unless the court otherwise directs, shall have the same number of days to propose amendments or file counter-affidavits as was allowed by such order to file such statement or affidavits. (As amended, October 25, 1911.)

RULE XXV

Settled by Referee—When a motion for a new trial is made in a cause tried before a referee, the statement shall be settled by the referee.

RULE XXVI

Undertakings—Stay of Execution—Certificate To State—No stay of execution upon motion for a new trial shall be granted or allowed, nor execution or other proceeding be stayed in any case, except upon the giving of a good and sufficient undertaking, in the manner and form as other undertakings are given, to be approved by the judge, with at least two sureties, for the payment of the judgment or debt, or performance of the act directed by the judgment or order, in such amount as may be fixed by the judge. An order to stay execution, or other proceedings in an action, shall be of no effect until a copy of notice thereof is served upon the opposite party, or his attorney, and any other party or officer whose proceedings are to be stayed thereby, unless said attorney or officer be present at the time of making such order. And if an execution or other order shall have been issued to the sheriff, coroner, elisor, or other person, he shall return the same with the cause therefor and his proceedings thereunder endorsed thereon, upon receiving from the clerk a certificate, under the seal of the court, of the granting of the stay of execution or other proceedings. The certificate shall state the title of the action, the order staying the execution or other proceedings, and the date of such order, together with the filing and approval of the undertaking above required, and the date of such filing and approval; and such certificate shall operate as a supersedeas of the execution or a vacation of the order.

Cited, Frevert v. Swift, 19 Nev. 401, 402.

RULE XXVII

Stipulations—No agreement or stipulation between the parties in a cause, or their attorneys, in respect to proceedings therein, will be regarded, unless the same shall be entered in the minutes in the form of an order, by consent, or unless the same shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel.

Cited, Haley v. Eureka Bank, 20 Nev. 410, 422, 425; Stretch v. Montezuma M. Co., 29 Nev. 163, 167.

RULE XXVIII

Juror, How Excused—No juror shall be excused except in open court; and when a juror is excused, the clerk shall immediately withdraw his name from the box for the period for which he has been excused.

RULE XXIX

Guardians—No person shall be appointed guardian ad litem, either upon the application of the infant or otherwise, unless he be the general guardian of the infant, or an attorney, or other officer of this court, or is fully competent to understand and protect the rights of the infant; has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party, nor unless he be of sufficient pecuniary ability to answer to the infant for any damage which may be sustained for his negligence or misconduct in defense of the suit.

RULE XXX

Attorneys as Guardians Ad Litem—Every attorney, or officer of this court, shall act as guardian of an infant defendant whenever appointed for that purpose by an order of the court. He shall examine into the circumstances of the case so far as to enable him to make the proper defense, and shall be entitled to such compensation as the court may deem reasonable.

RULE XXXI

Guardians Ad Litem—No guardian ad litem shall receive any money or property, or proceeds of sale of real estate, until he has given security by bond, in double the amount of such property or money, with two sureties, who shall justify as in other cases, approved by the judge and filed by the clerk, conditioned for the faithful discharge of his trust.

RULE XXXII

To Furnish to the Clerk—The counsel obtaining any order, judgment, or decree, shall furnish the form of the same to the clerk.

RULE XXXIII

To Be Filed—The sheriff shall file with the clerk the affidavit and order on which any arrest is made, within five days after such arrest is made.

RULE XXXIV

Retax Costs—The party against whom judgment is entered shall have five days after service of a copy of the cost bill in which to move to retax costs. (As amended, October 25, 1911.)

RULE XXXV

Mechanics' Liens—In actions to enforce mechanics' liens, other lienholders coming in under the notice published by the plaintiff shall do so by filing with the clerk and serving on the plaintiff and also on the defendant, if he be within the state, or be represented by counsel, a written statement of the facts constituting their liens, together with the dates and amounts thereof, and the plaintiff and other parties adversely interested shall be allowed five days to answer such statements.

RULE XXXVI

Notice of Order Extending Time—No order, made on ex parte application and in the absence of the opposing party, provided he has appeared, granting or extending the time to file any paper or do any act, shall be valid for any purpose, in case of objection, unless written notice thereof is promptly given to such opposing party. Such notice shall be given as other notices are given, or may be given by registered mail sent to the last known address of the attorney for such party, or, if he has no attorney, to such party himself. If the address of such attorney or party be not known then the notice may be addressed to such attorney or party in care of the clerk. (As amended, October 25, 1911.)

RULE XXXVII

Appeal from Justice's Court—Dismissed, When—When an appeal from the justice's court to this court has been perfected, and the papers are not filed in this court within fifteen days from the day of filing the undertaking on appeal, this court, on the production of a certificate from the justice to the effect that an appeal has been taken and perfected, but the papers have not been ordered up, or the proper costs not paid, or upon showing that any other necessary steps have not been taken, shall dismiss the appeal at the cost of the appellant.

Cited, Andrews v. Cook, 28 Nev. 268.

RULE XXXVIII

Appeal Dismissed, When—The plaintiff shall cause the papers in a case certified to this court under the provisions of the 539th section of the practice act, to be filed in the office of the clerk of this court within fifteen days from the day upon which the order of the justice is made directing the transfer of the case. If the papers are not so filed the case shall be dismissed, upon filing a certificate from the justice to the effect that he has certified the papers as required by said section, but that the same have not been ordered up, or the proper costs paid; or if it shall appear that such papers are not filed in this court by reason of the neglect of the plaintiff to pay the fees of the clerk for filing the same.

RULE XXXIX

Duties of the Sheriff—During the time the court remains in session it shall be the duty of the sheriff in attendance to prevent all persons from coming within the bar, except officers of the court, attorneys and parties to, or jurors or witnesses in, the cause or matter being tried or heard. The sheriff shall also keep the passage way to the bar clear for ingress or egress.

RULE XL

Instructions To Be Settled and Given, When—Before the argument begins counsel shall prepare their instructions, submit them to the inspection of the opposite party, and deliver them to the court. The court will hear objections to instructions and if either party request it will settle the instructions in advance of the argument and permit counsel to use them when addressing the jury, but this shall not prevent the giving of further instructions which may become necessary by reason of the argument. (As amended, October 25, 1911.)

Regarding the giving of instructions in civil cases, see sections 5210, 5212; in criminal cases, section 7159.

RULE XLI

Trials—When any district judge shall have entered upon the trial or hearing of any cause or proceeding, demurrer or motion, or made any ruling, order or decision therein, no other judge shall do any act or thing in or about said cause, proceeding, demurrer or motion, unless upon the written request of the judge who shall have first entered upon the trial or hearing of said cause, proceeding, demurrer or motion; provided, that the judges in any district having more than one judge shall adopt such rules as they deem necessary to provide for the division and disposal of the business of their district. (As amended, October 25, 1911.)

Cited, Twaddle v. Winters, 29 Nev. 88, 93.

RULE XLII

Writs—When an application or petition for any writ, rule or order shall have been made to a district judge and is pending, or has been denied by such judge, the same application or motion shall not again be made to the same or another district judge, unless upon the consent in writing of the judge to whom the application or motion was first made.

RULE XLIII

Duties of Judge—No judge, except the judge having charge of the cause or proceeding, shall grant further time to plead, move, or do any act or thing required to be done in any cause or proceeding, unless it be shown by affidavit that such judge is absent from the state, or from some other cause is unable to act; provided, that this rule may be abrogated or modified in districts having more than one judge, in the manner indicated in rule XLI. (As amended, October 25, 1911.)

Cited, Twaddle v. Winters, 29 Nev. 88, 97.

RULE XLIV

Causes Certified by State Land Register—When a cause shall have been certified by the state land register to the district court for trial, it shall be the duty of the first applicant, within thirty days after receiving notice of such certification, to file and serve upon the adverse party a complaint setting forth the facts upon which he claims to be entitled to the land. The adverse party shall, within ten days after service of the complaint, file and serve his answer, in which answer he shall set forth the facts upon which he relies.

RULE XLV

Vacating Judgments and Orders—Time To Amend—No judgment, order, or other judicial act or proceeding, shall be vacated, amended, modified or corrected by the court or judge rendering, making, or ordering the same, unless the party desiring such vacation, amendment, modification or correction shall give notice to the adverse party of a motion therefor, within six months after such judgment was rendered, order made, or action or proceeding taken. (As amended, October 25, 1911.)

CIVIL PRACTICE

Main civil practice act, sections 4943–5821.

Act to encourage the collection of mineral specimens and to exempt same from sale under execution, sections 5822–5824.

Act to provide for the adoption of children, sections 5825–5834.

Act relating to changing names of individuals, sections 5835–5837.

Sections relating to divorce, sections 5838–5845.

Act concerning liabilities of joint debtors, sections 5846–5848.

Act prescribing mode of maintaining and defending possessory actions on public lands, sections 5849–5856.

OTHER STATUTORY PROVISIONS

Action against purchaser or intending purchaser of ore, section 2489.
Action against partners, section 2907.
Action for recovery of cost of removal of nuisances, section 921.
Action for delinquent taxes, section 3659, et seq.
Adoption of children, sections 5825–5835.
Apprentices, justice of the peace to act in regard to, section 490, et seq.
Attorneys at law, sections 498–524.
Bankruptcy, federal act, sections 543–615.
Banks, district court may enjoin bank examiner from taking possession of closed bank, section 675.
Bonds and undertakings, sections 695–701.
Changing names of persons, sections 5835–5846.
Children, order for maintenance of illegitimate, section 766.
Cities, change in class of, courts to take judicial notice of, section 775.
Cities and towns, district court to act in incorporation of, section 768, et seq.
Community property, decree to divide, section 2166.
Condemnation of land for mines, proceedings in district court, section 2459, et seq.
Contested election for city officers, section 801.
Contested election for county and township officers, section 1803, et seq.
Contested election for district judge, section 1813.
Contested election for state officers, section 1823, et seq.
Contested election for members of legislature, section 1818.
Corporations, dissolution, appointment of receivers, sections 1194, 1195, 1240.
Corporations, district court may make order regarding election of directors, section 1130.
County commissioners, removal, suspension, section 3753.
Courts and court officers, sections 4828–4928.
Criminal practice act, sections 6851–7528.
Deceased persons, district court to decree execution of contracts of, for deed of real estate, section 6147.
Delinquent taxes, actions for, section 3659, et. seq.
Disincorporation, proceedings for, sections 1194, 1195, 1240.
District attorney, court may appoint temporary, section 1597.
District judge may make order for removal of directors of corporations, section 1179.
Divorce, sections 5838–5845.
Election returns, canvass by district judge for legislative officers and county commissioners, section 1513.
Estates of deceased persons, sections 5854–6144.
Exemption of specimens, sections 5822–5825.
Guardians, sections 6149–6201.
Habeas corpus proceedings, sections 6226–6265.
Homestead to be set apart on death of husband, section 2165.
Injunction against intending purchaser of ore, section 2489.
Joint debtors, liability of, sections 5846–5848.
Judge must be attorney, section 525.
Judicial notice, courts to take in change of class and organization of cities, section 775.
Jurors and juries, sections 4928–4942.
Justice of the peace may issue subpena in contest for election for members of legislature, section 1819.
Juvenile court law under jurisdiction of district court, section 729, et seq.
Land contests, district court to decide, section 3208.
Liens for labor and material, section 2213, et seq.
Lost certificates of stock, new in lieu of, section 1165.
Mortgagee of mine may recover expenditure made to prevent forfeiture, section 1091.
Municipal courts, powers of, section 822.
Nuisances, actions for recovery of cost of removal, section 921.

Order authorizing women to act as sole traders, section 2191.
Partners, actions against, section 2907.
Probate practice, sections 5857–6144.
Possessory actions, sections 5849–5856.
Railroad rates, proceedings relating to regulation of, sections 4548–4585.
Revisory power over corporate elections, section 1123, et seq.
Removal from office, section 2851, et seq.; county commissioners, section 3753.
Sale of real property of religious and charitable corporations, order for, section 1369.
Undertakings, sections 695–701.
Veterinarian, order for service of, section 4379.
Wages, protection of, section 6145.
Wills, sections 6202–6222.

CONSTITUTIONAL PROVISIONS

Appeal, legislature may prescribe methods of, section 323.
Bankruptcy, U. S. Const., section 114.
Civil action, one form of—Law and equity administered in same action, section 329.
Civil process suspended on election day, section 253.
Contracts not to be impaired, section 244.
Corporations may sue and be sued in like manner as individuals, section 342.
Court fees to be charged, section 331.
Courts of record, what are—Appeals, section 323.
Due process and equal protection of law guaranteed, Nev. Const., section 237; U. S. Const., sections 175, 185.
Exemption of property from execution, section 243.
Extradition, U. S. Const., section 161.
Federal judges, terms and compensation, U. S. Const., section 153.
Fees, court, to be charged, section 331.
Fees, no judicial officers except justice of the peace and city recorder to receive, section 325.
Foreigners who have bona fide residence to have same rights to property as native-born citizens, section 245.
Habeas corpus not to be suspended except in case of rebellion or invasion, Nev. Const., section 234; U. S. Const., section 130.
Imprisonment for debt prohibited, section 243.
Judicial power of state in supreme court, district courts, justices of the peace and municipal courts, section 316.
Judicial power of United States, U. S. Const., sections 119, 159.
Juries, only electors not convicted of crime to serve on, section 285.
Jury trial secured, Nev. Const., section 232; U. S. Const., sections 156, 176.
Leave of absence, legislature not to grant to judicial officer; ninety days' absence from state forfeits office, section 332.
Libel, in actions for, truth may be taken in evidence, section 238.
Property not to be taken for public use without compensation, Nev. Const., section 237; U. S. Const., section 175.
Search and seizure not to take place without oath and probable cause, Nev. Const., section 247; U. S. Const., section 174.
State may be sued, section 280.
Style of process, "The State of Nevada," section 328.

[NOTE—Three acts prescribing a general system of civil practice have been passed in this state, namely Stats. 1861, 314; 1869, 196, and the following. The acts of 1861 and 1869 were frequently amended and supplemented by other acts and all existing law on the subject was finally merged into the present act. The former acts had numerous citations, many of which are yet authoritative for the reason that numerous sections of this act are continuations of those of former acts, or the difference is so slight as to render the construction put upon such sections by the courts still in point. So far as possible the annotations contained in this act have been apposed to the corresponding section.]

An Act to regulate proceedings in civil cases in this state and to repeal all other acts in relation thereto.

Approved March 17, 1911

Chapter 1—Preliminary provisions, sections 4943–4945.
Chapter 2—Limitations in general, sections 4946, 4947.
Chapter 3—Limitations—Real property, sections 4948–4966.
Chapter 4—Limitations other than real property, sections 4967–4973.
Chapter 5—Limitations—Miscellaneous, sections 4974–4985.
Chapter 6—Parties, sections 4986–5010.
Chapter 7—Place of trial, sections 5011–5015.
Chapter 8—Manner of commencing action, sections 5016–5034.
Chapter 9—Pleadings, sections 5035–5037.

Chapter 10—Complaint, sections 5038, 5039.
Chapter 11—Demurrer to complaint, sections 5040–5045.
Chapter 12—Answer, sections 5046–5052.
Chapter 13—Demurrer to answer, sections 5053–5066.
Chapter 14—Reply, sections 5057–5059.
Chapter 15—Verification, sections 5060–5064.
Chapter 16—General rules of pleading, sections 5065–5079.
Chapter 17—Variance, mistakes in pleadings and amendments, sections 5080–5086.
Chapter 18—Arrest and bail, sections 5087–5113.
Chapter 19—Discharge from arrest, sections 5114–5123.
Chapter 20—Claim and delivery, sections 5124–5135.
Chapter 21—Injunction, sections 5136–5146.
Chapter 22—Attachment, sections 5147–5168.
Chapter 23—Garnishment, sections 5169–5191.
Chapter 24—Deposit in court, section 5192.
Chapter 25—Receivers, section 5193.
Chapter 26—Provisional remedies on behalf of defendant, section 5194.
Chapter 27—Issues, mode of trial, and postponement, sections 5195–5203.
Chapter 28—Drawing of jury, number upon consent, examination of, sections 5204–5220.
Chapter 29—The verdict, sections 5221–5225.
Chapter 30—Trial by the court, sections 5226–5229.
Chapter 31—References and trials by referees, sections 5230–5235.
Chapter 32—Judgment by default, section 5236.
Chapter 33—Judgment on dismissal or nonsuit, section 5237.
Chapter 34—Judgment in general, sections 5238–5242.
Chapter 35—Parties not originally summoned, sections 5243–5248.
Chapter 36—Judgment by confession, sections 5249–5251.
Chapter 37—Submitting controversy without action, sections 5252–5254.
Chapter 38—Arbitration, sections 5255–5264.
Chapter 39—Offer of compromise, section 5265.
Chapter 40—Manner of giving and entering judgment—Roll—Docket—Lien, sections 5266–5278.
Chapter 41—Satisfaction of judgment, section 5279.
Chapter 42—Execution—Exemptions—Redemption, sections 5280–5306.
Chapter 43—Proceedings supplementary to execution, sections 5307–5314.
Chapter 44—Exceptions, sections 5315–5318.
Chapter 45—New trials, sections 5319–5324.
Chapter 46—Appeals, sections 5325–5361.
Chapter 47—Motions and orders, sections 5362–5366.
Chapter 48—Notices—Filing and serving of parties, sections 5367–5375.
Chapter 49—Costs, sections 5376–5393.
Chapter 50—Contempt, sections 5394–5407.
Chapter 51—Public writings, sections 5408–5413.
Chapter 52—Private writings, sections 5414, 5415.
Chapter 53—Admission or inspection of writings, sections 5416–5418.
Chapter 54—Witnesses—Competency, sections 5419–5449.
Chapter 55—Affidavits, sections 5450–5453.
Chapter 56—Depositions taken within the state, sections 5454–5457.
Chapter 57—Depositions taken out of the state, sections 5458–5463.
Chapter 58—Perpetuating testimony, sections 5464–5473.
Chapter 59—Common law—Definitions—Defective titles to papers—Successive and consolidated actions—Action between sureties—Clerk's register—Seal—Computation of time—Oath—General provisions relating to undertakings and sureties—Majority of referees and arbitrators—Acts of judge after his term—Lien on bullion—Deferred claims for wages—Elisors—Lien on animals, sections 5474–5500.
Chapter 60—Foreclosure of mortgages, sections 5501–5503.
Chapter 61—Actions for nuisance, waste, trespass, entering mine, damages, sections 5504–5513.
Chapter 62—Actions to quiet title, for foreclosure regarding real property, and mines, sections 5514–5526.
Chapter 63—Partition, sections 5527–5583.
Chapter 64—Termination of life estate, section 5584.
Chapter 65—Forcible entry and detainer, sections 5585–5605.
Chapter 66—Eminent domain, sections 5606–5629.
Chapter 67—Lost records affecting real property—Restoration of, sections 5630–5646.
Chapter 68—Death by wrongful act, action for, sections 5647, 5648.
Chapter 69—Personal injuries—Action for, sections 5649–5652.
Chapter 70—Actions against the state, sections 5653–5655.
Chapter 71—Quo warranto, sections 5656–5682.
Chapter 72—Certiorari, sections 5683–5693.

Chapter 73—Mandamus, sections 5694–5707.
Chapter 74—Prohibition, sections 5708–5710.
Chapter 75—General provisions as to certiorari, mandamus and prohibition, sections 5711–5713.
Chapter 76—Justices' courts—Jurisdiction, section 5714.
Chapter 77—Justices' courts—Place of trial, sections 5715–5721.
Chapter 78—Manner of commencing actions in justices' courts, sections 5722–5733.
Chapter 79—Pleadings in justices' courts, sections 5734–5743.
Chapter 80—Provisional remedies in justices' courts, sections 5744–5753.
Chapter 81—Trials and judgments in justices' courts, sections 5754–5782.
Chapter 82—Executions from justices' courts, sections 5783–5787.
Chapter 83—New trials and appeals from justices' courts, sections 5788–5794.
Chapter 84—Justices' courts—Contempts and general provisions, sections 5795–5816.
Chapter 85—Concerning the repeal of certain provisions of the civil practice act and acts in relation thereto, sections 5817–5821.

In adopting the practice act of California, it must be presumed to have been adopted as interpreted by the highest court of judicature of that state. Williams v. Glasgow, 1 Nev. 533, 538; Whitmore v. Shiverick, 3 Nev. 303; Weil v. Howard, 4 Nev. 393.

Our practice act was indirectly borrowed from New York. Howe v. Coldren, 4 Nev. 176; Rose v. Treadway, 4 Nev. 460.

The provisions of the civil practice act, not inconsistent with the revenue laws, are applicable to suits brought for the collection of taxes. State v. Yellow J. S. M. Co., 14 Nev. 220, 235, 236.

The practice act is a remedial law. It was designed to simplify legal proceedings, to expedite them and render them less costly and burdensome to litigants (Beatty, J.). Idem, 253.

CHAPTER 1

PRELIMINARY PROVISIONS

4943. One form of action.

SECTION 1. There shall be in this state but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs.

Kerr, C. C. P., 307.
See Const., sec. 329.

Mining companies failing to file annual statements may not prosecute or defend until statement filed, section 1338.
Same in case of foreign corporations failing to comply with laws, sections 1355, 1364.
Cited, State v. Yellow Jacket S. M. Co., 14 Nev. 238.

Although the same court has jurisdiction, under our system, of cases at law and in equity in matters of probate, yet the several classes of cases must be kept separate, and a petition to the court of probate cannot be confounded with an action at law or a suit in chancery. Lucich v. Medin, 3 Nev. 93 (93 A. D. 376).

It is as necessary, under our system of practice, to maintain in the pleadings the distinction between actions arising out of torts and those growing out of contracts, as it was under the old practice. Knickerbocker N. S. M. Co. v. Hall, 3 Nev. 194, 198.

If the pleading be upon contract a recovery should not be allowed if the proof be of a trespass, from which there could be no presumption of a contract. Idem.

The district courts in proper cases may administer both legal and equitable relief. Botsford v. Von Riper, 33 Nev. — (110 P. 706).

4944. Designation of parties.

SEC. 2. In such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

Kerr, C. C. P., 308.

4945. When special issues may be tried by jury.

SEC. 3. In a case where neither party can, as of right, require a trial by jury of an issue of fact arising upon the pleadings, or where a question of fact, not in issue upon the pleadings, is to be tried, an order for the trial thereof by a jury may be made, stating distinctly and plainly the question of fact to be tried. Such an order is the only authority necessary for the trial.

Kerr, C. C. P., 309; Utah, 3098.

Stats. 1913, 29, 120
4943

CHAPTER 2

LIMITATIONS IN GENERAL

4946. Actions to be commenced within periods prescribed.

SEC. 4. Civil actions can only be commenced within the periods prescribed in this act, after the cause of action shall have accrued, except where a different limitation is prescribed by statute.

Kerr, C. C. P., 312.

Mining companies failing to file annual statements may not prosecute or defend until statement filed, sec. 1338.

Same in case of foreign corporations failing to comply with law, secs. 1355, 1364.

Statutes of limitations cited generally. Bullion M. Co. v. Croesus M. C., 2 Nev. 174, 181, 182.

Where plaintiff originally sued on a written contract, and afterwards amended his complaint by adding a second count on an implied contract for the same cause of action: Held, that such amendment could not be resisted on the ground that a new suit on such second count would then be barred by the statute of limitations, and that to strike out such second count on that ground was error. Tucker v. Virginia, 4 Nev. 20.

A foreign corporation cannot plead the statute of limitations either in personal or real actions. Barstow v. Union Con. S. M. Co., 10 Nev. 386, 387; Sutro T. Co. v. S. B. M. Co., 19 Nev. 125.

The statute of limitations, like any other statute, is to be construed according to the manifest intention of the legislature, and in ascertaining such intention, the language used should be construed if possible, according to the usual meaning of the words used. Treadway v. Wilder, 12 Nev. 108, 113.

The revenue laws of this state do not except taxes from the operation of the statute of limitations or extend the time for bringing suits for their collection beyond the period allowed by that statute. State v. Y. J. S. M. Co., 14 Nev. 229.

To make the possession of one tenant in common adverse as against the others, it is not necessary that notice should be given of the adverse intent; but the intent must be manifested by outward acts of an unequivocal kind. Abernathie v. Con. Va. M. Co., 16 Nev. 261.

4947. Cause of action arising in another state or foreign country.

SEC. 5. When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of a citizen thereof who has held the cause of action from the time it accrued.

Kerr, C. C. P., 361.

Where default is made in a payment of a firm note executed in California by a partner residing there, and the other partner is a resident of New York, the right of action, as against the latter, accrues in New York, and not in California; and, if no action is brought on the note in New York within a time prescribed by the statutes of limitations of that state, the holder cannot maintain an action against him in Nevada by reason of this section. Lewis v. Hyams, 26 Nev. 68, 79–84 (99 A. S. 677, 63 P. 126).

CHAPTER 3

LIMITATIONS—REAL PROPERTY

4948. When action cannot be brought by grantee from this state.
4949. When actions by state or its grantees are to be brought within seven years.
4950. State not to sue, when.
4951. Action for recovery of mining claims —Occupation and possession defined —Other provisions applicable.
4952. No cause of action effectual unless party or predecessor seized or possessed within five years.
4953. Idem—Five years.
4954. When peaceable entry not valid as claim.
4955. Possession presumed in legal owner, unless adversely held.
4956. Adverse possession under written instrument, decree—What deemed held.
4957. Idem — What constitutes possession and occupancy.
4958. Adverse possession under claim of title only—Land deemed held.
4959. Idem—What constitutes possession and occupancy.
4960. Adverse possession, must be five years continuously, all taxes paid.
4961. Possession of tenant or landlord—Presumption limited.

4962. Right of possession not affected by descent cast.
4963. Action to recover estate sold by guardian, three years.
4964. Action to recover estate sold by executor, three years.
4965. Legal disability prevents running of statute—Removal.
4966. Idem—Time of disability not reckoned.

4948. When action cannot be brought by grantee from this state.

SEC. 6. No action can be brought for or in respect to real property by any person claiming under letters patent, or grants from this state, unless the same might have been commenced by the state as herein specified in case such patent had not been issued or grant made.

Kerr, C. C. P., 316.

4949. When actions by state or its grantees are to be brought within seven years.

SEC. 7. When letters patent or grants of real property issued or made by this state, are declared void by the determination of a competent court, an action for the recovery of the property so conveyed may be brought, either by the state, or by any subsequent patentee or grantee of the property, his heirs or assigns, within seven years after such determination, but not after that period.

Kerr, C. C. P., 317.

4950. State not to sue, when.

SEC. 8. The State of Nevada will not sue any person for, or in respect to, any real property, or the issues or profits thereof, by reason of the right or title of the state to the same unless:

1. Such right or title shall have accrued within ten years before any action or other proceeding for the same; or,

2. Unless the state, or those from whom it claims, shall have received the rents and profits of such real property, or of some part thereof within the space of ten years.

Kerr, C. C. P., 315.

4951. Action for recovery of mining claims—Occupation and possession defined—Other provisions applicable—Proviso.

SEC. 9. No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, or those through or from whom he claims, were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the same, in the usual and customary mode of holding and working similar claims in the vicinity thereof. All the provisions of this act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims; *provided,* that in such application "two years" shall be held to be the period intended whenever the term "five years" is used; *and, provided further,* that when the terms "legal title" or "title" are used, they shall be held to include title acquired by location or occupation, according to the usages, laws, and customs of the district embracing the claim.

Under some circumstances lapse of time is a good defense, although the statute of limitations is not specially pleaded. Gottschall v. Melsing, 2 Nev. 185, 188–190.

The act of Congress in relation to the location of mining claims and the determination of the rights thereto in case of conflict (U. S. Stats. 1872, 91, sec. 7) does not prevent the application of the state statute of limitation; on the contrary, an actual, exclusive and uninterrupted adverse possession for the statutory period constitutes a complete bar. 420 M. Co. v. Bullion M. Co., 9 Nev. 240, 249.

The pendency of a suit to recover possession of real estate does not estop the plaintiff, in case of a suit subsequently commenced against himself, from setting up the

statute of limitations and claiming rights and privileges under it. Idem.

Locating, holding and working a mining claim in the usual mode constitutes occupation and adverse possession under this section. Patchen v. Keeley, 19 Nev. 410 (14 P. 347).

Occupation and adverse possession of a mining claim shall consist in holding and working the same, in the usual and customary mode of holding and working similar claims in the vicinity. South End M. Co. v. Tinney, 22 Nev. 34, 35, 65, 70 (35 P. 89).

The statute of limitations does not begin to run against a person entitled to the legal title to mining ground until the patent is issued to him. South End M. Co. v. Tinney, 22 Nev. 221 (38 P. 401).

Cited, Nash v. McNamara, 30 Nev. 130 (93 P. 405, 16 L. R. A. (N. S.) 168).

4952. No cause of action effectual unless party or predecessor seized or possessed within five years.

SEC. 10. No cause of action, or defense to an action, founded upon the title to real property, or to rents, or to services out of the same, shall be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within five years before the committing of the act in respect to which said action is prosecuted or defense made.

Kerr, C. C. P., 318.

The statute of limitations does not begin to run against a resulting trust in favor of the trustee because the trustee's possession is deemed in law the possession of the cestui que trust. Levy v. Ryland, 32 Nev. 461 (109 P. 905).

The statute does not begin to run against the trust until it has been openly disavowed by the trustee insisting on an adverse right and interest clearly and unequivocally made known to the cestui que trust. Idem.

The statute does not begin to run against an action by cestui que trust until the time of the discovery by the latter of the fraud or mistake on which it is based. Idem.

Section 33 of this act does not in any way qualify this section. This section prescribes the general rule as to limitations of real actions or actions for the possession of real estate, and section 33 declares the exceptions to the general rule. Chollar-Potosi M. Co. v. Kennedy, 3 Nev. 361, 368–370 (93 A. D. 409).

See 420 M. Co. v. Bullion M. Co., under last preceding section.

Cited, Chollar-Potosi M. Co. v. Kennedy, 3 Nev. 370 (93 A. D. 409).

Cited, Malmstrom v. People's D. D. Co., 32 Nev. 246, 253 (107 P. 98, 102).

4953. Idem—Five years.

SEC. 11. No action for the recovery of real property, or for the recovery of the possession thereof other than mining claims, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question, within five years before the commencement thereof.

Kerr, C. C. P., 318.

Cited, South End M. Co. v. Tinney, 22 Nev. 65, 70.

4954. When peaceable entry not valid as claim.

SEC. 12. No peaceable entry upon real estate shall be deemed sufficient and valid as a claim, unless an action be commenced by the plaintiff for possession within one year from the making of such entry, or within five years from the time when the right to bring such action accrued.

Kerr, C. C. P., 320.

A party claiming a prescriptive right for five years who, within that time, enlarges the use, cannot, at the end of that time, claim the use as enlarged within that period. The acts by which the right is sought to be established must be such as to operate as an invasion of the right claimed to such an extent that during the whole period of use the party whose estate is sought to be charged with the servitude could have maintained an action therefor. Boynton v. Longley, 19 Nev. 69, 76 (3 A. S. 781, 6 P. 437).

Cited in dissenting opinion of Murphy, C. J., in South End M. Co. v. Tinney, 22 Nev. 69.

See Levy v. Ryland, under sec. 10 of this act.

4955. Possession presumed in legal owner, unless adversely held.

SEC. 13. In every action for the recovery of real property, or the pos-

session thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it shall appear:

1. That it has been protected by a substantial inclosure; or,

2. That it has been cultivated or improved in accordance with the usual and ordinary methods of husbandry.

Kerr, C. C. P., 321.

Under this section, a party is entitled to maintain an action for the possession of real property at any time before the expiration of five years of adverse possession after he obtained the legal title. Where the legal title remains in the government until the issuance of a patent, the statute of limitations does not commence to run until that date; the time between the date of the certificate of the purchase and of the issuance of the patent is not to be computed as a part of the five years of adverse possession. Treadway v. Wilder, 12 Nev. 108, 112, 113.

Cited in dissenting opinion of Murphy, C. J., in South End Co. v. Tinney, 22 Nev. 66, 69 (35 P. 89).

Color of title in plaintiff and its payment of taxes on land make it impossible under this section for title by adverse possession to be acquired by one whose possession was subordinate to that of another who occupied the premises in subordination to the title of plaintiff and virtually as its tenant. Reno Brewing Co. v. Packard, 31 Nev. 433, 440 (103 P. 415).

4956. Adverse possession under written instrument, decree, what deemed held.

SEC. 14. Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises, under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises, under such claim, for five years, the premises so included shall be deemed to have been held adversely, except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

Kerr, C. C. P., 322.

When a deed to real estate, absolute upon its face, is given to secure a debt, and there is no agreement when such debt shall become due, the statute of limitations begins to run in favor of the grantee in possession immediately on the delivery of the deed.

In an action to redeem mortgaged real estate the payment of taxes on the land by either the mortgageor or the mortgagee after the mortgage debt was due will not arrest the operation of the statute of limitations in favor of the mortgagee in possession, and such action is barred when not brought within the time limited after the maturity of the debt. Borden v. Clow, 21 Nev. 275, 278 (37 A. S. 511, 30 P. 821).

4957. Idem—What constitutes possession and occupancy.

SEC. 15. For the purpose of constituting adverse possession by any person claiming a title, founded upon a written instrument, or judgment, or decree, land shall be deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved.

2. Where it has been protected by a substantial inclosure.

3. Where, though not inclosed, it has been used for the supply of fuel, or of fencing timber, for the purpose of husbandry; or, for the use of pasturage, or for ordinary uses of the occupant.

4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be

deemed to have been occupied for the same length of time as the part improved and cultivated.

Kerr, C. C. P., 323.

4958. Adverse possession under claim of title only—Land deemed held.

SEC. 16. Where it appears that there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment, or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.

Kerr, C. C. P., 324.

4959. Idem—What constitutes possession and occupancy.

SEC. 17. For the purpose of constituting an adverse possession, by a person claiming title, not founded upon a written instrument, judgment, or decree, land shall be deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure.
2. Where it has been usually cultivated or improved.

Kerr, C. C. P., 325.

4960. Adverse possession, must be five years continuously, all taxes paid.

SEC. 18. In no case shall adverse possession be considered established unless it be shown, in addition to the above requirements, that the land has been occupied and claimed for the period of five years, continuously, and that the party or persons, their predecessors and grantors, have paid all taxes, state, county and municipal, which may have been levied and assessed against said land for the period above mentioned.

Kerr, C. C. P., 325.

4961. Possession of tenant or landlord—Presumption limited.

SEC. 19. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord until the expiration of five years from the expiration of the tenancy, or, where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

Kerr, C. C. P., 326.

4962. Right of possession not affected by descent cast.

SEC. 20. The right of a person to the possession of any real property, shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

Kerr, C. C. P., 327.

4963. Actions to recover estate sold by guardian, three years.

SEC. 21. No action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship.

Kerr, C. C. P., 1806; Utah, 2869.
See secs. 6018, 6185.

4964. Action to recover estate sold by executor, three years.

SEC. 22. No action for the recovery of any estate sold by an executor or administrator in the course of any probate proceeding can be maintained by any heir or other person claiming under the decedent, unless it be

commenced within three years next after such sale. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud or other lawful grounds upon which the action is based.

Kerr, C. C. P., 1573; Utah, 2870.
See sec. 6018.

4965. Legal disability prevents running of statute—Removal.

SEC. 23. The two preceding sections shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues, but all such persons may commence an action at any time within one year after the removal of the disability.

Kerr, C. C. P., 1574, 1806; Utah, 2871.
See sec. 6018.

4966. Idem—Time of disability not reckoned.

SEC. 24. If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense, founded on the title to real property, or to rents or services out of the same, be at the time such title shall first descend or accrue, either:

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life—

the time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such actions, or the making of such entry or defense, but such action may be commenced or entry or defense made, within the period of two years after such disability shall cease, or after the death of the person entitled, who shall die under such disability, but such action shall not be commenced, or entry or defense made, after that period.

Kerr, C. C. P., 328.
See sec. 6018.
Part of this section is Stats. 1861, 30, sec. 22, which has had the following citation: Chollar-Potosi M. Co. v. Kennedy, 3 Nev. 368 (93 A. D. 409).

CHAPTER 4

LIMITATIONS OTHER THAN REAL PROPERTY

4967. Limitations of various actions.
4968. Time, how reckoned.
4969. Idem—From last item of mutual account.
4970. Action for relief not provided for—Four years.
4971. Limitations apply to state.
4972. Proceedings to contest election of state officer, limitation.
4973. Proceedings to contest the election of county officer, limitation.

4967. Limitations of various actions.

SEC. 25. Actions other than those for the recovery of real property, can only be commenced as follows:

Within six years: 1. An action upon a judgment, or decree of any court of the United States, or of any state or territory within the United States.

2. An action upon a contract, obligation, or liability, founded upon an instrument in writing, except those mentioned in the preceding sections.

Within four years: 1. An action on an open account for goods, wares, and merchandise sold and delivered.

2. An action for any article charged in a store account.

3. An action upon a contract, obligation or liability, not founded upon an instrument in writing.

Within three years: 1. An action upon a liability created by statute, other than a penalty or forfeiture.

2. An action for waste or trespass of real property; *provided,* that when the waste or trespass is committed by means of underground works upon any mining claim, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such waste or trespass.

3. An action for taking, detaining, or injuring personal property, including actions for specific recovery thereof; *provided,* that in all cases where the subject of the action is a domestic animal usually included in the term "live stock," having upon it at the time of its loss a recorded mark or brand, and when such animal was strayed or stolen from the true owner without his fault, the statute shall not begin to run against an action for the recovery of such animal until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession thereof by the defendant.

4. An action for relief on the ground of fraud or mistake; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Within two years: 1. An action against a sheriff, coroner, or constable, upon the liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution.

2. An action upon a statute for a penalty or forfeiture, where the action is given to an individual, or to the state, or an individual and the state, except when the state imposing it prescribes a different limitation.

3. An action for libel, slander, assault, battery, false imprisonment or seduction.

4. An action against a sheriff, or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

5. An action to recover damages for the death of one caused by the wrongful act or neglect of another.

Within one year: 1. An action against an officer, or officers *de facto:* (*a*) To recover any goods, wares, merchandise or other property seized by any such officer in his official capacity, as tax collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to, any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure. (*b*) For money paid to any such officer under protest, or seized by such officer in his official capacity, as a collector of taxes, and which, it is claimed, ought to be refunded.

2. Actions or claims against a county, incorporated city or town, which have been rejected by the board of county commissioners, city council, or board of trustees, as the case may be; after the first rejection thereof by such board, city council, or board of trustees.

See sec. 6048.

On bond of guardian, 6185.

Kerr, C. C. P., 335-339; Utah, 2877, 2878, 2880, 2881.

This section is a modification of Stats. 1861, p. 29, sec. 16, which has had the following citations:

When a debt secured by mortgage is barred by the statute of limitations, the mortgage is not thereby extinguished.

Even when all action or legal proceeding on the mortgage is barred, still, if the mortgagee gets rightful possession of the premises mortgaged, he may retain the same until his debt is paid.

The [old] statute of limitations provides a limitation of six months to the maintenance of an action on contracts for the payment of money made out of this state. But this same statute would only bar an action to foreclose a mortgage executed on property within this state to secure such debt after the lapse of four years. Henry v. Confidence M. Co., 1 Nev. 619, 620.

A party holding a mortgage is not barred of his right to foreclose the same until four years shall have elapsed from the accruing of the action, although the statute may have barred an action at law on the debt before that time.

A party taking a second mortgage during the period intervening between the time when the statute bars the action at law, and when it bars the proceeding to foreclose, holds his lien, subject to the first mortgage. Mackie v. Lansing, 2 Nev. 302.

See Chollar-Potosi M. Co. v. Kennedy, 3 Nev. 361.

Cited State v. Y. J. S. M. Co., 14 Nev. 229.

An action to recover sheep alleged to have been owned jointly with the defendant's testator, where the joint ownership was denied by the deceased in 1895, was barred by this section, since an action of replevin could have been maintained on the denial of ownership, the property being severable. Schwartz v. Stock, 26 Nev. 129, 153 (65 P. 351).

Cited, Chollar-Potosi M. Co. v. Kennedy, 3 Nev. 368–370, 372; Warren v. Sweeney, 4 Nev. 103.

Where money is loaned without note or writing and a mortgage is given to secure its repayment, although the statute of limitations may run against an action on the debt in two years, it does not run against a foreclosure of the mortgage in less than four years. Cookes v. Culvertson, 9 Nev. 199, 208.

An action for the collection of taxes is an action upon "a liability created by statute," and is barred in three years. State v. C. P. R. R. Co., 10 Nev. 80.

Cited, State v. Y. J. S. M. Co., 14 Nev. 232.

Suit to foreclose mortgage was commenced more than four years after the date of the mortgage, or trust deed, but less than four years after the bonds secured thereby became due: Held, that the action was not barred by the statute of limitations. Bassett v. Monte Cristo M. Co., 15 Nev. 293.

When a married woman, who holds the legal title to real estate in her own name, mortgages the same to a bona fide mortgagee, without notice that she holds the same in secret trust for another, to whom she afterwards conveys it, the right of the mortgagee to foreclose the mortgage is not barred, as against such grantee, because more than four years have elapsed since the maturity of the indebtedness secured, unless the right to foreclose is barred as against the mortgageor. Rickards v. Hutchinson, 18 Nev. 216, 220, 223, 224 (2 P. 52).

This section embraces all character of actions, legal and equitable, and mere lapse of time, not extending beyond the period fixed in the statute of limitations for the commencement of the suit, constitutes no bar to the action. Lang Syne M. Co. v. Ross, 20 Nev. 140 (19 A. S. 334, 18 P. 358).

Cited, Borden v. Clow, 21 Nev. 279 (37 A. S. 511, 30 P. 821).

An action upon a bail bond is an action upon an obligation founded upon an instrument in writing, and is not an action upon a statute for a forfeiture or penalty to the state which must be commenced within two years after the right of action has accrued. State v. Murphy, 23 Nev. 390, 399 (48 P. 628).

Cited, Mandelbaum v. Gregovich, 24 Nev. 158 (50 P. 849).

Cited, Chollar-Potosi M. Co. v. Kennedy, 3 Nev. 368–370 (93 A. D. 409); Sutro T. Co. v. S. B. M. Co., 19 Nev. 125 (7 P. 271).

See Levy v. Ryland under sec. 10 of this act.

4968. Time, how reckoned.

SEC. 26. The time in the preceding section shall be deemed to date from the last transaction or the last item charged, or last credit given; and whenever any payment on principal or interest has been or shall be made upon an existing contract, whether it be a bill of exchange, promissory note or other evidence of indebtedness if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.

4969. Idem—From last item of mutual account.

SEC. 27. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

Kerr, C. C. P., 344.

"A mutual, open and current account where there have been reciprocal demands," within the meaning of this section, is one consisting of demands upon which each party respectively might maintain an action.

If all the items on one side of an account were intended by the parties as payments or credits on account, it is not a mutual, open and current account where there are reciprocal demands. Warren v. Sweeney, 4 Nev. 101, 102, 106.

Cited, Chollar-Potosi M. Co. v. Kennedy, 3 Nev. 368 (93 A. D. 409).

4970. Action for relief not provided for—Four years.

SEC. 28. An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued.

Kerr, C. C. P., 343.

Cited, Chollar-Potosi v. Kennedy, 3 Nev. 368 (93 A. D. 409); Schwartz v. Stock, 26 Nev. 156 (65 P. 354).

The statute of limitations embraces all characters of actions, legal and equitable, and is as obligatory upon the courts in a suit in equity as in actions of law.

A cestui que trust of an expressed trust has no right of action until the trust is denied or some act is done by the trustee inconsistent with the trust; and until then the statute of limitations does not begin to run.

In a case of the purchase of property alleged to be in trust, where it became necessary for the plaintiff to establish facts out of which the trust arose, and then to show that the trust property had been converted into money: Held, that under the circumstances the ordinary action for money had and received to plaintiff's use would not lie against the trustee, and that the section of the statute of limitations applicable was the four years' limitation, and not the two years' one. White v. Sheldon, 4 Nev. 280, 288, 289, 294.

Cited, State v. Y. J. S. M. Co., 14 Nev. 229, 230.

4971. Limitations apply to state.

SEC. 29. The limitations prescribed in this act shall apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties.

Kerr, C. C. P., 345.

Cited, Chollar-Potosi M. Co. v. Kennedy, 3 Nev. 368 (93 A. D. 409).

The statute of limitations applies to suits brought by the state for the collection of delinquent taxes. State v. Y. J. S. M. Co., 14 Nev. 229, 230.

4972. Proceedings to contest election of state officer, limitation.

SEC. 30. Proceedings to contest the election of any state officer must be begun within sixty days after the facts or evidence upon which the contest is based come to the knowledge of the contestant.

4973. Proceedings to contest the election of county officer, limitation.

SEC. 31. Proceedings to contest the election of any county officer or any other officer than a state officer, must be begun within forty days after the facts of evidence upon which the contest is based become known to the contestant.

CHAPTER 5

LIMITATIONS—MISCELLANEOUS

4974. No limitation where property or money deposited in bank.
4975. Absence suspends running of statute.
4976. Legal disability prevents running of statute—Removal.
4977. Death before expiration of limitation—Effect—Filing of claim.
4978. Death of debtor out of state, statute suspended.
4979. Action by alien enemy—War suspends limitation.
4980. Judgment reversed—Action to be brought within one year.
4981. Action stayed by injunction.
4982. Disability, when available.
4983. Coexisting disability must be removed.
4984. Action against directors or stockholders for penalty or forfeiture—Three years after discovery of facts.
4985. Renewal of cause to be in writing.

4974. No limitation where property or money deposited in bank.

SEC. 32. To actions brought to recover money or other property deposited with any bank, banker, trust company or savings and loan society, there is no limitation.

Kerr, C. C. P., 348.

4975. Absence suspends running of statute.

SEC. 33. If, when the cause of action shall accrue against a person, he be out of the state, the action may be commenced within the time herein limited after his return to the state; and if after the cause of action shall have accrued, he depart the state, the time of his absence shall not be part of the time prescribed for the commencement of the action.

Kerr, C. C. P., 351.

This section does not in any way qualify section 10 of this act. This section declares the exceptions to the general rule. Chollar-Potosi M. Co. v. Kennedy, 3 Nev. 361, 369, 370, 372 (93 A. D. 409).

Foreign corporations are within the exception of this section. Idem.

This section, in the use of the expression "cause of action," includes real actions or actions as to real estate as well as personal actions.

Chollar-Potosi M. Co. v. Kennedy (3 Nev. 361), in so far as it expresses an opinion that a foreign corporation is entitled to avail itself of the bar of the statute in an action concerning real property, disapproved. Robinson v. Imperial S. M. Co., 5 Nev. 45, 46, 73–76.

This section has entirely overthrown the old rule, that the statute, when once it began to run, continued to run, notwithstanding absence from the state. Todman v. Purdy, 5 Nev. 239, 242.

Cited, Barstow v. Union Con. S. M. Co., 10 Nev. 387.

Cited, Perkins v. Sierra Nevada S. M. Co., 10 Nev. 406, 416; Rickards v. Hutchinson, 18 Nev. 222 (2 P. 52).

This section applies to the class of cases mentioned in section 32 [old act] as well as to those mentioned in section 25 of this act. It applies to all causes of actions; to foreign corporations as well as individuals absent from this state; to contracts made out of this state to be performed within it as well as contracts made within the state. Sutro T. Co. v. S. B. M. Co., 19 Nev. 121, 125, 126 (7 P. 271).

Cited, Mandelbaum v. Gregovich 24 Nev. 159 (50 P. 849); Lewis v. Hyams, 26 Nev. 82 (99 A. S. 677, 63 P. 126).

4976. Legal disability prevents running of statute—Removal.

SEC. 34. If a person entitled to bring an action other than for the recovery of real property, be, at the time the cause of action accrued, either:

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life; or,
4. A married woman—

the time of such disability shall not be a part of the time limited for the commencement of the action.

Kerr, C. C. P., 352.

Cited, Chollar-Potosi M. Co. v. Kennedy, 3 Nev. 368–372 (93 A. D. 409); Robinson v. Imperial S. M. Co., 5 Nev. 75.

4977. Death before expiration of limitation—Effect—Filing of claim.

SEC. 35. If the person entitled to bring an action, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors or administrators after the expiration of that time, and within one year after the issuing of letters testamentary or of administration; *provided*, the final account of such executor or administrator in the estate of such decedent be not sooner filed, *and, provided*, a claim therefor be presented as required by the law governing estates of deceased persons.

Kerr, C. C. P., 353.

When a party dies owing a debt not barred by the statute of limitations at his death, the holder of the claim has one year after administration granted on the debtor's estate within which to bring his action, although the action would have been barred in less than one year if the debtor had lived; if, however, the claim is presented to the administrator and rejected, suit must be brought thereon within three months after the rejection.

The statute giving one year after administration granted applies to all classes of cases. Wick v. O'Neale, 2 Nev. 303–305.

Cited, Robinson v. Imperial S. M. Co., 5 Nev. 75.

The object of this section was to extend the time, in certain cases, within which actions might be commenced and was not intended to limit the time given by other sections of the act. Rickards v. Hutchinson, 18 Nev. 216, 223 (2 P. 52).

Under the provisions of this section, trover for conversion of sheep by a testator cannot be maintained against his executrix where not brought within a year from the issuance of letters testamentary. Schwartz v. Stock, 26 Nev. 155, 157 (65 P. 357).

4978. Death of debtor out of state, statute suspended.

SEC. 36. If a person against whom a cause of action exists dies without the state, the time which elapses between his death and the expiration of one year after the issuing, within this state, of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator.

4979. Action by alien enemy—War suspends limitation.

SEC. 37. When a person shall be an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the period limited for the commencement of the action; *provided, however,* that nothing in this section shall be so construed as to consider any citizen or person of any state engaged in rebellion against the United States government as an alien.

Kerr, C. C. P., 354.

4980. Judgment reversed—Action to be brought within one year.

SEC. 38. If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his heirs or representatives, may commence a new action within one year after the reversal.

Kerr, C. C. P., 355.

4981. Action stayed by injunction.

SEC. 39. When the commencement of one action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.

Kerr, C. C. P., 356.

4982. Disability, when available.

SEC. 40. No person shall avail himself of a disability, unless it existed when his right of action accrued.

Kerr, C. C. P., 357.
Cited, Robinson v. Imperial S. M. Co., 5 Nev. 74.

4983. Coexisting disability must be removed.

SEC. 41. When two or more disabilities coexist, at the time the right of action accrues, the limitation shall not attach until they all be removed.

Kerr, C. C. P., 358.

4984. Action against directors or stockholders for penalty or forfeiture—Three years after discovery of facts.

SEC. 42. The preceding sections shall not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed or to enforce a liability created by law; but such actions must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.

Kerr, C. C. P., 359.

4985. Renewal of cause to be in writing.

SEC. 43. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this act, unless the same be contained in some writing signed by the party to be charged thereby, except as provided in section 26 of this act.

Kerr, C. C. P., 360.
Indebtedness of public officer, does not run against, sec. 2866.

The above sections in regard to limitations of actions are taken from Stats. 1861, 26, secs. 32, 33, and 34, which (omitted) have had the following citations:

Whenever a debt secured by mortgage is barred by the statute of limitations, the mortgage is not thereby extinguished. Henry v. Confidence M. Co., 1 Nev. 619.

See, also, Lewis v. Hyams, under sec. 5 of this act.

Where a bond is drawn up in California and there signed and sealed by an obligor and then sent to this state to be signed and sealed by the remaining obligor, the finishing act in the execution of the bond having been done in this state, it must be held in regard to the statute of limitations as a bond executed in this state, and not in another state. Alcalda v. Morales, 3 Nev. 132, 136.

Upon review of facts it was held that a note and mortgage were consummated in this state. Reade v. Edwards, 2 Nev. 262.

Cited, Wick v. O'Neale, 2 Nev. 304.

Statutes of limitation apply only to the remedy on a contract, and not to the right or obligation, so that, although the statutory bar has fully run against a contract where made, yet, if it is to be performed at another place, and it is not there barred, it may be enforced, provided the statute has not absolutely, by its terms, extinguished and nullified the claim itself.

A promissory note, made in California, and payable "in California and Nevada," can at payer's option be paid in either state, and therefore cannot be construed into a contract to be performed in Nevada, so as to bring it within the purview of the rule touching the place of payment.

The statute of limitations in force at the time of suit brought governs the remedy on a contract; provided, in case of the passage of a new statute after the making of a contract, a reasonable time be given to bring suit.

This section excludes an acknowledgment or promise not in writing as evidence of a new or continuing contract to take a case out of the operation of a statute.

Part payment is not sufficient as a new promise to take a case out of the operation of the statute of limitations.

An acknowledgment, to take a case out of the operation of the statute of limitations, must be clear, explicit, and direct to the point that the debt is due.

If a plaintiff, relying upon an acknowledgment in writing to take a case out of the operation of the statute of limitations, proves a general acknowledgment of indebtedness, the burden of proof is on the defendant to show that it related to a different demand from the one in controversy.

A promise to pay a debt when able, is not sufficient of itself as an acknowledgment or new promise to take a case out of the operation of the statute of limitations. Wilcox v. Williams, 5 Nev. 207, 214, 215.

Part payment under our statute of limitations does not avail to raise its bar.

The acknowledgment or promise in writing, contemplated by the statute to take a case out of its operation, must be made by the party to be charged or his authorized agent and to some one having interest or authority to receive it. Taylor v. Hendry, 8 Nev. 243, 246.

CHAPTER 6

PARTIES

4986. Action to be brought in name of real party in interest.
4987. Action by executor or trustee—Trustee of express trust defined.
4988. Assignment of a thing in action—Effect—Not to apply to negotiable paper, when.
4989. Actions by or against a married woman.
4990. Husband and wife sued together—Wife may defend.
4991. Deserted husband or wife as a party.
4992. Infant, insane, or incompetent person to appear by guardian.
4993. Guardian ad litem, how appointed.
4994. Unmarried female may sue for seduction.
4995. Idem—When parent or guardian may sue.
4996. Parent or guardian may sue for death of minor child or ward.
4997. Heirs, guardian, or personal representatives may sue for death of adult.
4998. Persons interested may be joined as plaintiffs.
4999. Who may be joined as defendants.
5000. Persons claiming under common title.
5001. Parties in interest, when to be joined—When one or more may sue or defend for all.
5002. Plaintiff may sue in one action the different parties to commercial paper—Insurers of property.
5003. Defendants may be sued in the name designated in contract—Judgment, how entered.
5004. Action not to abate by death or transfer—Substitution.
5005. Another person may be substituted for the defendant, when—Deposit of money or delivery of property—Conflicting claimants must interplead.
5006. Intervention, when it takes place, and how made—Costs.
5007. Associates may be sued by name of association—Summons, how served—Judgment binding.
5008. Court may decide controversy or order other parties brought in.
5009. Unknown heirs to real property may be made parties.
5010. Idem—Allegations and proof that names and residences of heirs are unknown.

4986. Action to be in name of real party in interest.

SEC. 44. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act.

Kerr, C. C. P., 367.

Under our practice the real parties in interest are made plaintiffs and defendants. Sherman v. Dilley, 3 Nev. 25.

A party to whom certain lands are granted for the purpose of bringing an action for water rights connected therewith, there being an oral agreement between the parties that upon the termination of the litigation the lands should be reconveyed, may prosecute and maintain the action in his own name. Such suit is founded on the legal title. Smith v. Logan, 18 Nev. 149, 152 (1 P. 678).

A pledgee of a negotiable note has collateral security, is entitled to be protected as a bona fide holder to the same extent as one who becomes the absolute owner, and may maintain suit thereon in his own name as the real party in interest. The only difference between the rights of such parties is that the absolute owner may recover in full, while the pledgee, if there be equities, is restricted to the extent of his advances. Haydon v. Nicoletti, 18 Nev. 290, 299 (3 P. 473).

A plaintiff may maintain an action on a simple contract, to which he was not a party, upon which he was not consulted, and to which he did not assent, when it contains a provision for his benefit. Miliani v. Tognini, 19 Nev. 133, 134 (7 P. 279).

When two cotenants separately convey their interest in a mine, a subsequent deed from one of them, conveying to the other all his interests and title in the land for the express purpose of enabling the grantee to sue in her own name to set aside the first deed for fraud, and recover all the land, and providing that, in the event of recovery, such grantee shall reconvey to the grantor his interest, and pay him his proportion of any damages recovered, does not give the grantee such an interest in the grantor's interest as will entitle her to sue in her own name to set both the deeds aside. (By Murphy, J., Belknap, J., dissenting.)

The assignment of a bare right to file a bill in equity for a fraud committed on the assignor cannot be maintained in the name of the assignee. It is contrary to public policy, and savors of the character of maintenance. (Belknap J., dissenting.) Gruber v. Baker, 20 Nev. 453, 465, 467 (23 P. 858, 9 L. R. A. 302).

Under this section, an assignee of an interest in a judgment is a proper party plaintiff in an action on such judgment. Mandelbaum v. Gregovich, 24 Nev. 154, 158 (50 P. 849).

4987. Action by executor or trustee—Trustee of express trust defined.

SEC. 45. An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person or persons for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.

Kerr, C. C. P., 369.

An assignee of an account may sue on it in his own name though the assignor have an interest in it. The assignor, in such case, need not be made a party. Carpenter v. Johnson, 1 Nev. 332, 334.

4988. Assignment of a thing in action—Effect—Not to apply to negotiable paper, when.

SEC. 46. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense, existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note, or bill of exchange, transferred in good faith, and upon good consideration, before due.

Kerr, C. C. P., 368.

To an action brought upon an undertaking on attachment, defendants' defense would be as complete, in case they were sued by an assignee, as it would be if the suit were brought by the party to whom the undertaking was given. Elder v. Shaw, 12 Nev. 82.

A negotiable note payable to two or more persons jointly, indorsed by only one of the payees, is subject to any equities in favor of the maker, the same as though it had not been indorsed by either. Such a note is payable to all the payees, or to their joint order, and cannot be transferred except by the joint endorsement of all the payees. Haydon v. Nicoletti, 18 Nev. 299 (3 P. 473).

4989. Actions by or against a married woman.

SEC. 47. When a married woman is a party, her husband must be joined with her, except:

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone.

3. When she is living separate and apart from her husband by reason of his desertion of her, or by agreement, in writing, entered into between them, she may sue or be sued alone.

Kerr, C. C. P., 370.

4990. Husband and wife sued together—Wife may defend.

SEC. 48. If husband and wife are sued together, the wife may defend of her own right, and if either neglect to defend, the other may defend for both.

Kerr, C. C. P., 371; Utah, 2905; Iowa, McClain's An. C. (1888), 3768.

4991. Deserted husband or wife as a party.

SEC. 49. When a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have, and, under like circumstances, the husband shall have the same right.

Utah, 2906; Iowa, McClain's An. C. (1888), 3769.

4992. Infant, insane, or incompetent person to appear by guardian.

SEC. 50. When an infant, or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian *ad litem* appointed by the court in which the action is pending, in each case. A guardian *ad litem* may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane, or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him.

Kerr, C. C. P., 372.

4993. Guardian ad litem, how appointed.

SEC. 51. When a guardian *ad litem* is appointed by the court, he must be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons, or if under that age, or if he neglect to so apply, then upon the application of a relative or friend of the infant, or any other party to the action.

3. When an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding.

Kerr, C. C. P., 373.

4994. Unmarried female may sue for seduction.

SEC. 52. An unmarried female, under twenty years of age at the time of her seduction, may prosecute, as plaintiff, an action therefor, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor.

Kerr, C. C. P., 374.

4995. Idem—When parent or guardian may sue.

SEC. 53. A father, or, in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, who, at the time of her seduction, is under the age of majority; and the guardian, for the seduction of the ward, who, at the time of her seduction, is under the age of majority, though the daughter or the ward be not living with or in the service of the plaintiff at the time of the seduction, or afterwards, and there be no loss of service.

Kerr, C. C. P., 375.

4996. Parent or guardian may sue for death of minor child or of ward.

SEC. 54. A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the death or injury of a minor child, when such injury or death is caused by the wrongful act or neglect of another; and a guardian may maintain an action for the injury or death of his ward, if the ward be of lawful age, when such injury or death is caused by the wrongful act or neglect of another, the action by the guardian to be prosecuted for the benefit of the heirs of the ward. Any such action may be maintained against the person causing the injury or death, or, if such person be employed by another person who is responsible for his conduct, also against such other person.

Kerr, C. C. P., 376.

When the action was commenced, the party to whom the cause of action belonged was a minor; it was held that suit was therefore properly brought in the name of his mother, who was also his guardian. Ricord v. C. P. R. R. Co., 15 Nev. 167, 175.

At the time of the trial the minor had attained his majority, and upon his motion was joined with his mother as party plaintiff. This was held error, and that it would have been proper to substitute him as the sole plaintiff in her place, but having no joint interest in the cause of action they could not be united as plaintiffs. Idem.

4997. Heirs, guardian, or personal representatives may sue for death of adult.

SEC. 55. When the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or, if such person be employed by another person who is responsible for his conduct, then also against such other person. If such adult person have a guardian at the time of his death, only one action can be maintained for the injury to or death of such person, and such action may be brought by either the personal representatives of such adult person deceased for the benefit of his heirs, or by such guardian for the benefit of his heirs as provided in section 54. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just.

Kerr, C. C. P., 377.

4998. Persons interested may be joined as plaintiffs.

SEC. 56. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this act.

Kerr, C. C. P., 378.

While this section declares that all persons having an interest in the subject of an action, and in obtaining the relief demanded, may be joined as plaintiffs, the converse of the proposition is also true, that none can be united who have not such interest. McBeth v. Van Sickle, 6 Nev. 134, 135.

See Mandelbaum v. Gregovich, 24 Nev. 154. 158 (50 P. 849), under sec. 44 of this act.

All tenants in common may unite in prosecuting an action for possession of the common property so one tenant in common may sue for his share. Bullion M. Co. v. Croesus G. & S. M. Co., 2 Nev. 169 (89 A. D. 526).

4999. Who may be joined as defendants.

SEC. 57. Any person may be made a defendant, who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.

Kerr, C. C. P., 379.

Executors not qualifying need not be joined, sec. 6027.

In an action to dissolve a copartnership where one of the questions involved in a suit is whether the property described in the complaint is the homestead of the defendant, or the property of the partnership, the wife of the defendant is a necessary party to the action. Rhodes v. Williams, 12 Nev. 20, 27.

5000. Persons claiming under common title.

SEC. 58. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners or in severalty, may unite in an action against any person claiming an adverse estate or interest therein for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.

Kerr, C. C. P., 381.

5001. Parties in interest, when to be joined—When one or more may sue or defend for all.

SEC. 59. Of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants; but if the consent of any one, who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. Tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally bring or defend or continue the prosecution or defense of any action for the enforcement of the rights of such person or persons.

Kerr, C. C. P., 382, 384.

Cited, Smith v. Shrieves, 13 Nev. 326.

A suit was brought by a minor in the name of his mother and guardian. At the time of the trial, the minor had attained his majority, and upon his motion he was joined with his mother as a party plaintiff: Held, error; that it would have been proper to substitute him as the sole plaintiff in her place, but having no joint interest in the cause of action, they could not be united as plaintiffs. Ricord v. C. P. R. R. Co., 15 Nev. 167, 175.

Where there are many persons having a common interest, one or more may sue for the benefit of all, and those who come in and establish their claims share with the plaintiff in the benefits of the decree.

The creditor who commences the action in behalf of himself, and all others who may come in and establish their debts, is not required to give notice to the other creditors or to get their consent to the bringing of the suit. Thompson v. Lake, 19 Nev. 104, 117 (3 A. S. 797, 7 P. 68).

It was the intention of the legislature by this section to make the equity rule as to joinder of parties available in an action at law. In an action against voluntary associations, it is proper to sue the associations as such and join a few natural persons, members of the association, to represent all the members. Branson v. I. W. W., 30 Nev. 270, 290 (95 P. 354).

5002. Plaintiff may sue in one action the different parties to commercial paper—Insurers of property.

SEC. 60. Persons severally liable on the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff; and all or any of them join as plaintiffs in the same action, concerning or affecting the obligation

or instrument upon which they are severally liable. Where the same person is insured by two or more insurers separately in respect to the same subject and interest, such person, or the payee under the policies, or the assignee of the cause of action, or other successor in interest of such assured or payee, may join all or any of such insurers in a single action for the recovery of a loss under the several policies, and in case of judgment a several judgment must be rendered against each of such insurers according as his liability shall appear.

Kerr, C. C. P., 383.

This section authorizes the joinder of a guarantor and an original obligor in the same action. Van Doren v. Tjader, 1 Nev. 387.

The release of one joint debtor operates to release his portion of the debt. Hoppin v. First Nat. Bank, 25 Nev. 84, 92.

5003. Defendants may be sued in name designated in contract—Judgment, how entered.

SEC. 61. In all actions brought on contract, the defendants may be sued by the name or style under which the contract was made, and upon its being shown on the trial who are the persons of whom the name or style are descriptive, judgment may be rendered against them.

5004. Action not to abate by death or transfer—Substitution.

SEC. 62. An action shall not abate by the death or other disability, of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court, on motion, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. After verdict shall have been rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law.

Kerr, C. C. P., 385.

See sec. 6032.

Dissolved corporation may be party for certain purposes, secs. 1191, 1194.

Under this section, where a person is substituted as plaintiff, he does not come in as a new party, as under the old chancery practice, but he takes the place of the original plaintiff, who ceases to be a party to the suit. Virgin v. Brubaker, 4 Nev. 32, 38, 39.

Under this section it is proper to substitute a minor for whom a suit had been brought by guardian as the sole plaintiff in place of the guardian. Ricord v. C. P. R. R. Co., 15 Nev. 175.

Held, that supreme court rule 9 is not in conflict with this section, the two agreeing and allowing the substitution of the representative of a deceased litigant, but the statute going further and directing that the action may be continued by or against his successor in interest or the person to whom he has transferred his interest.

Where there is a conflict between a statute and a supreme court rule, the former will control. Twaddle v. Winters, 29 Nev. 89, 90, 107 (85 P. 280).

5005. Another person may be substituted for the defendant, when—Deposit of money or delivery of property—Conflicting claimants must interplead.

SEC. 63. A defendant against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make

the order. And whenever conflicting claims are or may be made upon a person for or relating to personal property or the performance of an obligation or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made, and applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.

Kerr, C. C. P., 386.

5006. Intervention, when it takes place, and how made—Costs.

SEC. 64. Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant; and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint. The court shall determine upon the intervention at the same time that the action is decided; if the claim of the party intervening is not sustained he shall pay all costs incurred by the intervention.

Kerr, C. C. P., 387.

This section is similar in part to section 599, Stats. 1869, 287, which has had the following citations:

To entitle a person to intervene, he must have such an interest in the matter of litigation that he would either gain or lose by the direct legal operation and effect of the judgment which might be rendered in the suit between the original parties.

Where there is no statement of any fact which entitles petitioner to interevene, the petition must be treated the same as a complaint which fails to state facts sufficient to constitute a cause of action; hence, an objection to its sufficiency can be taken at any time.

The defendant cannot avail itself of the testimony admitted upon the issues presented by an intervention that was improperly allowed by the court. Harlan v. Eureka M. Co., 10 Nev. 92, 94.

A corporation of which the district judge was a stockholder brought mandamus to compel him to pass upon a claim against an insolvent estate: Held, that another claimant had sufficient interest to intervene by asking that he be compelled to call another judge. State ex rel. B. & E. Bank v. Mack, 26 Nev. 430, 441 (69 P. 862).

5007. Associates may be sued by name of association—Summons, how served—Judgment binding.

SEC. 65. When two or more persons, associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been made defendants, and had been sued upon their joint liability.

Kerr, C. C. P., 388.

When a company is sued by its firm name, and on the trial it is proved who composed that company, judgment may not only go against the company property but against the individuals composing the company. Gillig v. Lake Bigler R. Co., 2 Nev. 214, 226.

The "proprietors of the Mexican Mill," a copartnership or unincorporated association, cannot prosecute an action under such copartnership or associate name. Proprietors v. Y. J. S. M. Co., 4 Nev. 40, 42.

An action cannot be maintained in a name as plaintiff which is neither that of a natural person, nor of such an artificial person as is recognized by the law as capable of suing. A proceeding commenced in such a name,

there being no plaintiff, is not an action, but a mere nullity, and may be dismissed at any time. Idem.

This section is similar in part to section 597, Stats. 1869, p. 287, which has had the following citation:

An account was filed in the justice's court against "Irving McKay & Co."; the summons was returned served on "the defendants," and the judgment was entered by default: Held, that the complaint and summons were sufficient to sustain the judgment. Martin v. District Court, 13 Nev. 85, 89.

5008. Court may decide controversy or order other parties brought in.

SEC. 66. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and thereupon the party directed by the court shall serve a copy of the summons in the action, and the order aforesaid in like manner of service of the original summons, upon each of the parties ordered to be brought in, who shall have ten days, or such time as the court may order, after service, in which to appear and plead; and in case such party fail to appear and plead within the time aforesaid, the court may cause his default to be entered, and proceed as in other cases of default, or may make such other order as the condition of the action and justice shall require. And when, in an action for the recovery of real or personal property, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment.

Kerr, C. C. P., 389.

The provision in above section as to bringing in of other parties is not a matter of discretion but of judicial duty and if the parties to the record neglect to raise the question, the court, upon its own motion, will supply the omission; hence, the contention that by answering the complaint and going to trial, the demurrer of defendants upon the ground of defect of parties was waived, is not tenable. Robinson v. Kind, 23 Nev. 330, 338 (47 P. 1).

All parties materially interested either legally or equitably in the subject-matter of the suit must be made parties when their rights will be affected by the final decree. Bliss v. Grayson, 24 Nev. 422, 451 (56 P. 231).

5009. Unknown heirs to real property may be made parties.

SEC. 67. In any action in which the title to real property situate in this state is involved and in which the heir or heirs, or any thereof, of a deceased person may be necessary or proper party or parties defendant and the name or names and place or places of residence of which heir or heirs are unknown to the plaintiff or plaintiffs, such heir or heirs may be made a party or parties defendant by being described in the complaint and summons as the unknown heir or heirs of such deceased person, giving the name and last place of residence of such deceased person, with any further description that may be necessary to reasonably identify him.

5010. Idem—Allegations and proof that names and residences of heirs are unknown.

SEC. 68. In any such action the plaintiff, or plaintiffs, shall allege, in the complaint, and prove at the trial, that diligent search and inquiry have been made by or in behalf of the plaintiff, or plaintiffs, to ascertain the name, or names, and place, or places, of residence of such heir, or heirs, without success, and that the same are and remain unknown to the plaintiff or plaintiffs.

CHAPTER 7

PLACE OF TRIAL

5011. Actions affecting realty tried where subject situated.
5012. Action tried where cause arose.
5013. Actions against or between counties, how brought—Papers delivered to district attorney.
5014. Residence of parties determines place of trial—Change of place.
5015. Change of venue—Grounds.

5011. Actions affecting realty tried where subject situated.

SEC. 69. Actions for the following causes shall be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this act:

1. For the recovery of real property, or an estate, or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

2. For the partition of real property.

3. For the foreclosure of all liens and mortgages on real property. Where the real property is situated partly in one county and partly in another the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action; *provided,* that in the case mentioned in this subdivision if the plaintiff prays in his complaint for an injunction pending the action, or applies pending the action for an injunction, the proper county for the trial shall be the county in which the defendant resides or a majority of the defendants reside at the commencement of the action.

Kerr, C. C. P., 392.

This section is similar in parts to sec. 18, Stats. 1869, p. 198, which has had the following citations:

An order changing the place of trial is not appealable but is properly brought before the court on an appeal from the judgment as an intermediate order involving the merits and necessarily affecting the judgment.

The provisions of the practice act governing the place of trial are not applicable to actions to recover delinquent taxes. State v. Shaw, 21 Nev. 222 (29 P. 321).

An action to cancel a deed of real and personal property located in part in the county in which the action is brought, is an action, in part, within this section, and being substantially a proceeding in rem, may be pursued against a nonresident by publication. Robinson v. Kind, 23 Nev. 330 341 (47 P. 1).

5012. Action tried where cause arose.

SEC. 70. Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

1. For the recovery of a penalty or forfeiture imposed by statute; except, that when it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offense was committed.

2. Against a public officer, or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, does anything touching the duties of such officer.

Kerr, C. C. P., 393.

5013. Actions against or between counties, how brought—Papers delivered to district attorney.

SEC. 71. Actions against a county may be commenced in the district court of the judicial district embracing said county; *provided,* that actions between counties shall be commenced in a court of competent jurisdiction in any county not a party to the action. Immediately on the service of process, it shall be the duty of the officer served to deliver such process, and all papers accompanying such service to the district attorney for such county. Actions brought for or against the county shall be in the name of such county.

Kerr, C. C. P., 394, 411, subd. 5.

5014. Residence of parties determines place of trial—Change of place.

SEC. 72. In all other cases, the action shall be tried in the county in which the defendants, or any one of them, may reside at the commencement

of the action; or, if none of the defendants reside in the state, or if residing in the state, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if any defendant, or defendants, may be about to depart from the state, such action may be tried in any county where either of the parties may reside or service be had, subject, however, to the power of the court to change the place of trial, as provided in this act.

Kerr, C. C. P., 395.

As a general rule, the matter of change of place of trial is within the discretion of the court; but when the motion to change is made on the ground of the residence of defendant, there is no room for the exercise of discretion.

A defendant who comes within purview of this section is entitled, as a matter of right, to have an action against him tried in the county of his residence; the statute is peremptory.

There cannot properly be any such practice as an affirmative motion to retain a cause for trial; everything usually called so is only a matter of defense to a motion for a change.

Where a defendant in a proper case moves to change the place of trial to the county of his residence, he has an absolute right to such change; and the mere fact that he files counter affidavits and contests an effort to retain a cause on the ground of convenience of witnesses, will not amount to any waiver of his right.

The legal presumption of a waiver of any right by a litigant will not be drawn except in a clear case, and especially not when to allow such a presumption would be to deprive a party of his day in court.

Where a defendant in a proper case moves to change the place of trial to the county of his residence, the court is by force of his motion ousted of all jurisdiction in the cause, except to decide upon the proposition of his residence at the time of the commencement of the action, and to transfer the case. Williams v. Keller, 6 Nev. 141, 144.

See State v. Shaw, 21 Nev. 222, 224 (29 P. 321), under sec. 69 of this act.

5015. Change of venue—Grounds.

SEC. 73. If the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant before the time for answering expires demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of the parties, or by order of the court, as provided in this section. The court may, on motion, change the place of trial in the following cases:

1. When the county designated in the complaint is not the proper county.

2. When there is reason to believe that an impartial trial cannot be had therein.

3. When the convenience of the witnesses and the ends of justice would be promoted by the change. When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed; unless otherwise provided by the consent of the parties in writing duly filed, or by order of the court, and the papers shall be filed, or transferred, accordingly.

Kerr, C. C. P., 396, 397.

This section is in part similiar to sec. 21, Stats. 1869, p. 199, which has had the following citations:

See Williams v. Keller, 6 Nev. 144, under last preceding section.

An action against a county is a civil suit; and in the absence of any special provision or statute to the contrary it is governed by the same rules of practice applicable to other civil suits in reference to jurisdiction and change of venue.

Where a county is sued in a judicial district of which it did not form a part, but it appeared and answered without presenting any objection to the jurisdiction: Held, that it thereby waived its right to a change of venue and trial in its own judicial district. Clarke v. Lyon Co., 8 Nev. 182, 186.

Defendants, residents of Eureka County, were sued, in an action for debt, in Lincoln County. Held, that the court had no authority to change the venue because no demand in writing was made therefor, as contemplated by this section. Elam v. Griffin, 19 Nev. 442, 443 (14 P. 582).

The district court of one county has no power to make an order that an action pending in the court of another county shall be transferred to the first-named court. Such an order is void, and gives the court no jurisdiction of the action. Ex Parte Gardner, 22 Nev. 280, 284 (39 P. 570).

Mandamus will issue to compel a judge who was of counsel in an action previous to

his appointment as judge to change the place of trial of such action to some other judicial district although no motion for that purpose was ever made in open court, where the application for the change, signed by petitioner's attorneys, was presented to the judge, the originals later being properly filed, and the motion for removal was informally made, and a list of authorities forwarded to him, he being engaged in judicial duties in another county, and, from his reasons for refusal, it was evident that he would not have granted the motion, had it been formally made. (Talbot, J., dissenting.) Gamble v. District Court, 27 Nev. 233, 247, 248 (74 P. 530).

This section is similar to section 21 of the old practice act, which has had the following citations:

Affidavits which do not show that a fair and impartial trial cannot be had in the county where an action is brought, are not sufficient, under this section, to entitle a party to a change of venue. Hale & N. G. & S. M. Co. v. Bajazette and G. E. G. & S. M. Co., 1 Nev. 322, 323.

An application for a change of venue to suit the convenience of witnesses should not be denied because the application was not made until after the answer was filed and the cause set for trial. Nor is it necessary that the answer should make any allusion to the facts on which such application is based.

The fact that the case had been set down for trial on a certain day should not interfere with an application for change of venue to suit the convenience of witnesses, unless there had been delay in making the application, or the parties had already prepared for the trial by subpenaing witnesses, etc. Sheckles v. Sheckles, 3 Nev. 404, 407.

CHAPTER 8

MANNER OF COMMENCING ACTION

5016. Actions, how commenced.
5017. Complaint and summons, manner of filing and issuing—Alias summons.
5018. Summons, what shall state.
5019. Idem—Answer, time allowed for.
5020. Idem—Notice of claim to be inserted in.
5021. Actions affecting real property—Lis pendens.
5022. Summons, by whom served, proof of, return.
5023. Summons, how served.
5024. Foreign corporation to appoint resident agent upon whom process may be served—Secretary of state.
5025. Idem—When no agent, service on secretary of state or deputy.
5026. When service made by publication.
5027. Idem—Order, mailing copies, personal service, when complete.
5028. Service by publication on unknown heirs.
5029. Idem—Affidavit showing want of knowledge before judgment entered.
5030. Service by publication on unknown parties generally.
5031. Summons served on part of several defendants jointly or severally liable.
5032. Proof of service, how made.
5033. Idem—Affidavit.
5034. Jurisdiction, when acquired.

5016. Actions, how commenced.

SEC. 74. Civil action in the district courts shall be commenced by the filing of a complaint with the clerk of the court, and the issuance of a summons thereon and the placing of the same in the hands of the sheriff of the county, or other person authorized to serve the same; *provided,* that after the filing of the complaint a defendant in the action may appear, answer, or demur, whether the summons has been issued or not, and such appearance, answer, or demurrer shall be deemed a waiver of summons.

Kerr, C. C. P., 405.

The limitation within which adverse action on application for patent for mining claim must be commenced is fixed by the federal statute, but the question as to what constitutes the commencement of an action is determined by this section. Harris v. Helena G. M. Co., 29 Nev. 506, 513 (92 P. 1).

Where the complaint was filed within the thirty days, the filing by defendant of a general demurrer after the thirty days, was a waiver of the issuance of the summons under this section. Idem.

Section 20 of the act of 1861, 26, providing when an action shall be deemed to be commenced, so as to take it out of the statutes, applies to all actions, both real and personal. Robinson v. Imp. S. M. Co., 5 Nev. 44, 75.

This section is largely similar to sec. 22, Stats. 1869, p. 199, which has had the following citations:

Cited, Marshall v. Golden Fleece M. Co., 16 Nev. 176.

Defendant, by demurring and answering, waives the issuance of summons. Iowa M. Co. v. Bonanza M. Co., 16 Nev. 64; Rose v. Richmond M. Co., 17 Nev. 54 (37 P. 1105, affirmed, 114 U. S. 576).

Cited, Sweeney v. Schultes, 19 Nev. 57 (6 P. 44).

Where, in an action under Rev. Stats. U. S. 2326 (U. S. Comp. Stats. 1901, p. 1430),

providing that an adverse action must be commenced within thirty days after the filing of the adverse claim, the complaint was filed within thirty days, the filing by defendants of a general demurrer after the thirty days was a waiver of the issuance of summons under this section, and had the effect of the issuance of summons on the day the complaint was filed, conferring on the court jurisdiction of the subject-matter and the parties. Harris v. Helena G. M. Co., 29 Nev. 506, 513, 515, 516 (92 P. 1).

5017. Complaint and summons, manner of filing and issuing—Alias summons.

SEC. 75. The clerk must indorse on the complaint the day, month, and year the same is filed, and at any time within one year after the filing of the same the plaintiff may cause to be issued a summons thereon. The summons shall be issued and signed by the attorney of the plaintiff, or by the clerk, and when issued by the clerk shall be issued under the seal of the court. If the summons is returned without being served on any or all of the defendants, or if it has been lost, the clerk, upon the demand of the plaintiff, may issue an alias summons in the same form as the original.

Kerr, C. C. P., 406, 408.

5018. Summons, what shall state.

SEC. 76. The summons shall state the parties to the action, the court in which it is brought, the county in which the complaint is filed, the cause and general nature of the action, and require the defendant to appear and answer the complaint within the time mentioned in the next section, after the service of summons, exclusive of the day of service; or that judgment by default will be taken against him, according to the prayer of the complaint, briefly stating the sum of money or other relief demanded in the complaint. The names of the plaintiff's attorneys shall be indorsed upon the summons.

Kerr, C. C. P., 407.
Summons, tax suit, sec. 3663.
Cited, Sweeney v. Schultes, 19 Nev. 57 (6 P. 44); Sherwin v. Sherwin, 33 Nev.— (111 P. 288).

5019. Idem—Answer, time allowed for.

SEC. 77. The time in which the summons shall require the defendant to answer the complaint shall be as follows:

1. If the defendant is served within the county in which the action is brought, ten days.
2. If the defendant is served out of the county, but in the district in which the action is brought, twenty days.
3. In all other cases, forty days.

Kerr, C. C. P., 407.

Where a plaintiff might proceed under either one of two laws prescribing the method of serving summons, one of which laws would require the defendant to answer within twenty days, and the other forty, and the summons were so contradictory and indefinite as not to show under which law the plaintiff was proceeding, the defendant would not be bound to answer within twenty days, and no default could legally be taken until after the expiration of forty days.

When the first clause of a summons requires the defendant to appear and answer within forty days, and the concluding clause notifies him that if he does not answer in twenty days a default will be taken, this is too contradictory and uncertain to require an answer within the shorter period. Kidd v. Four-Twenty M. Co., 3 Nev. 381, 383, 384.

The courts have uniformly held that the provisions of the statute in regard to personal service and published notice must be strictly complied with, or the court is without jurisdiction to proceed.

Process, except in particular cases, requiring an appearance forthwith, is ordinarily void. Golden v. District Court, 31 Nev. 260 (101 P. 1021).

Cited, Sherwin v. Sherwin, 33 Nev.— (111 P. 288).

5020. Idem—Notice of claim to be inserted in.

SEC. 78. There shall also be inserted in the summons a notice in substance as follows:

1. In an action arising on contract for the recovery only of money or damages, that the plaintiff will take judgment for a sum specified therein if the defendant fail to answer the complaint.

2. In other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the court for the relief demanded therein.

Kerr, C. C. P., 407.

The distinction made in above section of notice required in different cases should be observed and enforced by the courts as essential and necessary.

The object of a summons is to put the defendant upon notice of a demand against him, and to bring him into court at the time therein specified.

If the defendant makes a general appearance by filing a demurrer or answer, the court could thereafter, proceed and grant any relief to which the plaintiff is entitled, regardless of the error in the form of the notice inserted in the summons.

Held, that the error of the court in refusing to set aside the summons, on the ground that it did not contain the notice required by the statute, was immaterial and harmless and must be disregarded. Sweeney v. Schultes, 19 Nev. 53, 54–57 (6 P. 44).

The omission in the notice in the summons of the amount for which plaintiff will take judgment on failure to answer, when a certified copy of the complaint served with the summons states the amount, if it be an error, is not one affecting any substantial right, and the court should, in every stage of the proceedings, disregard it. Higley v. Pollock, 21 Nev. 198, 201 (27 P. 895).

Where the notice in a summons in an action on a promissory note is that upon failure to answer the complaint plaintiff will "take judgment * * * according to the prayer of the complaint," and the prayer of the complaint is full and explicit, this is sufficient to warrant the entering of defendant's default and a judgment thereon. Prezeau v. Spooner, 22 Nev. 88, 91 (35 P. 514).

5021. Actions affecting real property—Lis pendens.

SEC. 79. In an action for the foreclosure of a mortgage upon real property, or affecting the title or possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file with the recorder of the county in which the property, or some part thereof, is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property, in that county affected thereby, and the defendant may also in such notice state the nature and extent of the relief claimed in the answer. From the time of filing, only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and in case of the foreclosure of such mortgage all purchasers or incumbrancers, by unrecorded deed or other instrument in writing made prior to the filing of such notice, and subsequent to the date of such mortgage, shall be deemed and held purchasers or incumbrancers subsequent to the filing of such notice, and subject thereto, unless they can show that at the time of filing the notice the plaintiff had actual notice of such purchase or incumbrance.

Kerr, C. C. P., 409.

5022. Summons, by whom served, proof of, return.

SEC. 80. The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by any citizen of the United States over twenty-one years of age; and, except as hereinafter provided, a copy of the complaint, certified by the clerk or the plaintiff's attorney, shall be served with the summons. When the summons shall be served by the sheriff or his deputy, it shall be returned with the certificate or affidavit of the officer, of its service, and of the service of a copy of the complaint, to the office of the clerk of the county in which the action is commenced. When the summons is served by any other person, as before provided, it shall be returned to the office of the clerk of the county in which the action is commenced, with the affidavit of such person of its service, and of the service of a copy of the complaint. If there be more than one defendant to

the action residing within the county in which the action is brought, a copy of the complaint need be served only on one of such defendants.

Kerr, C. C. P., 410.

Where service of a summons has been made, and the demands of the writ satisfied, the conclusive presumption of the law is that its office having been accomplished, no person can effectively thereafter use it for its original purpose.

Where a summons has been served upon a defendant out of the district and afterwards served upon him in the district, with the intention of shortening the time allowed him to answer: Held, that the second service was an absolute nullity. Mayenbaum v. Murphy, 5 Nev. 383, 387, 388.

Courts could acquire jurisdiction over foreign corporations doing business in the state by following the statutory rules for the service of summons by publication, where no agent or other officer was found in the state upon whom service could be made. Brooks v. Nickel Syndicate, 24 Nev. 324(53 P. 527).

Cited, Harris v. Helena M. Co., 29 Nev. 517 (92 P. 1); Sherwin v. Sherwin, 33 Nev. —(111 P. 288).

5023. Summons, how served.

SEC. 81. The summons must be served by delivering a copy thereof attached to a certified copy of the complaint as follows:

1. If the suit is against a corporation formed under the laws of this state; to the president or other head of the corporation, secretary, cashier, or managing agent thereof.

2. If the suit is against a foreign corporation, or a nonresident joint-stock company or association, doing business and having a managing or business agent, cashier, or secretary within this state; to such agent, cashier, or secretary, or to an agent designated in section 82; or in the event no such agent is designated as provided in section 82, to the secretary of state or the deputy secretary of state, as provided in section 83.

3. If against a minor, under the age of fourteen years, residing within this state, to such minor, personally, and also to his father, mother, or guardian; or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

4. If against a person residing within this state who has been judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such person, and also to his guardian.

5. If against a county, city, or town, to the chairman of the board of commissioners, president of the council or trustees, mayor of the city, or other head of the legislative department thereof.

6. In all other cases to the defendant personally.

Kerr, C. C. P., 411.

Service of legal process upon corporation, sec. 1178.

This section is similar to sec. 29 of the old practice act, which has had the following citations:

Service of summons on a corporation may be made by serving a copy of the same on the secretary of the company. Gillig v. Ind. M. Co., 1 Nev. 247, 249.

Service of summons upon a California corporation, made in accordance with this section is valid.

Where an attempted service of summons upon a California corporation was made in this state, and a subsequent service in California, under this section: Held, that it made no difference whether an order refusing to quash the first service was correct or not, it appearing that the second service was good, and no prejudice done. Caples v. C. P. R. R. Co., 6 Nev. 265, 268.

A party relying solely upon a constructive service of summons is bound to prove a strict compliance with some of the modes prescribed by the statute for obtaining such service.

Where the officer certifies that he served the summons upon the business manager of a corporation: Held, that this was not a compliance with the provisions of the statute requiring the service to be upon the managing agent.

Courts must know, and officers must be presumed to know, what the legislature meant by the term managing agent; but courts cannot know what an officer means by a designation unknown to the law. Scorpion S. M. Co. v. Marsano, 10 Nev. 370, 381.

The statutory provisions for acquiring jurisdiction by other than personal service must be strictly pursued. Victor M. & M. Co. v. Justice Court, 18 Nev. 24–27 (1 P. 831).

The service of the summons upon the managing agent was a personal service upon the corporation. Lang Syne Co. v. Ross, 20 Nev. 137 (19 A. S. 337, 18 P. 358).

Held, that in the absence of the personal service required by law, the mailing of a copy of the summons and complaint to the president and trustees of the defendant corporation added no force to the officer's return on the summons. Lonkey v. Keyes S. M. Co., 21 Nev. 312, 317, 318 (17 L. R. A. 351, 31 P. 57).

Under this section, service on an assistant cashier of a bank in charge of a branch bank who has power to sign drafts and correspondence, and who is under the supervision of the cashier, and who has nothing to do with the control or management of the corporation, is not sufficient. Karns v. State Bank & T. Co., 31 Nev. 170, 171, 178 (101 P. 564).

5024. Foreign corporation to appoint resident agent upon whom process may be served—Secretary of state.

SEC. 82. Every incorporated company or association created and existing under the laws of any other state, or territory, or foreign government, or the government of the United States, owning property or doing business in this state, shall appoint and keep in this state an agent upon whom all legal process may be served for such corporation or association. Such corporation shall file a certificate, properly authenticated by the proper officers of such company, with the secretary of state, specifying the full name and residence of such agent, which certificate shall be renewed by such company as often as a change may be made in such appointment, or vacancy shall occur in such agency.

Mutual insurance companies, secs. 1316, 1325; mining companies, sec. 1218. See sec. 1178.

5025. Idem—When no agent, service on secretary of state or deputy.

SEC. 83. If any such company shall fail to appoint such agent, or fail to file such certificate for fifteen days after a vacancy occurs in such agency, on the production of a certificate of the secretary of state showing either fact, which certificate shall be conclusive evidence of the fact so certified to and be made a part of the return of service, it shall be lawful to serve such company with any and all legal process, by delivering a copy to the secretary of state, or, in his absence, to any duly appointed and acting deputy secretary of state, and such service shall be valid to all intents and purposes; *provided*, that in all cases of such service the defendant shall have forty days (exclusive of the day of service) within which to answer or plead. This section shall be construed as giving an additional mode and manner of serving process and as not affecting the validity of any other valid service.

Service on insurance company, on attorney or controller, secs. 1273, 1276, 1316, 1325.

5026. When service made by publication.

SEC. 84. When the person on whom the service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, and the fact shall appear by affidavit, to the satisfaction of the court or judge thereof, and it shall appear, either by affidavit or by a verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons.

Kerr, C. C. P., 412.

To obtain a legal service by publication of a summons against a nonresident, it must appear by affidavit, not only that the defendant is a nonresident, but also that a cause of action exists against him; and a judgment procured in such a case before a justice of the peace, when the latter fact does not appear by affidavit, is void. Little v. Currie, 5 Nev. 90–92.

This section applies to justices' courts; but the precise method of acquiring jurisdiction prescribed by law must be pursued.

This section and section 511 (old act) of the practice act are to be construed together

as parts of the same statute relating to the same general subject of jurisdiction; the latter being evidently intended to cover residents of this state, while the former was intended to reach nonresidents.

Affidavit for publication of summons against a nonresident defendant, which states legal conclusions instead of facts, is fatally defective. Roy v. Whitford, 9 Nev. 370, 372.

Cited, Scorpion S. M. Co. v. Marsano, 10 Nev. 385; Victor M. & M. Co. v. Justice Court, 18 Nev. 21, 24 (1 P. 831); Lonkey v. Keyes S. M. Co., 21 Nev. 315 (17 L. R. A. 351, 31 P. 57); Robinson v. Kind, 23 Nev. 340 (47 P. 1); Brooks v. Nickel Syndicate, 24 Nev. 324 (53 P. 597).

Held, that an affidavit stating that complaint had been filed to recover a sum of money, which cause of action was fully set out therein, and making the complaint part of the affidavit, was sufficient to authorize the justice to order service of summons by merely publication, though the complaint consisted merely of a copy of an account for goods sold and delivered. Pratt v. Stone, 25 Nev. 365, 370, 371 (60 P. 514).

5027. Idem—Order, mailing copies, personal service, when complete.

SEC. 85. The order shall direct the publication to be made in a newspaper, to be designated by the court or judge thereof as one most likely to give notice to the person to be served, for a period of six weeks, and at least once a week during said time. In case of publication, where the residence of a nonresident or absent defendant is known, the court or judge shall also direct a copy of the summons and complaint to be deposited in the postoffice, directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint, out of the state, shall be equivalent to completed service by publication and deposit in the postoffice, and the person so served shall have forty days after said service to appear and answer or demur. The service of summons shall be deemed complete in cases of publication at the expiration of six weeks from the first publication, and in cases when a deposit of a copy of the summons and complaint in the postoffice is also required, at the expiration of six weeks from such deposit.

Kerr, C. C. P., 413.

In a suit brought against the Scorpion S. M. Co., a corporation, where the justice of the peace deposited a copy of the complaint and summons in the postoffice addressed to "Robert Apple, R. W. H. Martin, San Francisco, California," and there was no evidence at the time of such deposit, before the justice that either Apple or Martin was connected with the corporation in any manner or capacity whatever: Held, that this was not a compliance with the law which required the summons to be directed to the defendant. Scorpion S. M. Co. v. Marsano, 10 Nev. 370, 383.

An affidavit for publication of summons against a foreign corporation must show that the corporation had no officer within this state upon whom personal service could be made, and must state the facts showing what diligence had been used to obtain personal service. An affidavit which merely states that the constable had returned the summons not served, and that due diligence had been used to find defendant, is not sufficient.

If service is made by publication, and the residence of the absent defendant is known, the service is void unless the court directs a copy of the complaint and summons to be deposited in the postoffice, directed to the person to be served, at his place of residence.

A deposit made by an attorney without an order of court is insufficient.

The affidavit must state the facts necessary to show that a cause of action exists against the defendant. An averment that the amount claimed was "due from the defendant to plaintiff" is simply an allegation of a legal conclusion, and is insufficient. Victor M. Co. v. Justice Court, 18 Nev. 21, 22, 25 (1 P. 831).

Where a constructive service is relied upon to sustain a judgment, a strict compliance with the provisions of the statute is required; otherwise the court acquires no jurisdiction over the defendant. Coffin v. Bell, 22 Nev. 169 (58 A. S. 738, 37 P. 240).

A void service of a summons does not preclude another and perfect service of the same; and the fact of the summons having been returned and filed does not prevent its being withdrawn and properly served. Idem.

The order for publication of summons must succeed, not precede, the issuance of the summons. Idem.

Personal service of the summons out of the state is by this section made equivalent to publication and deposit in the postoffice. Coffin v. Bell, 22 Nev. 169, 183 (58 A. S. 738, 37 P. 240).

Where an affidavit for publication of summons sets forth that the "defendant is a nonresident of this state, but is a resident of the State of California, county unknown," it is not necessary to deposit in the postoffice a copy of the complaint and summons. The statute requires such deposit only in case the place of residence of the defendant

is known. Pratt v. Stone, 25 Nev. 366, 374 (60 P. 514).

When personal service without the state is made in lieu of publication, or in lieu of publication and deposit in the postoffice, the service is not complete until expiration of six weeks from such personal service, and, where such service was made November 10th, defendant had forty-two days after the service in addition to the statutory period of forty days in which to answer, and a default entered December 21st, and a decree thereon entered December 28th, were premature, and plaintiff could have them set aside. Sherwin v. Sherwin, 33 Nev.— (111 P. 286).

5028. Service by publication on unknown heirs.

SEC. 86. When it appears to the satisfaction of the court or the judge thereof from the verified complaint or from an affidavit in behalf of the plaintiff or plaintiffs in any action that any heir or heirs of a deceased person is or are necessary or proper party or parties defendant, that a cause of action in favor of the plaintiff or plaintiffs exists against him or them, and that due diligence to ascertain the name or names and the place or places of residence of such heir or heirs has been unsuccessfully exercised by, or in behalf of the plaintiff or plaintiffs, the court or judge may grant an order for the service of the summons in such action on such unknown heir or heirs by publication in like manner and for the period of time prescribed by the laws of the State of Nevada for the publication of summons in other actions; and such service when made shall as to such unknown heir or heirs be sufficient to confer on the court jurisdiction to hear and determine the issues in such action, and the judgment of the court based on such service and duly made and entered in such action shall bind each and every one of the heirs of such deceased person whose name or names and place or places of residence were so as aforesaid unknown to the plaintiff or plaintiffs with like effect as if the name or names of such heir or heirs had been inserted in the complaint and published summons, regardless of whether such heir or heirs shall subsequently appear to have been residents or nonresidents of the State of Nevada at the time of such publication.

5029. Idem—Affidavit showing want of knowledge before judgment entered.

SEC. 87. Before final judgment in favor of the plaintiff or plaintiffs and against any such unknown heir or heirs shall be entered in any such action every such plaintiff shall make and file with the clerk of the court in which said action is pending an affidavit showing that since the commencement of said action he has neither learned the name or names of any such heir or heirs nor received any information indicating a line of search or inquiry which if properly pursued might lead to the discovery of such name or names and that the same still remains or remain unknown to such plaintiff; or, if he has received such information, such affidavit shall so state and show that diligent search and inquiry along the lines indicated had been made by or in behalf of such plaintiff and resulted in failure to learn such name or names and that the same are still unknown to such plaintiff.

5030. Service by publication on unknown parties generally.

SEC. 88. If any plaintiff shall allege that there are, or that he verily believes that there are, persons, other than heirs, interested in the subject-matter of the complaint, whose names he cannot insert therein, because they are unknown to him, and shall describe the interest of such persons, and how derived, so far as his knowledge extends, the court, or the judge thereof, shall make an order for the publication of summons, reciting, moreover, the substance of the allegations of the complaint in relation to the interest of such unknown parties; and after the completion of service by such publication, the court shall have jurisdiction of such persons, and any judgment or decree rendered in the action shall apply to and conclude

such persons with respect to such interest in the subject-matter of the action.

Colorado, Mills An. C. (1896), 44; Utah, 2951.

5031. Summons served on part of several defendants jointly or severally liable.

SEC. 89. Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action be against the defendants jointly indebted upon a contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendant served; or,

2. If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants.

Kerr, C. C. P., 414.

Cited, Gillig v. Lake Bigler R. Co., 2 Nev. 225, 226.

"Copartnership property and assets" is joint property, within the meaning of that term as used in this section. Whitmore v. Shiverick, 3 Nev. 288, 289, 304–308.

Where an action was commenced against two persons, alleged to be partners, for a debt, alleged to be a partnership debt, and one of them only was served, who appeared and filed an answer admitting all the allegations of the complaint; and the court found in favor of plaintiff, and rendered judgment against both parties, to be enforced against the joint property of both, and the separate property of the defendant served: Held, that the proceeding and judgment were authorized by, and in strict accordance with, this section.

This section does not require, nor does it seem to authorize, one of several joint debtors, upon whom only service is made, to appear in answer for his codefendants who are not served; but service upon any one alone is sufficient to warrant a judgment against the joint property.

A judgment by confession of one joint debtor will not reach the joint property, but be effective only against him who authorizes its entry, for the reason that this section does not authorize such a judgment by confession. Flannery v. Anderson, 4 Nev. 437, 441–443.

This section does not provide a rule for the disposition of actions against several joint debtors, where all have been served and appeared, and the proceedings against one are suspended by bankruptcy. Tinkum v. O'Neale, 5 Nev. 93, 98.

Where the defendants in an action against two are both served with the summons, a judgment, under this section, cannot be entered against one to be executed against his separate property and the joint property of both. Mayenbaum v. Murphy, 5 Nev. 383, 387.

5032. Proof of service, how made.

SEC. 90. Proof of the service of the summons shall be as follows:

1. If served by the sheriff or his deputy, the affidavit or certificate of such sheriff or deputy; or,

2. If by any other person, his affidavit thereof; or,

3. In case of publication, the affidavit of the publisher, his foreman or principal clerk, or other employee having knowledge thereof, showing the same, and an affidavit of a deposit of a copy of the summons in the postoffice, if the same shall have been deposited; or,

4. The written admission of the defendant.

Kerr, C. C. P., 415.

See Mayenbaum v. Murphy 5 Nev. 383, 388, under section 80 of this act.

Where a party relies upon the publication of summons, it is necessary not only to publish a copy of the summons but to deposit another copy in the postoffice directed to the defendant at his place of residence if known; and the statute prescribes that such deposit shall be proved by affidavit. Scorpion S. M. Co. v. Marsano, 10 Nev. 370, 383, 384.

See Sherwin v. Sherwin, under sec. 85 of this act.

5033. Idem—Affidavit.

SEC. 91. In case of service otherwise than by publication, the certificate or affidavit shall state the time and place of the service.

Kerr, C. C. P., 418.

5034. Jurisdiction, when acquired.

SEC. 92. From the time of the service of the summons in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to personal service of the summons upon him.

Kerr, C. C. P., 416.

The statute, having prescribed what shall be an appearance for certain purposes, does not preclude an appearance in a different manner for other purposes.

Although an alternative writ of mandamus may not properly be returnable in less than ten days after its issuance, yet if the respondent appears upon such writ and asks for time to make his answer, and that time is granted, he cannot afterwards be heard to complain that the writ was irregular as to the time when a return was required.

A general appearance not only waives defect in a writ, or summons, but gives jurisdiction over the person in cases where the writ was void. State ex rel. Curtis v. McCullough, 3 Nev. 202, 214.

Cited, Stevenson v. Mann, 13 Nev. 274; In re Schnitzer, 33 Nev. — (112 P. 849).

CHAPTER 9

PLEADINGS

5035. Defined.

SEC. 93. The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.

Kerr, C. C. P., 420.

5036. Forms and sufficiency, how determined.

SEC. 94. All the forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed in this act.

Kerr, C. C. P., 421.

Cited, Howard v. Richards, 2 Nev. 132 (89 A. D. 520).

This section manifestly refers to the pleadings in cases of mandamus as well as to the pleadings in other actions or proceedings provided for by the act. State ex rel. Piper v. Gracey, 11 Nev. 232.

Secs. 37–40 of the acts of 1869, 196, corresponding with secs. 94–97 of this act, were cited in State v. Y. J. S. M. Co., 14 Nev. 220, 238.

See McKim v. District Court, under sec. 96 of this act.

5037. Pleadings of plaintiff—Of defendant.

SEC. 95. The pleadings on the part of the plaintiff are:

1. The complaint;
2. The demurrer to the answer;
3. The reply.

And on the part of the defendant:

1. The demurrer to the complaint;
2. The answer;
3. The demurrer to the reply.

Kerr, C. C. P., 422; Utah, 2958.

Where a document styled a "motion" was filed by the defendant asking that the complaint be dismissed for certain reasons set forth therein, ascertaining a defense which could only be asserted by demurrer or answer, it should have been dismissed as having no legal standing and not merely denied. Symons-Kraussman Co. v. Reno B. Co., 32 Nev. 241 (107 P. 96).

This section is similar to section 38 of the old practice act which has had the following citations:

After an answer is filed, judgment cannot be entered by default, although the answer may not be served.

Service of answer is for convenience of plaintiff's counsel and may be enforced by the court, but is not necessary to give jurisdiction of the defendant. Maples v. Geller, 1 Nev. 233, 236.

CHAPTER 10
COMPLAINT

5038. Complaint, what to contain.

SEC. 96. The complaint shall contain:

1. The title of the action, specifying the name of the court and the name of the county in which the action is brought, and the names of the parties to the action, plaintiff and defendant.

2. A statement of the facts constituting the cause of action, in ordinary and concise language.

3. A demand for the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof shall be stated.

Kerr, C. C. P., 426.

A complaint setting out a note in full, and alleging the execution and delivery to, and ownership thereof by plaintiff, and that there is "due, owing and payable," a certain sum, is a good complaint, although it does not in direct terms allege the nonpayment of the note. Howard v. Richards, 2 Nev. 128, 131 (89 A. D. 520).

A complaint under this section must contain a statement of the fact constituting the cause of action. Under the statute a mere detention of property will not support an action, but the detention must be wrongful. Whether the detention is rightful or wrongful depends on the circumstances of the particular case, and must be shown by the complaint. Perkins v. Barnes, 3 Nev. 564.

The allegation that the defendant became indebted to plaintiff is simply a statement of a conclusion of law; the facts out of which the indebtedness arose should be stated. Cal. State Tel. Co. v. Patterson, 1 Nev. 158, 161.

A complaint on a promissory note is good where all other facts are properly alleged, although nonpayment is not alleged in direct terms. Howard v. Richards, 2 Nev. 128.

In an action on a promissory note, the averment in the complaint, that plaintiff "is now the holder and owner of said promissory note," is immaterial. Allen v. Riley, 15 Nev. 452.

Though the holder of a promissory note, which proves to be void, may, in a proper case, recover on the consideration for which the note was intended to be given, he cannot do so unless the pleadings set out such consideration. Wayman v. Torreyson, 4 Nev. 124.

An allegation that defendant "is a corporation duly organized and doing business as such in the State of Nevada" is equivalent to an averment that such defendant is a corporation duly organized in the State of Nevada.

An amendment which changes the parties to a suit cannot be made. Little v. V. & G. H. W. Co., 9 Nev. 317.

The allegations of complaint stated and held equivalent to a positive averment that the note was made and delivered to the plaintiff, as surviving partner in the name of the firm and to be sufficient to enable plaintiff to maintain the action. Manning v. Smith, 16 Nev. 85.

To hold one who has obtained the legal title of land as trustee for another, who claims to be the owner, as being substituted to the rights of a third person, it is necessary to set forth and show that such third person was the owner. Gentry v. Low, 4 Nev. 99.

Where a complaint for work, labor and services alleged an indebtedness in a sum certain therefor, but omitted to allege specifically the value of the same or a promise to pay; and defendant, without demurring, put in an answer denying indebtedness, admitting service performed, and setting up payment in full, and there was a verdict for plaintiff: Held, that whatever the defects of the complaint, they were cured by defendant's pleading and by the verdict. McManus v. Ophir S. M. Co., 4 Nev. 15.

Failure to allege "promise to pay": Held, "complaint did not state facts sufficient, etc." Gerrens v. Huhn & Hunt S. M. Co., 10 Nev. 137.

Where a complaint upon a contract does not show a breach of the contract by the defendant, it fails to state facts sufficient to constitute a cause of action. Hutchins v. Sutherland, 22 Nev. 363 (40 P. 409).

Averments that money was expended "to defendant's use," and alleging his "promise to pay," may be treated as surplusage. Orr Water Ditch Co. v. Reno Water Co., 19 Nev. 60 (6 P. 72).

Complaint must allege not only value of wood delivered to defendant, but that their contract made them liable for that quantity. Horton v. Ruhling, 3 Nev. 498.

Allegation of actual damage or facts from which it must be inferred is indispensably necessary to recover more than nominal damages. Richardson v. Jones & Denton, 1 Nev. 405.

If complaint charges indebtedness, manner in which it accrued, promise to pay and refusal, it is sufficient. Williams v. Glasgow, 1 Nev. 533.

If an appellate court finds on investigation that the facts stated in the complaint, with all legal intendments in its favor, will not support the judgment, the court can do no less than reverse such judgment, although

counsel may not have hit on the proper grounds for asking a reversal.

Where the terms and conditions of an agreement are set out in the complaint and the violation of that agreement is charged against the defendant, if it is such an instrument as the law requires to be in writing and the complaint is silent as to whether it was oral or written, courts will presume it to be a lawful or written agreement until the contrary is shown. Van Doren v. Tjader, 1 Nev. 380.

If, in an action on insurance policy, the claimant alleges generally a compliance with its terms and verifies his pleadings, he will not be put to proof unless in the answer particular breach is averred. Healey v. Imperial Ins. Co., 5 Nev. 268.

Where a complaint alleged that plaintiff was the owner and entitled to the possession of lands, that there were improvements thereon, that defendants were in possession and threatened to destroy and would if not enjoined destroy such improvements, and that defendants were insolvent and unable to respond in damages: Held, sufficient to support an order enjoining defendants from removing the improvements or committing waste.

After a verdict or decision in a district court upon issue joined, the complaint will be supported by every legal intendment, if there be nothing material in the record to prevent it.

The rule that carries every legal intendment in favor of a complaint in case there has been a judgment thereon after issue joined, equally applies in case of an order, such as an injunction, made upon it after a full hearing. Meadow Valley M. Co. v. Dodds, 6 Nev. 261.

An allegation that property was assessed "in an amount greatly in excess of that authorized by law" is not sufficient to raise any issue as to the true cash value of the property, and to raise such issue such value should be alleged.

The statute expressly provides that "where the person complaining of the assessment has refused to give the assessor his list under oath, no reduction shall be made by the board of equalization in the assessment made by the assessor." Held, that an allegation that defendant made application to the board of equalization for a reduction of his assessment must include the averment that the sworn statement was furnished to the assessor, or that no demand was made for it, in order to constitute a defense to an action for taxes. State v. Sadler, 21 Nev. 13 (33 P. 799).

In an action for the diversion of water, the complaint, filed April 11, 1894, was sworn to November 17, 1893, and it was objected that it did not, for this reason, state a cause of action existing at the time of the commencement of the action: Held, that the allegations of the complaint should be construed as referring to the time of the commencement of the action, and that it was sufficient. Ronnow v. Delume, 23 Nev. 29 (41 P. 1074).

In a case where plaintiff was not allowed to remove fixtures: Held, there was no necessity of alleging the value of the fixtures. The plaintiffs only had to allege the extent of the damage they sustained in consequence of not being permitted to remove the same. Prescott v. Wells, Fargo & Co., 3 Nev. 82.

Although all forms of pleadings are abolished, a party must prove the case he makes in his pleadings, or fail. A party who alleges a contract, and seeks to recover under that contract, cannot recover on proof of a trespass. Carson R. L. Co. v. Bassett, 2 Nev. 249.

It is as necessary, under our system of practice, to maintain in pleadings the distinction between actions arising out of torts and those growing out of contracts, as it was under the old practice.

If the pleadings be upon contract, a recovery should not be allowed if the proof be of a trespass, from which there could be no presumption of a contract. Knickerbocker & N. S. M. Co. v. Hall, 3 Nev. 194.

When a statute makes an instrument void it is proper to plead the statute specially.

At common law, a party could not plead his own fraud or violation of law as a defense to an action. But when the statute declares certain instruments shall be void, a defendant may plead the facts which make it void, although in so doing he shows a violation of law by himself. It being the policy of the law to allow such pleas to prevent the violation of the statute. Maynard v. Johnson, 2 Nev. 16.

In an action for damages for improperly suing out a writ of attachment, it is necessary to aver that the attachment was sued out "without probable cause." Levey v. Fargo, 1 Nev. 415.

In a complaint for money expended and services performed, it is always best to use technical words, the meaning of which have long been established, rather than phrases of doubtful import. The complaint should state the money was expended for the use and benefit of defendant, and at his instance and request. So in regard to the performance of labor. Huguet v. Owen, 1 Nev. 464.

The allegation that defendant became indebted to plaintiff is simply a statement of a conclusion of law; the facts out of which the indebtedness arose should be stated. Cal. St. Co. v. Patterson, 1 Nev. 151.

In a complaint by a husband to recover a chose in action given in the name of his wife, but belonging to the community, it is sufficient for him, to show his right of action, to allege either that he is the owner or that it is common property, and even both allegations in the same complaint will not render it demurrable. Crowe v. Van Sickle, 6 Nev. 146.

This provision is uniformly construed to mean that the plaintiff must set forth in his

complaint, specifically, every fact in an issuable form, which is necessary to establish his right of action, or which, if admitted to be true, or not denied by the defendant, will enable the court to grant the relief sought. State ex rel. Piper v. Gracey, 11 Nev. 232.

A cause of action is stated by an allegation of the facts, and the alleged amount of damages demanded. Waters v. Stevenson, 13 Nev. 165 (29 A. R. 293).

A judgment must accord with, and be sustained by the pleadings of the party in whose favor it is rendered. Marshall v. Golden Fleece M. Co., 16 Nev. 156, 176.

Cited, Rose v. Richmond M. Co., 17 Nev. 52 (37 P. 1105, affirmed 114 U. S. 576); Gillson v. Price, 18 Nev. 116, 117 (1 P. 459).

A complaint showing a good cause of action is not bad because of unnecessary averments contained in it. Orr Water Ditch Co. v. Reno Water Co., 19 Nev. 60, 65 (6 P. 72).

Cited, Branson v. I. W. W., 30 Nev. 285 (95 P. 354).

A complaint alleging that plaintiff is a subcontractor for the erection of walls of a state prison, and responsible for the labor thereon; that defendant (the architect for the state) had, pursuant to an agreement with the plaintiff and the principal contractor, received from the state, for the use and benefit of plaintiff, the sum of fifteen thousand dollars, and had only paid out on plaintiff's account ten thousand dollars, and refused to pay over or account for the remaining five thousand dollars; states fact sufficient to constitute a cause of action. Richardson v. Hoole, 13 Nev. 492.

In all cases where there is nothing remaining to be done except the payment of money by the defendant, the plaintiff may declare generally upon the common counts; and the facts which create the indebtedness or liability need not, in order to sustain the count of money had and received, be stated in the complaint. White Pine Co. Bank v. Sadler, 19 Nev. 98 (6 P. 941).

Upon a review of the pleadings in an action against the trustees of a corporation for levying unnecessary assessments with intent to defraud the stockholders, and to have the assessments declared null and void, and for other relief: Held, that the demurrer to the complaint was properly overruled; that the complaint stated the cause of action against the personal defendant; and that the corporation was a proper party defendant. Marshall v. Golden Fleece M. Co., 16 Nev. 157.

If the plaintiff is the owner of a promissory note, he has a right of action notwithstanding the defendant may be in possession thereof.

The plaintiff's want of possession changes the character of the proof to be introduced, but not the character of the pleadings.

A party need not plead the loss of an instrument to be allowed to introduce secondary evidence of its contents. It is only necessary to prove such loss on trial.

When a note sued on is in possession of defendant, the remedy is at law. McClusky v. Gerhauser, 2 Nev. 47.

Corresponding to sec. 39, of the act of 1869, 196, cited, State v. Northern Belle M. Co., 12 Nev. 92.

Under this section, and sec. 102, matters in abatement or bar can only be set up in the answer. McKim v. District Court, 33 Nev. — (110 P. 4).

Where the answer raises a question preliminary to the right of a court to determine the merits, it is proper for the court to first determine such matters before considering issues going to the merits. Idem.

5039. Joinder of causes of action.

SEC. 97. The plaintiff may unite several causes of action in the same complaint, when they all arise out of:

1. Contracts, express or implied; or,

2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; or,

3. Claims to recover specific personal property, with or without damages for the withholding thereof; or,

4. Claims against a trustee, by virtue of a contract, or by operation of law; or,

5. Injuries to character; or,

6. Injuries to person; or,

7. Injuries to property—

but the causes of action so united shall all belong to only one of these classes and shall affect all the parties to the action, and not require different places of trial, and shall be separately stated; *provided, however,* that an action for malicious arrest and prosecution, or either of them, may be united with an action for either injury to character or to the person.

Kerr, C. C. P., 427.

Notwithstanding this section authorizes the recovery of mesne profits and damages for waste committed on the premises in the action of ejectment, it is not necessary for the plaintiff to prove damages to entitle him to recover the possession of the premises. Dilley v. Sherman, 2 Nev. 69.

This section is not inconsistent with the revenue law. State v. Y. J. S. M. Co., 14 Nev. 237, 239, 241, 255–258, 261.

Cited, Lake v. Lake, 17 Nev. 235 (50 P. 878).

An objection that the several causes of action set out in the complaint are not separately stated, is waived by answering to the merits. Gardner v. Gardner, 23 Nev. 207, 211 (45 P. 139).

CHAPTER 11

DEMURRER TO COMPLAINT

5040. Demurrer, grounds for.
5041. Demurrer must specify grounds.
5042. Defendant may demur, or demur and answer.
5043. Amended complaint to be served—Answer—Default.
5044. Objections not apparent taken by answer.
5045. Objections not taken, what deemed waived.

5040. Demurrer, grounds for.

SEC. 98. The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties for the same cause; or,

4. That there is a defect or misjoinder of parties, plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action; or,

7. That the complaint is ambiguous, unintelligible, or uncertain.

Kerr, C. C. P., 430.

The defendant in a suit brought for the collection of delinquent taxes has a right to interpose a demurrer to the complaint upon any of the grounds set forth in this section as a cause of demurrer. State v. Y. J. S. M. Co., 14 Nev. 220, 238, 239.

The district court has jurisdiction of an action involving the question of title to real property. If the jurisdiction is irregularly acquired, objection upon this question cannot be raised by demurrer. James v. Leport, 19 Nev. 175, 178 (8 P. 47).

If the question of misjoinder is not raised by either demurrer or answer, it is waived. Ronnow v. Delume, 23 Nev. 33 (41 P. 1074).

A complaint which is ambiguous in respect to whether the cause of action is based on an express or implied contract should be attacked on the seventh ground above set forth and not by general demurrer. Burgess v. Helm, 24 Nev. 242 (51 P. 1025).

It is error in an action against a voluntary unincorporated association in which are joined a few natural persons, members of the association, to represent all the members, to grant a combined motion to strike the complaint, to vacate the summons and annul all the proceedings of the cause and dismiss the action by dismissing only as to the association of such, since the court, not being able to grant the relief asked, should have denied the motion in toto and left the parties to their remedy by demurrer. Branson v. I. W. W., 30 Nev. 270, 292 (95 P. 354).

For further authorities on demurrer, see sec. 96 of this act.

Demurrer admits truth of whatever is contained in complaint, but does not admit new facts. Van Doren v. Tjader, 1 Nev. 380.

"Misjoinder of causes of action"—Action on official bond. Cause of action against principal and sureties cannot be united with cause of action for damages against principal alone. State v. Kruttschnitt, 4 Nev. 179.

Misjoinder of actions cannot be taken advantage of on general demurrer. Ruhling v. Hackett, 1 Nev. 360.

An action on an undertaking given to the sheriff upon the return of property replevined, should be brought in the name of the real party at interest, and where the name of the sheriff was joined with his as plaintiff: Held, that the complaint was demurrable for misjoinder of parties. McBeth v. Van Sickle, 6 Nev. 134.

The proper practice when a demurrer is overruled is to give time to replead. Eastabrook v. Upton, 1 Nev. 398.

A joint demurrer may be sustained as to one defendant, and overruled as to another. Wood v. Olney, 7 Nev. 109.

When an answer is put in effective only

in form, plaintiff should demur and not move for judgment on the pleadings. He cannot by moving for judgment on the pleadings, deprive defendant of the right to amend. Gallagher v. Dunlap, 2 Nev. 326.

If a complaint states a substantial allegation only by way of recital, the defect should be objected to specifically and cannot be taken advantage of on general demurrer.

Where a demurrer to a complaint was overruled and judgment rendered for plaintiff, there being neither showing nor suggestion of a defense on the merits: Held, that the defendant was not entitled as a matter of absolute right to answer.

Where a demurrer to a complaint has been overruled an entry of default is not a prerequisite to the rendition of judgment. Winter v. Winter, 8 Nev. 129, 130.

To file answer and move for judgment on pleadings irregular; must be sustained, however, when complaint is fatally defective in not stating a cause of action. Lake Bigler R. Co. v. Bedford, 3 Nev. 399.

When a pleading contains a defective statement of a cause of action, as distinguished from a statement of a defective cause of action, the defect, if relied on by the opposite party, should be pointed out by demurrer, so as to afford an opportunity to amend—neither the spirit of the code nor properly speaking its practice allowing a substantial right to be cut off by a mere technical judgment without giving such opportunity. Treadway v. Wilder, 8 Nev. 91.

If, instead of demurring, advantage be taken of a defective pleading by motion for judgment, the court should permit an amendment of the pleading where an amendment will cover the defect the same as if a demurrer had been interposed. Cal. St. Co. v. Patterson, 1 Nev. 151.

If a demurrant wishes to take advantage of any supposed error in overruling the demurrer he must let final judgment be entered upon it; for, if he shall answer after such ruling, he waives any objection to it, except the two radical defects—want of jurisdiction and failure to state a cause of action. Harden v. Emmons, 24 Nev. 329 (53 P. 854).

If party demur for nonjoinder of parties or uncertainty, he must let final judgment be entered on demurrer. If he answers, he waives right to rely on demurrer. Lonkey v. Wells, 16 Nev. 271; Hammersmith v. Avery, 18 Nev. 225; Gardner v. Gardner, 23 Nev. 207.

A defense that an action should not be maintained for the reason that the defendants were authorized to commit the acts complained of by general law of the state, should be taken by demurrer and not by plea in abatement.

A defense on the ground of a defect of parties defendant should be made by answer, and not by plea in abatement. Mandelbaum v. Russell, 4 Nev. 551.

Misjoinder of actions cannot be taken advantage of on a general demurrer. Ruhling v. Hackett, 1 Nev. 360.

A demurrer for "defect of parties plaintiff," or "that plaintiff has not legal capacity to sue," will not reach the defect of a proceeding in a name, as plaintiff, of neither a natural or artificial person. Proprietors of Mexican Mill v. Y. J. S. M. Co., 4 Nev. 41, 43 (97 A. D. 510).

The demurrer should have specified distinctly in what the uncertainty or ambiguity or want of clearness consisted. This it wholly fails to do, and ought not, therefore, to be considered. Ferguson v. V. & T. R. R. Co., 13 Nev. 187.

See McKim v. District Court, under sec. 96 of this act.

5041. Demurrer, must specify grounds.

SEC. 99. The demurrer shall distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so it may be disregarded.

Kerr, C. C. P., 431.

5042. Defendant may demur, or demur and answer.

SEC. 100. The defendant may demur to the whole complaint, or to one or more of several causes of action stated therein and answer the residue; or may demur and answer at the same time.

Kerr, C. C. P., 431.

5043. Amended complaint to be served—Answer—Default.

SEC. 101. If the complaint be amended, a copy of the amendment shall be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendment shall be served upon every defendant to be affected thereby, or upon his attorney, if he has appeared by attorney. The defendant shall answer in such time as may be ordered by the court, and judgment by default may be entered upon failure to answer, as in other cases.

Kerr, C. C. P., 432.

5044. Objections not apparent taken by answer.

SEC. 102. When any of the matters enumerated in section 98 do not

appear upon the face of the complaint, the objection may be taken by answer.

Kerr, C. C. P., 433.

A defense on the ground of a defect of parties defendant should be made by answer, and not in the way of a plea in abatement. Mandelbaum v. Russell, 4 Nev. 551, 556.

Cited, Ronnow v. Delmue, 23 Nev. 33 (41 P. 1074).

See McKim v. District Court, under sec. 96 of this act.

5045. Objections not taken, what deemed waived.

SEC. 103. If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

Kerr, C. C. P., 434.

Cited, Proprietors Mexican Mill v. Y. J. S. M. Co., 4 Nev. 43 (97 A. D. 510); Howe v. Howe, 4 Nev. 472.

If the question of misjoinder is not raised by either demurrer or answer, it is waived. Ronnow v. Delmue, 23 Nev. 33 (41 P. 1074).

CHAPTER 12

ANSWER

5046. Answer, what to contain—Denial—Counterclaim.
5047. Counterclaim defined.
5048. Effect of failure to set up counterclaim.
5049. Cross-demands compensated as far as equal.
5050. Several defenses allowed.
5051. Proceeding when new party necessary to decision on counterclaim.
5052. Cross-complaint against codefendants—Delay—Provisional remedies.

5046. Answer, what to contain—Denial—Counterclaim.

SEC. 104. The answer of the defendant shall contain:

1. If the complaint be verified, a special denial to each allegation of the complaint, controverted by the defendant, or a denial thereof according to his information and belief; if the complaint be not verified, then a general denial to each of such allegations; but a general denial shall only put in issue the material and express allegations of the complaint.

2. A statement, in ordinary and concise language, of any new matter constituting a defense or counterclaim.

Kerr, C. C. P., 437.

An answer in which an officer attempts to justify his seizure under execution should not only set out the execution but also the judgment on which it is founded, and show distinctly that defendant is an officer properly acting under such execution. McDonald v. Prescott, 2 Nev. 109.

The answer must be direct and not argumentative. Gallagher v. Dunlap, 2 Nev. 326.

The answer may be stricken out when frivolous or not verified when it should be, and judgment may be rendered on complaint if defect is not cured in reasonable time. Lehane v. Keyes, 2 Nev. 361.

Under our practice an equitable defense may be set up to an action at law, and in this way the common law and chancery practice become to some extent blended in the same case. Lucich v. Medin, 3 Nev. 99 (93 A. D. 376).

The answer may be held to aid the complaint and sustain the action. Hawthorne v. Smith, 3 Nev. 182.

New matter in avoidance of prima facie case should be specially pleaded, and no proof of such facts can be had unless specially pleaded. Horton v. Ruhling, 3 Nev. 498.

All mere formal objections to a complaint are waived by a plea of confession and avoidance. McManus v. Ophir S. M. Co., 4 Nev. 15.

In an action for the conversion of chattels alleged by plaintiff to be of a certain value, defendant denied that they were of such value or of any greater value than a certain less sum named: Held, that this was an admission that they were worth the less sum named.

Where a fact is admitted by the pleadings, there is no necessity of proof upon the point. Carlyon v. Lannan, 4 Nev. 156.

A general denial in an answer which is required to be verified is inoperative; the very object of putting a defendant on his oath being to have a specific answer on his conscience as to each separate allegation of the complaint. State v. W. U. T. Co., 4 Nev. 338.

A defendant claiming affirmative relief must plead as fully as if he were a plaintiff. Rose v. Treadway, 4 Nev. 455.

All affirmative matter in an answer is taken as denied. Cahill v. Hirschman, 6 Nev. 57.

An estoppel cannot be proved if it be not sufficiently pleaded. Sharon v. Minnock, 6 Nev. 378.

As "new matter" is matter in confession and avoidance, such as cannot be introduced in evidence under an answer simply denying the allegations of the complaint, it follows that in an action on a contract, it is not proving new matter for the defendant to show that there are other terms in the contract relied on besides those shown by plaintiff, whether such proof be calculated to defeat the action or only to reduce the damages. Ferguson v. Rutherford, 7 Nev. 385.

Where a complaint in replevin alleged the value of the property taken to be five hundred and seventy dollars, and the answer denied "that the property and the complaint described is or was of the value of five hundred and seventy dollars"; and the court, without any testimony on the subject, found the value as alleged: Held, that the pleadings justified a finding of any sum less than five hundred and seventy dollars, and that, if by finding that exact amount, any error occurred, it was of that infinitesimal character which could do no injury. Blackie v. Cooney, 8 Nev. 41.

Where a complaint is of an equitable nature, such as in a suit to quiet title to the use of water, the mere fact that the answer raises questions as to the plaintiff's title does not destroy the equitable character of the action. Lake v. Tolles, 8 Nev. 285.

Where the complaint alleges that the defendant agreed to pay plaintiff four dollars per day for his services, and the answer does not deny that allegation, no issue is presented by the pleading as to the value of plaintiff's services. Smith v. Lee, 10 Nev. 208.

Where a defendant relies upon the defense of estoppel he must, in his answer, allege the facts constituting the estoppel. Hansen v. Chiatovich, 13 Nev. 395.

Cited, Gillson v. Price, 18 Nev. 117.

In an action for possession of a schooner alleged to have been wrongfully detained by defendant, together with damages for its detention, a claim for services rendered by defendant in caring for such schooner, not exceeding the amount of damages demanded, is connected with the subject-matter of the action, and is a proper counterclaim, though on the trial plaintiff fails to recover any damages. Lapham v. Osborne, 20 Nev. 168 (18 P. 881).

In an action to recover delinquent taxes and penalties, an answer denying a possessory claim to the lands and stating facts showing that the rights claimed are untaxable, presents a good defense, although it does not deny all claim, title or interest in the property assessed. State v. C. P. R. R. Co., 21 Nev. 94 (25 P. 442).

A party that relies on an equitable defense to an action of ejectment must set up in his answer the facts constituting the same or it will not be considered. Brady v. Husby, 21 Nev. 453 (33 P. 801).

The defendant can set up an equitable defense to an action for the possession of lands, and as to such defense the case is to be tried in the same manner and upon the same principles as apply to an original bill in equity. South End M. Co. v. Tinney, 22 Nev. 19 (35 P. 89).

Where, by the language of an answer, it was evidently intended to set up a prescriptive title in defendants, and the cause is tried without objection to its sufficiency, all objections to it have been waived. Authors v. Bryant, 22 Nev. 242 (38 P. 439).

5047. Counterclaim defined.

SEC. 105. The counterclaim mentioned in the last section shall be one existing in favor of the defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising upon contract, any other cause of action arising also upon contract and existing at the commencement of the action.

Kerr, C.C. P., 438; see Kerr, C. C. P., secs. 439–440.

A counterclaim arising upon contract cannot be pleaded by a defendant to an action brought to recover damages for a trespass. Nor can unliquidated damages arising out of a tort be pleaded as a counterclaim in an action brought upon contract. Knickerbocker & N. S. M. Co. v. Hall, 3 Nev. 198.

The defendant, alleging a counterclaim, must establish it to the satisfaction of the jury by a preponderance of evidence. Margaroli v. Milligan, 11 Nev. 96.

In an action arising upon contract, any other cause of action arising also upon contract and existing at the time of the commencement of the action is a good counterclaim. Foulkes v. Rhodes, 12 Nev. 225, 232.

A demand of one of several defendants cannot be pleaded as a counterclaim to a demand upon which they are jointly liable unless there is an agreement that it shall so operate. Davis v. Noteware, 13 Nev. 421, 423.

See Lapham v. Osborne, 20 Nev. 168, 171 (18 P. 881), under last preceding section.

Plaintiff's failure to object in the trial court by demurrer or otherwise that the facts alleged in the answer did not constitute a proper counterclaim, constitutes a waiver of his objection thereto. Ennor v. Raine, 27 Nev. 178, 214 (74 P. 1).

5048. Effect of failure to set up counterclaim.

SEC. 106. If the defendant omit to set up a counterclaim in the cases mentioned in the first subdivision of the next preceding section, neither he nor his assignee can afterward maintain an action against the plaintiff therefor.

Kerr, C. C. P., 439.

5049. Cross-demands compensated as far as equal.

SEC. 107. When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up, neither shall be deprived of the benefit thereof by the assignment or death of the other, but the two demands shall be deemed compensation, so far as they equal each other.

Kerr, C. C. P., 440.

5050. Several defenses allowed.

SEC. 108. The defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer in a manner in which they may be intelligibly distinguished.

Kerr, C. C. P., 441.
Cited, Perkins v. Barnes, 3 Nev. 566.

5051. Proceeding when new party necessary to decision on counterclaim.

SEC. 109. When a new party is necessary to a final decision upon a counterclaim, the court may either permit such party to be made, or direct that the counterclaim be stricken out of the answer and made the subject of a separate action.

Iowa, McClain's An. C. 3868; Kansas (1889), 4180; Utah, 2973.

5052. Cross-complaint against codefendants — Delay—Provisional remedies.

SEC. 110. When a defendant has a cause of action affecting the subject-matter of the action against a codefendant, he may, in the same action, file a cross-complaint against the codefendant. The defendant thereto may be served as in other cases, and defense thereto shall be made in the time and manner prescribed in regard to the original complaint, and if such defendant file an answer to the cross-complaint a reply may be filed and served in time and manner as in the case of a reply to an answer to the original complaint, and with the same right of obtaining provisional remedies applicable to the case. The prosecution of the cross-complaint shall not delay the trial of the original action unless the court otherwise direct.

Kerr, C. C. P., 442; Utah, 2974; Iowa, McClain's An. C. 3869.

CHAPTER 13

DEMURRER TO ANSWER

5053. Grounds of demurrer to answer.
5054. Grounds of demurrer to counterclaim.
5055. Idem — How taken — Demurrer and reply—Grounds specified.
5056. Objections taken by reply—Not taken, deemed waived—Exceptions.

5053. Grounds of demurrer to answer.

SEC. 111. The plaintiff may, within ten days after the service of the

answer, demur to the same or any defense therein, upon one or more of the following grounds:

1. That several causes of counterclaim have been improperly joined;
2. That the answer does not state facts sufficient to constitute a defense;
3. That the answer is ambiguous, unintelligible, or uncertain.

Kerr, C. C. P., 443, 444.

5054. Grounds of demurrer to counterclaim.

SEC. 112. The plaintiff may also demur to a counterclaim where one or more of the following objections thereto appear upon the face of the counterclaim:

1. That the court has not jurisdiction of the subject thereof;
2. That the defendant has not legal capacity to maintain the same;
3. That there is another action pending between the same parties for the same cause;
4. That there is a defect or misjoinder of parties;
5. That the counterclaim does not state facts sufficient to constitute a cause of action;
6. Because the cause of action stated is not pleadable as a counterclaim to the action;
7. Because it is ambiguous, unintelligible or uncertain.

Mont. Civ. P. 714; Utah, 2977.

5055. Idem—How taken—Demurrer and reply—Grounds specified.

SEC. 113. Such demurrer may be taken to the whole answer, or to any of the alleged defenses or counterclaims therein; and the plaintiff may demur to one or more of the several defenses and counterclaims, and reply to the residue of the counterclaims. The demurrer shall distinctly specify the grounds of objection taken, and when to a counterclaim, in a similar manner to that required in a demurrer to the complaint; otherwise, it may be stricken out.

Mont. Civ. P., 712, 715; Utah, 2978.

5056. Objections taken by reply—Not taken, deemed waived—Exceptions.

SEC. 114. When any of the objections to a counterclaim mentioned in sections 111 and 112, do not appear upon the face of the answer, the objection may be taken by reply. If not so taken, either by the demurrer or reply, the plaintiff shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the counterclaim does not state facts sufficient to constitute a cause of action.

Kerr, C. C. P., 433, 434; Utah, 2979.

CHAPTER 14

REPLY

5057. Reply to counterclaim, what to contain—When filed and served.

SEC. 115. There shall be no reply except:

1. Where a counterclaim is alleged; or,
2. Where some matter is alleged in the answer to which the plaintiff claims to have a defense, by reason of the existence of some fact which avoids the matter alleged in the answer. When a reply must be filed, it shall be served and filed within ten days after the service of the answer or of notice of the overruling of a demurrer, and it shall consist of:

First—A specific denial of each allegation or counterclaim controverted, or a denial on information and belief; or,

Second—Any new matter not inconsistent with the complaint constituting a defense to the matter alleged in the answer; or the matter in the

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answer may be confessed, and any new matter alleged, not inconsistent with the complaint, which avoids the same.

Mont. Civ. P., 720; Utah, 2980.

5058. Failure to demur or reply admits counterclaim.

SEC. 116. If the plaintiff fails to demur or reply to the counterclaim, the same shall be deemed admitted.

Mont. Civ. P., 722; Utah, 2981.

5059. Demurrer to reply for insufficiency.

SEC. 117. The defendant may, within ten days, demur to the reply, or any defense therein, when upon the face thereof it does not state facts sufficient to constitute a defense, stating such grounds.

Mont. Civ. P., 723; Utah, 2982.

CHAPTER 15

VERIFICATION

5060. Pleadings to be subscribed—When to be verified.
5061. Verification, when may be omitted.
5062. Written instrument — When deemed admitted.
5063. Defense, written instrument—Exception to rules.
5064. Verification of pleadings, how and by whom made—Actions on behalf of state by attorney-general need not be verified.

5060. Pleadings to be subscribed—When to be verified.

SEC. 118. Every pleading shall be subscribed by the party or his attorney, and when the complaint is verified by affidavit the answer and reply shall be verified also, except as provided in the next section.

Kerr, C. C. P., 446.

Cited, Marshall v. Golden Fleece M. Co., 16 Nev. 176.

A verified answer should not deny facts unquestionably true. Parties doing so lay themselves liable to the penalties of the criminal law. Roeder v. Stein, 23 Nev. 92 (42 P. 867).

5061. Verification, when may be omitted.

SEC. 119. The verification of the answer or reply required in the last section may be omitted when an admission of the truth of the complaint or answer, as the case may be, might subject the party to prosecution for felony.

Kerr, C. C. P., 446.

5062. Written instrument—When deemed admitted.

SEC. 120. When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the answer denying the same be verified.

Kerr, C. C. P., 447, 449.

5063. Defense, written instrument—Exception to rules.

SEC. 121. When the defense to an action is founded upon a written instrument, and a copy thereof is contained in a verified answer, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the plaintiff file with the clerk, ten days after the service of the answer, an affidavit denying the same; *provided*, the execution of the instrument is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is, upon demand, refused an inspection of the original. Such demand must be in writing, served by copy, upon the adverse party or his attorney, and filed with the papers in the case.

Kerr, C. C. P., 448, 449.

This section is in part similar to section 54, Stats. 1869, 204, which has had the following citation:

Where a contract set up in defendant's answer did not appear upon its face to have been signed or executed by either of the parties, and did not purport to be a complete instrument, plaintiff was not required to file an affidavit denying its execution and genuineness. Tonopah Lumber Co. v. Riley, 30 Nev. 312, 318 (95 P. 1001).

5064. Verification of pleadings, how and by whom made—Actions on behalf of state by attorney-general need not be verified.

SEC. 122. In all cases of the verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true. And where a pleading is verified, it shall be by the affidavit of the party, unless he be absent from the county where the attorneys reside, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except the party, he shall set forth in the affidavit the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; or when the state, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts; except that in actions prosecuted by the attorney-general, in behalf of the state, the pleadings need not, in any case, be verified.

Kerr, C. C. P., 446.

Where there is a defective verification of an answer, the defendant should be allowed to correct the error if he desires to do so. Heintzelman v. L'Amoroux, 3 Nev. 377–379.

The verification to a petition for mandamus in the form of a jurat to ordinary affidavits is sufficient. State ex rel. Sears v. Wright, 10 Nev. 167, 172.

When the allegations of the complaint are made positively, and no averments stated upon information or belief, a verification, which omits the words "except as to those matters which are therein stated on his information and belief and as to those matters he believes it to be true," but otherwise follows the form prescribed by statute, is sufficient. Kelly v. Kelly, 18 Nev. 49 (51 A. R. 732, 1 P. 194).

CHAPTER 16

GENERAL RULES OF PLEADING

5065. Pleadings liberally construed.
5066. Errors, not substantial, disregarded.
5067. Sham and irrelevant matter may be stricken out—Bill of particulars.
5068. Account, how pleaded—Copy furnished, when.
5069. Description of real property in pleading.
5070. Judgment, how pleaded—Proof.
5071. Conditions precedent, how pleaded—Proof.
5072. Private statutes, how pleaded.
5073. Libel or slander, how pleaded—Proof.
5074. Idem—Truth and mitigating circumstances—Evidence.
5075. Allegations not controverted taken as true—Exception.
5076. Supplemental complaint, answer, and reply.
5077. Pleadings after complaint to be filed and served.
5078. Corporation, partnership, representative capacity pleaded generally.
5079. Corporate existence need not be proved unless denied.

5065. Pleadings liberally construed.

SEC. 123. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties.

Kerr, C. C. P., 452.

Cited, Howard v. Richards, 2 Nev. 132 (89 A. D. 520).

Because, under our practice, the pleadings are to be liberally construed, with a view to substantial justice between the parties, it does not follow that the substantial rules of pleading can be disregarded. Knickerbocker G. & S. Mining Co. v. Hall, 3 Nev. 199.

This and the following section have liberalized the rules of construction applicable to pleadings so as not only to embrace the whole of the English statutes of jeofails and amendments, but to go somewhat

beyond. McManus v. Ophir S. M. Co., 4 Nev. 15.

A petition for mandamus to compel the calling of a first annual meeting of the stockholders of a mining corporation for the election of the second board of trustees alleged that such meeting should have been held on a certain day two months before; that it was not called or held; that in consequence of failure to call it the petitioner requested the incumbent board of trustees, in writing, to call such meeting, at as early a day as practicable, and that the incumbent board refused, and continued to refuse to call such meeting, or any meeting, for the election of trustees: Held, that though as a pleading the petition might have been more explicit on the point that no election had been held, it was not so defective as to warrant a refusal of the writ on the ground of showing of that fact. Flagg v. Board of Trustees, 4 Nev. 401, 408.

The old common-law rule, that a pleading must be construed most strongly against the pleader, is replaced by the broader, more sensible and just rule of the code, that it shall be liberally construed with a view to substantial justice between the parties. State v. C. P. R. R. Co., 7 Nev. 99, 103.

This section applies merely to the construction of the language and the terms used, and has no reference to the question of the sufficiency of the facts or matters of substance. It is to be applied, as was the rule under the old system, mainly where words are equivocal and terms and expressions are capable of different meanings. State ex rel. Piper v. Gracey, 11 Nev. 232.

The rule of construing pleadings most strongly against the pleader has been changed by this section. Ferguson v. V. & T. R. R. Co., 13 Nev. 184, 191.

5066. Errors, not substantial, disregarded.

SEC. 124. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect.

Kerr, C. C. P., 475.

Cited, Levey v. Fargo, 1 Nev. 418.

Where a complaint in the nature of a bill in equity sets out distinctly most of the facts necessary to entitle the plaintiff to the relief sought, but omits one or two material allegations or facts, and these facts are clearly stated and admitted in the answer, the answer may be held to aid the complaint and sustain the action. Hawthorne v. Smith, 3 Nev. 182, 190 (93 A. D. 397).

See McManus v. Ophir M. Co., 4 Nev. 15, under preceding section.

Cited, Harper v. Mallory, 4 Nev. 454.

Construction of pleading in petition for mandamus. Flagg v. Lady Bryan M. Co., 4 Nev. 401.

After issue has been joined and a decision rendered upon the merits, it is the duty of appellate courts to support the pleadings by every legal intendment if there is nothing material in the record to prevent it. Skyrme v. Occidental M. and M. Co., 8 Nev. 228.

The general tendency of the decisions is to look with disfavor upon mere technical objections which relate solely to the form of the process or proceedings, especially where it is apparent that the error is one which has caused no substantial injury to the complaining party. Sweeney v. Schultes, 19 Nev. 58 (6 P. 44).

The omission in the notice in the summons of the amount for which plaintiff will take judgment on failure to answer, when a certified copy of the complaint served with the summons states the amount, if it be an error, is not one affecting any substantial right, and the court should, in every stage of the proceedings, disregard it. Higley v. Pollock, 21 Nev. 198, 207 (27 P. 895).

The rule of construing proceedings most strongly against the pleader has been changed. For the purpose of determining its effect, a pleading should be liberally construed. Ferguson v. V. & T. R. R. Co., 13 Nev. 184.

Technical error to be disregarded, notice not properly served but purpose accomplished. Lake v. Lake, 16 Nev. 363.

Where no substantial right of the appellant can possibly be affected by an error occurring in the lower court, both law and common sense require courts to disregard such error. Prezeau v. Spooner, 22 Nev. 88, 91 (35 P. 514).

Cited, Burgess v. Helm, 24 Nev. 249 (51 P. 1025).

It was held, under this section, where plaintiff and others, several owners of different lots, sued for the diversion of waters therefrom and a demurrer for misjoinder of parties and causes of action was sustained, it was improper to strike out plaintiff's amended complaint in which he sued alone; the allegations of the amended complaint relating alone to property, acts and matters set out in the original complaint, and both demanding damages and general relief. Smith v. Wells Estate Co., 29 Nev. 411, 419 (91 P. 315).

See Branson v. I. W. W., 30 Nev. 270, 293 (95 P. 354) under section 98 of this act.

Cited, Hoffman v. Owens, 31 Nev. 484 (103 P. 414).

A recognizance reciting that "an indictment having been found charging W. with the crime of uttering and passing false paper," sufficiently designates the crime without stating that the false paper was passed with intent to defraud. State v. O'Keefe, 32 Nev. 331 (108 P. 2).

5067. Sham and irrelevant matter may be stricken out, when—Bill of particulars.

SEC. 125. Sham and irrelevant answers and replies and so much of any pleading as may be irrelevant, redundant or immaterial, may be stricken out on motion, and upon such terms as the court, in its discretion, may impose. When any pleading is too general in its terms to be readily understood, the court may, on motion, require the same to be made more specific and certain, or may require a bill of particulars to be filed therewith.

Kerr, C. C. P., 453.

5068. Account, how pleaded—Copy furnished, when.

SEC. 126. It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but he shall deliver to the adverse party within five days after a demand thereof, in writing, a copy of the account, or be precluded from giving evidence thereof. The court, or a judge thereof, may order a further account when the one delivered is too general, or is defective in any particular.

Kerr, C. C. P., 454.

5069. Description of real property in pleading.

SEC. 127. In an action for the recovery of real property, such property shall be described with its metes and bounds, in the complaint, or with other equal certainty.

Kerr, C. C. P., 455.

5070. Judgment, how pleaded—Proof.

SEC. 128. In pleading a judgment or other determination of a court, or officer of especial jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

Kerr, C. C. P., 456.

In pleading the judgment or other determination of a court of limited jurisdiction, it is made necessary by this section to allege that such judgment or determination was duly made or given.

Without such an allegation in the pleading, the proof of the judgment proceedings of such court would be inadmissible. Keyes v. Grannis, 3 Nev. 548, 551.

In bringing suit on a judgment recovered in a sister state, it is not necessary to allege in the complaint that the court, in which the judgment was rendered, had jurisdiction either of the subject-matter of the action, or of the defendant. Want of jurisdiction is a matter of defense. Phelps v. Duffy, 11 Nev. 80, 85.

The fact of a suit or the judgment therein cannot be proved by parol. Davis v. Noteware, 13 Nev. 421.

5071. Conditions precedent, how pleaded—Proof.

SEC. 129. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall establish on the trial the facts showing such performance.

Kerr, C. C. P., 457.

In an action brought by a county against the sureties on an official bond of the county treasurer, to recover an amount of money for which the treasurer was in default, it is not necessary, in order to entitle the county to recover, that the complaint should specifically aver a performance of the several acts required to be performed by the county commissioners, but an averment that the commissioners complied with all the requirements and conditions of said bond, and the requirements of all acts of the legislature pertaining to the official bonds of county officers is sufficient. White Pine Co. v. Herrick, 19 Nev. 34, 36, 37 (5 P. 276).

5072. Private statutes, how pleaded.

SEC. 130. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

Kerr, C. C. P., 459.

5073. Libel or slander, how pleaded—Proof.

SEC. 131. In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall establish on the trial that it was so published or spoken.

Kerr, C. C. P., 460.

5074. Idem—Truth and mitigating circumstances—Evidence.

SEC. 132. In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of the damages; and, whether he prove the justification or not, he may give in evidence the mitigating circumstances.

Kerr, C. C. P., 461.

In an action for libel, the intent and motive of the defendant in the publication of the alleged libelous article, may be shown in mitigation of damages. Thompson v. Powning, 15 Nev. 195, 204.

5075. Allegations not controverted taken as true—Exception.

SEC. 133. Each material allegation of the complaint not controverted by the answer, and each material allegation of new matter in the answer not controverted by the reply, where a reply is required, must, for the purposes of the action, be taken as true. But an allegation of new matter in the answer to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party.

Kerr, C. C. P., 462; Utah, 2996.

When the death of one of the defendants is put in issue by the pleadings, it should, like every other issue of fact, be left to the jury. Fowler v. Houston, 1 Nev. 469, 472.

Under our practice, all affirmative matter in an answer is taken as denied. Cahill v. Hirschman, 6 Nev. 57, 60.

A defendant's plea of estoppel is new matter and he is bound to plead and prove it. Gillson v. Price, 18 Nev. 110, 117 (1 P. 459).

Where, in an action for services as agent from June 30, 1896, to June 30, 1900, the answer alleged the determination of the agency on February 24, 1897, there is an admission of liability for part of the time in question which will render a general verdict for defendant erroneous. Manning v. Bowman, 26 Nev. 451, 453 (69 P. 995).

If it be conceded that new matter alleged against a defendant in the answer of a codefendant is deemed denied without answer or reply thereto, the rule is not applicable where the answer setting up the new matter is not served on such defendant. Gulling v. Washoe County Bank, 28 Nev. 450 (82 P. 800).

Cited, in dissenting opinion of Talbot, J., Gulling v. Washoe County Bank, 29 Nev. 278 (89 P. 25).

"A material allegation in a pleading is one essential to the claim or defense and which could not be stricken from the pleading without leaving it insufficient." Above being sec. 66 of the act of 1869, 196, cited, Gillson v. Price, 18 Nev. 117 (1 P. 459).

5076. Supplemental complaint, answer, and reply.

SEC. 134. Either party may be allowed to make a supplemental complaint, answer, or reply, alleging facts material to the case, which have happened, or have come to his knowledge, since the filing of the former pleading; such new pleading shall not be considered a waiver of former pleadings.

Kerr, C. C. P., 464; Utah, 2998.

5077. Pleadings after complaint to be filed and served.

SEC. 135. All pleadings subsequent to the complaint must be filed with the clerk and copies thereof served upon the adverse party or his attorney.

Kerr, C. C. P., 465; Utah, 2999.

5078. Corporation, partnership or representative capacity pleaded generally.

SEC. 136. A plaintiff suing as a corporation, partnership, executor, guardian, or in any other way implying corporate, partnership, representative, or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver the same generally, or as a legal conclusion, and where a defendant is held in such capacity or relation a plaintiff may aver such capacity or relation in the same general way.

Iowa, McClain's An. C. 3923; Utah, 3000.

5079. Corporate existence need not be proved unless denied.

SEC. 137. In an action by or against a corporation, the plaintiff need not prove upon the trial the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff or defendant, as the case may be, is not a corporation.

Utah, 3000.
Due incorporation cannot be attacked collaterally, sec. 1154.
See sec. 1184.

CHAPTER 17

VARIANCE, MISTAKES IN PLEADINGS, AND AMENDMENTS

5080. Variance not prejudicial deemed immaterial—Amendment.
5081. Idem—Order, if variance immaterial —Amendment.
5082. Idem—Failure of proof distinguished from variance.
5083. Amendments as of course—If demurrer to answer or reply be overruled, what facts deemed denied—Time for pleading over.
5084. Discretionary power of court as to amendments, defaults, mistakes, neglects; defendant not personally served.
5085. Defendant's name unknown — Fictitious name used.
5086. Time to amend, answer, or reply runs from service of notice—Exception.

5080. Variance not prejudicial deemed immaterial—Amendment.

SEC. 138. No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just.

Kerr, C. C. P., 469.

5081. Idem—Order, if variance immaterial—Amendment.

SEC. 139. Where the variance is not material, as provided in the next preceding section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

Kerr, C. C. P., 470.

5082. Idem—Failure of proof distinguished from variance.

SEC. 140. Where, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof.

Kerr, C. C. P., 471.

5083. Amendments as of course—If demurrer to answer or reply be overruled, what facts deemed denied—Time for pleading over.

SEC. 141. Any pleading may be amended once by the party as of course,

and without costs, at any time before the time for pleading to it has expired, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have ten days thereafter in which to answer, reply, or demur to the amended pleading. A demurrer is not waived by filing an answer or reply at the same time; and when the demurrer to a complaint or counterclaim is overruled and there is no answer or reply filed, the court may, upon such terms as may be just, allow an answer or reply to be filed. If a demurrer to the answer or reply be overruled, the facts alleged therein must be considered as denied to the extent mentioned in section 133.

Kerr, C. C. P., 472.

5084. Discretionary power of court as to amendments, defaults, mistakes, neglects; defendant not personally served.

SEC. 142. The court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may upon like terms enlarge the time for an answer, reply, or demurrer, or demurrer to an answer or reply filed. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may upon like terms allow an answer or reply to be made after the time limited; and may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; and when, from any cause, the summons, and a copy of the complaint in an action have not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action.

Kerr, C. C. P., 473.

The object of this section is to relieve a party from the effects of some judgment or order made by the court in its regular proceedings; not to give some affirmative right which he has lost by his own conduct, but in regard to which the court has made no order whatever. Killip v. Empire M. Co., 2 Nev. 35, 43–45.

When default is improperly taken, defendant should apply to the court during the term for relief. Kidd v. Four Hundred and Twenty M. Co., 3 Nev. 381.

When upon the trial of a cause it appears that plaintiff's complaint is so defective as not to stay the cause of action, the court should either grant leave to plaintiff to amend his complaint or dismiss the action without prejudice. Horton v. Ruhling, 3 Nev. 498.

Cited, Proprietors Mexican M. v. Y. J. S. M. Co., 4 Nev. 44 (97 A. D. 510).

The punctuation after the words "excusable neglect," in this section, as printed, is absurd; there should be a full stop after these words.

Courts should be liberal in setting aside defaults, when it appears that the party defaulted has a good defense, and has been guilty only of carelessness and inattention, without wilful or fradulent delay. Howe v. Coldren, 4 Nev. 171, 175.

On a motion to open a judgment by default defendant presented his affidavit that he had employed an attorney to defend him in due time; that the attorney had filed a demurrer and advised him that it was good and would be sustained, and ample time be given to answer; that immediately afterwards defendant was called away and unavoidably detained until after the demurrer was overruled, and till the next day (Sunday) after the five days given to answer had expired; that the next day (Monday), when he came to prepare and file his answer, he found that default and judgment had been entered against him and that he had a meritorious defense; and his attorney also presented an affidavit that during the five days allowed to answer, he had made repeated efforts to advise with the defendant but without success; and that he had every reason to suppose until the evening of the last day, that the time to answer would be extended by consent. Held, a case of inexcusable negligence, and that the refusal of the court below to open the default and judgment was proper.

Howe v. Coldren, 4 Nev. 171, so far as

the supreme court refused to interfere with the order of the court below in setting aside the default in that case, was correctly decided; but the opinion contains many dicta on the subject of defaults which are not applicable to the facts involved therein, and are therefore not authority. Harper v. Mallory, 4 Nev. 447, 448, 452, 454.

The allowance of the filing of an answer after the time prescribed by statute is a matter very much in the discretion of the court, and especially so where there has been no default entered and there is no showing, but a failure to plead has occasioned any delay or injury to the opposite party. Conley v. Chedic, 7 Nev. 336.

An amendment which changes the parties to a suit cannot be made. Little v. V. & G. H. W. Co., 9 Nev. 320.

After the term of court expires the records cannot be amended, unless there is something in the record to amend by. Clark v. Strouse, 11 Nev. 76.

The court has no jurisdiction at a subsequent term to set aside a default or vacate a decree or judgment rendered at a previous term of court unless its jurisdiction is saved by some proper proceeding instituted within the time allowed by law. Daniels v. Daniels, 12 Nev. 118; State v. First Nat. Bank, 4 Nev. 358; Lang Syne M. Co. v. Ross, 20 Nev. 127 (19 A. S. 334, 18 P. 358).

A party wishing to amend his pleading ought, as a general rule, to ask leave of the court to amend when objections to the sufficiency of the pleadings are made, and before the introduction of testimony; but courts in allowing amendments are necessarily clothed with discretionary power, and whenever an offer is made to amend at any such stage of the proceedings, that the opposite party will not lose an opportunity to fairly present his case, it cannot be said that the court has abused its discretion in allowing an amendment. McCausland v. Ralston, 12 Nev. 195, 203 (28 A. R. 781).

Courts have the power, as between parties to a suit, in furtherance of justice, to amend the pleadings by adding to or striking out, names of parties plaintiff or defendant; but this power cannot be exercised so as to change the rights and liabilities of third parties. Quillen v. Arnold, 12 Nev. 235, 245, 250.

Cited, State v. Con. Va. M. Co., 13 Nev. 202.

On motion of one joint defendant, the judgment may be set aside as to both. Stevenson v. Mann, 13 Nev. 268.

If evidence is objected to because the pleadings are defective, the court should allow the pleadings to be amended. Jeffree v. Walsh, 14 Nev. 144.

Defendant was sued and served with process as "The San Francisco Sulphur company." It suffered default. At a subsequent term it specially appeared under its full name of "The San Francisco Sulphur Mining company," and moved to set aside the default, upon the ground of a technical mistake in its name: Held, that this section was only intended to apply for the benefit of those who have a meritorious defense and who offer to make it, and not to those who offer a mere technical excuse for not answering in time. Jones v. S. F. Sulphur Co., 14 Nev. 172, 174, 175.

A judgment entered by default should not be set aside upon affidavits and an answer which failed to show that the defendant had a good and meritorious defense to the action. The judgment should not be set aside to enable the defendant to raise some technical objection. Ewing v. Jennings, 15 Nev. 379, 382.

The court, after the findings were made, properly denied plaintiff's application to amend its complaint so that it should conform to the findings of the referee. Marshall v. Golden Fleece G. & S. M. Co., 16 Nev. 157.

The manner of vacating judgments is regulated by statute, and the statutory provisions must be complied with, in order to authorize the court to act. The court has no jurisdiction to set aside a judgment upon a mere motion. State ex rel. Smith v. District Court, 16 Nev. 371, 373.

In construing the provisions of this section: Held, that a defendant corporation, in a case where personal service was made upon its managing agent, cannot have the judgment set aside, and leave given to answer, after the term has expired at which the judgment was rendered.

The above clause giving the party the right to move "within six months after the rendition of any judgment in such action to answer to the merits of the original action," only applies to cases where the defendant has not been personally served with summons. Lang Syne G. M. Co. v. Ross, 20 Nev. 127, 136 (19 A. S. 337, 18 P. 358).

On application to set aside the default of defendant, it appeared that the defendants procured the suit to be instituted against themselves. They employed one attorney for both sides, paying all fees, and managed the entire case for a time, withdrew the demurrer they had filed, and asked for and obtained ten days to file an answer, but filed none, and, after allowing nearly a year to pass without further action, a default was entered against them. They alleged that the action was an amicable one instituted for their benefit, on plaintiff's verbal agreement to convey to them on obtaining judgment, and the plaintiff agreed not to take a default against them: Held, that this did not excuse their delay in filing an answer, and their negligence in having one attorney only to manage both sides of the case, and plaintiff's subsequent action in assigning the judgment to the third person was not grounds sufficient to authorize the court to set aside the default. Haley v. Eureka County Bank, 20 Nev. 410, 421 (22 P. 1098).

The courts should liberally exercise the

power of amendment for the purpose of establishing the truth and sustaining the substance of the proceedings before them, and when a decision upon the sufficiency of an affidavit might operate as a surprise and deprive appellant of a substantial right, leave will be granted to amend the proof of service. Elder v. Frevert, 13 Nev. 279 (3 P. 237).

In support of a motion to set aside a default and judgment thereon, an affidavit of merits made by the attorney, is sufficient, when it shows that he is familiar with all the facts in the case.

Facts recited and held that the neglect to file an answer, while reprehensible, was not inexcusable, and that the motion to open the default should have been granted, upon such terms as would be just. (Murphy, J., dissenting.)

An application to open a default should be made immediately. Horton v. New Pass G. & S. M. Co., 21 Nev. 184 (27 P. 376).

Held, that where defendants were not personally served with summons, and where judgment had been rendered against them in the action or an appearance for them by an unauthorized attorney, they were not guilty of laches where they commenced proceedings to set aside the judgment at any time within six months from the date of the judgment. Stanton-Thompson Co. v. Crane, 24 Nev. 171, 178, 181 (51 P. 116).

Where the matter of the allowance of cost still remains in the hands of the court under a motion to retax or strike out, the court has power to permit the cost bill to be amended so as to include jury fees incurred in such courts. State ex rel. Cohn v. District Court, 26 Nev. 253, 258 (66 P. 743).

Under facts in this case, held, the motion or order ought not to have covered less than the vacation of the whole judgment, and the restoration of their right to defend the suit (Per Talbot, J., concurring). Mitchell v. Mitchell, 28 Nev. 126 (79 P. 50).

After reciting facts, held, that defendant was not guilty of inexcusable delay, and was entitled to a vacation of the default and leave to answer. Stretch v. Montezuma M. Co., 29 Nev. 63, 168 (86 P. 445).

See Smith v. Wells Estate Co., 29 Nev. 411, 419 (91 P. 315), cited under sec. 124 of this act.

Facts recited and held that the affidavit of counsel shows "mistake, inadvertence, surprise or inexcusable neglect," and entitled him to relief against his default and a further extension of time in which to make the motion. Sherman v. S. P. R. R. Co., 31 Nev. 285–290 (102 P. 257).

An amended complaint filed without asking leave of court or in any way compliant with district court rule 17, or with this section, was properly stricken out on motion. Weir v. Washoe H. & S. Co., 31 Nev. 528, 529 (104 P. 19).

An amendment of the ad damnum clause of the complaint by increasing the amount claimed, is a matter within the discretion of the court, and may be allowed during the trial. Shields v. Orr Ditch Co., 23 Nev. 349 (47 P. 194).

The trial court had jurisdiction to set aside by an order of May 25 a default judgment for defendant entered on March 11, upon motion therefor on the ground that plaintiff had no notice of the time of trial or entry of judgment until ten days after its entry. State ex rel. Kerr v. District Court, 32 Nev. 189 (105 P. 1025).

5085. Defendant's name unknown—Fictitious name used.

SEC. 143. When the plaintiff is ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding may be amended accordingly .

Kerr, C. C. P., 474.

5086. Time to amend, answer or reply runs from service of notice—Exception.

SEC. 144. When a demurrer to any pleading is sustained or overruled and time to amend, answer, or reply is given, the time so given runs from service of notice of the decision or order, except when the party against whom the decision is made, or his attorney, is present and asks for and is given time to amend, answer, or reply, in which case no notice of the decision is required.

Kerr, C. C. P., 476.

CHAPTER 18

ARREST AND BAIL

5087. Arrest in civil cases.
5088. Idem—When may be made.
5089. Order for arrest—From whom obtained.
5090. Affidavit necessary for arrest—Contents.
5091. Undertaking required before order for arrest made.
5092. When order may be made—Requisites of order.

5093. Copy of affidavit and order delivered to defendant.
5094. Arrest, by whom and how made.
5095. Defendant discharged on bail or deposit.
5096. Idem—Form of undertaking.
5097. Bail may surrender defendant.
5098. Idem—Bail may arrest defendant—When exonerated.
5099. Action against bail.
5100. Bail exonerated by death, imprisonment or discharge of defendant.
5101. Return of officer—Plaintiff may except to bail.
5102. Notice of justification of bail.
5103. Qualifications of bail.
5104. Justification of bail, how conducted.
5105. Allowance of bail exonerates officer.
5106. Deposit in lieu of bail—Certificate—Discharge.
5107. Sheriff must pay into court.
5108. Undertaking may be substituted for deposit.
5109. Disposition of deposit.
5110. When sheriff liable as bail—Discharge.
5111. Idem—Recovery on sheriff's official bond.
5112. Defendant may move to vacate arrest or reduce bail—Hearing.
5113. Idem—Order.

5087. Arrest in civil cases.

SEC. 145. No person shall be arrested in a civil action except as prescribed by this act.

Kerr, C. C. P., 478.

5088. Idem—When may be made.

SEC. 146. The defendant may be arrested, as hereinafter prescribed, in the following cases arising after the passage of this act:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors, or when the action is for libel or slander.

2. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied or converted to his own use by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such or by any other person in a fiduciary capacity, or for misconduct or neglect in office, or in professional employment, or for a wilful violation of duty.

3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff.

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought.

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

Kerr, C. C. P., 479.

Under subdivision 5 of this section the district court had jurisdiction to arrest and detain petitioner. Const., ante, 243.

Article 1, section 14, of the constitution does not prohibit the arrest and detention of a defendant for the fraudulent disposition of his property with intent to defraud his creditors under a judgment in an action for debt.

The imprisonment of petitioner is for the fraud practiced in attempting to evade the payment of the judgment, and, while in the nature of a punishment, is only a coercive means given by the statute and sanctioned by the constitution to enforce the collection of the judgment.

The imprisonment is authorized for the costs which are incurred in using the coercive means, as well as for the amount of the principal debt or demand. Ex Parte Bergman, 18 Nev. 331, 335, 339–341 (4 P. 209).

5089. Order for arrest—From whom obtained.

SEC. 147. An order for the arrest of the defendant shall be obtained from a judge of the court in which the action is brought.

Kerr, C. C. P., 480.

5090. Affidavit necessary for arrest—Contents.

SEC. 148. The order may be made whenever it shall appear to the judge,

by the affidavit of the plaintiff or some other person, that a sufficient cause of action exists, and the case is one of those mentioned in section 146. The affidavit shall be either positive or upon information and belief; and when upon information and belief, it shall state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit shall be filed with the clerk of the court.

Kerr, C. C. P., 481.

5091. Undertaking required before order for arrest made.

SEC. 149. Before making the order the judge shall require a written undertaking, payable in gold coin of the United States, on the part of the plaintiff, with sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least five hundred dollars. Each of the sureties shall annex to the undertaking an affidavit that he is a resident and householder or freeholder within the state, and worth double the sum specified in the undertaking over and above all his debts and liabilities, exclusive of property exempt from execution. The undertaking shall be filed with the clerk of the court.

Kerr, C. C. P., 482.

5092. When order may be made—Requisites of order.

SEC. 150. The order may be made to accompany the summons, or any time afterwards before judgment. It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, naming the money or currency in which it is payable, and to return the order at a time therein mentioned to the clerk of the court in which the action is pending.

Kerr, C. C. P., 483.

5093. Copy of affidavit and order delivered to defendant.

SEC. 151. The order of arrest, with a copy of the affidavit upon which it is made, shall be delivered to the sheriff, who, upon arresting the defendant shall deliver to him the copy of the affidavit, and also, if desired, a copy of the order of arrest.

Kerr, C. C. P., 484.

5094. Arrest, by whom and how made.

SEC. 152. The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law.

Kerr, C. C. P., 485.

5095. Defendant discharged on bail or deposit.

SEC. 153. The defendant, at any time before execution, shall be discharged from the arrest either upon giving bail or upon depositing the amount mentioned in the order of arrest in the money or currency therein named, as provided in this chapter.

Kerr, C. C. P., 486.

5096. Idem—Form of undertaking.

SEC. 154. The defendant may give bail by causing a written undertaking, payable in the money of the contract (if any be named), and in other cases as directed by the judge, to be executed by two or more sufficient sureties, stating their places of residence and occupations, to the effect that they are bound in the amount mentioned in the order of arrest; that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued

to enforce the judgment therein; or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

Kerr, C. C. P., 487.

5097. Bail may surrender defendant.

SEC. 155. At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration; or he may surrender himself to the sheriff of the county where he was arrested.

Kerr, C. C. P., 488.

See Ex Parte Bergman, 18 Nev. 339, 340 (4 P. 209), under sec. 146 of this act.

5098. Idem—Bail may arrest defendant—When exonerated.

SEC. 156. For the purpose of surrendering the defendant the bail at any time or place before they are finally charged, may themselves arrest him; or by a written authority, indorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of the defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail shall be exonerated; *provided*, such arrest, delivery, or surrender shall take place before the expiration of ten days after judgment; but if such arrest, delivery, or surrender be not made within ten days after judgment, the bail shall be finally charged on their undertaking, and be bound to pay the amount of the judgment within ten days thereafter.

Kerr, C. C. P., 489.

5099. Action against bail.

SEC. 157. If the bail neglect or refuse to pay the judgment within ten days after they are finally charged, an action may be commenced against such bail for the amount of such original judgment.

Kerr, C. C. P., 490.

5100. Bail exonerated by death, imprisonment or discharge of defendant.

SEC. 158. The bail shall also be exonerated by the death of the defendant, or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process.

Kerr, C. C. P., 491.

5101. Return of officer—Plaintiff may except to bail.

SEC. 159. Within the time limited for that purpose, the sheriff shall file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he shall retain in his possession until filed, as herein provided. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted them, and the sheriff shall be exonerated from liability. If no notice be served within ten days, the original undertaking shall be filed with the clerk of the court.

Kerr, C. C. P., 492.

5102. Notice of justification of bail.

SEC. 160. Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the places of residence and occupations of the latter), before the judge of the court, or clerk, at a specified time and place; the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there shall be a new undertaking.

Kerr, C. C. P., 493.

5103. Qualifications of bail.

SEC. 161. The qualifications of bail shall be as follows:

1. Each of them shall be a resident and householder, or freeholder, within the county.

2. Each shall be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge, or clerk, on justification, may allow more than two sureties to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

Kerr, C. C. P., 494.

5104. Justification of bail, how conducted.

SEC. 162. For the purpose of justification, each of the bail shall attend before the judge, or clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge, or clerk, in his discretion may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

Kerr, C. C. P., 495.

5105. Allowance of bail exonerates officer.

SEC. 163. If the judge, or clerk, find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the sheriff shall thereupon be exonerated from liability.

Kerr, C. C. P., 496.

5106. Deposit in lieu of bail—Certificate—Discharge.

SEC. 164. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of the bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case the sheriff shall give the defendant a certificate of the deposit made, and the defendant shall be discharged out of custody.

Kerr, C. C. P., 497.

5107. Sheriff must pay deposit into court.

SEC. 165. The sheriff shall, immediately after the deposit, pay the same into court, and take from the clerk receiving the same two certificates of such payment; the one of which he shall deliver or transmit to the plaintiff, or his attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff to collect the sum deposited as in other cases of delinquency.

Kerr, C. C. P., 498.

5108. Undertaking may be substituted for deposit.

SEC. 166. If the money be deposited, as provided in the last two sections, bail may be given and may justify upon notice at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited shall be refunded by such clerk to the defendant.

Kerr, C. C. P., 499.

5109. Disposition of deposit.

SEC. 167. Where money shall have been deposited, if it remain on deposit at the time of a recovery of a judgment in favor of the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction

thereof, and after satisfying the judgment shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall, under like direction of the court, refund to him the whole sum deposited and remaining unapplied.

Kerr, C. C. P., 500.

5110. When sheriff liable as bail—Discharge.

SEC. 168. If, after being arrested, the defendant escape or be rescued, the sheriff shall himself be liable as bail; but he may discharge himself from such liability by the giving and justification of bail at any time before judgment.

Kerr, C. C. P., 501.

5111. Idem—Recovery on sheriff's official bond.

SEC. 169. If a judgment be recovered against the sheriff, upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on his official bond for the recovery of the whole or any deficiency, as in other cases of delinquency.

Kerr, C. C. P., 502.

5112. Defendant may move to vacate arrest or reduce bail—Hearing.

SEC. 170. A defendant arrested may, at any time before the justification of bail, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice to the plaintiff, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs in addition to those on which the order of arrest was made.

Kerr, C. C. P., 503.

5113. Idem—Order.

SEC. 171. If, upon such application, it shall satisfactorily appear that there was not sufficient cause for the arrest, the order shall be vacated, or if it satisfactorily appear that the bail was fixed too high, the amount shall be reduced.

Kerr, C. C. P., 504.

Where a defendant was held upon preliminary examination upon a complaint charging him with the larceny of eighteen head of cattle of the value of $30 each with bail fixed by the justice at $5,000: Held, that the bail was excessive and ordered reduced. Ex Parte Douglas, 25 Nev. 425.

CHAPTER 19

DISCHARGE FROM ARREST

5114. Discharge from arrest as provided in this chapter.
5115. Notice of application to court.
5116. Idem—Service upon whom and when made.
5117. Hearing—Creditor may have evidence written.
5118. Discharge, oath to be taken, form.
5119. Order of discharge.
5120. Renewal of application for discharge.
5121. Exemption from further arrest—Judgment remains in force.
5122. Plaintiff may order discharge.
5123. Plaintiff must advance jailer's costs.

5114. Discharge from arrest as provided in this chapter.

SEC. 172. Every person confined in jail on an execution issued on a judgment rendered in a civil action, shall be discharged therefrom upon the conditions hereinafter specified.

Kerr, C. C. P., 1143.

Respondent was discharged from imprisonment under the provisions of this act. Evidence reviewed and held sufficient to authorize his discharge. Deal v. Schlomberg, 20 Nev. 330, 331 (22 P. 155).

Petitioner voluntarily surrendered himself into custody before any process had been issued against him, and thereafter, while he was so in custody, the plaintiff notified the sheriff that he did not demand the arrest and

detention, and petitioner was allowed to depart. It was held that such surrender, notice and release did not prevent plaintiff from causing his subsequent arrest and detention under an execution issued on a judgment in the second action. Ex Parte Bergman, 18 Nev. 332, 339 (4 P. 209).

5115. Notice of application to court.

SEC. 173. Such person shall cause a notice, in writing, to be given to the plaintiff, his agent, or attorney, that at a certain time and place he will apply to the district judge of the county in which such person may be confined for the purpose of obtaining a discharge from his imprisonment.

Kerr, C. C. P., 1144.

5116. Idem—Service upon whom and when made.

SEC. 174. Such notice shall be served upon the plaintiff, or his agent or attorney, one day at least before the hearing of the application. If the plaintiff be not a resident of the county, and have no agent or attorney in the county, no such notice need be served.

Kerr, C. C. P., 1145.

5117. Hearing—Creditor may have evidence written.

SEC. 175. At the time and place specified in the notice, such person shall be taken before such judge, who shall examine him, under oath, concerning his estate and property and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed, and such judge shall also hear any other legal and pertinent evidence that may be produced by the debtor or creditors.

Kerr, C. C. P., 1146.

5118. Discharge, oath to be taken—Form.

SEC. 176. If, upon examination, the judge be satisfied that the prisoner is entitled to his discharge, such judge shall administer to him the following oath: "I, ..., do solemnly swear, or affirm, that I have not any estate, real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed, or in any way disposed of with design to secure the same to my use, or to defraud my creditors."

Kerr, C. C. P., 1148.

5119. Order of discharge.

SEC. 177. After administering the oath, the judge shall issue an order that the prisoner be discharged from custody, if he be imprisoned for no other cause; and the officer, upon service of such order, shall discharge the prisoner forthwith, if he be imprisoned for no other cause.

Kerr, C. C. P., 1149.

5120. Renewal of application for discharge.

SEC. 178. If such judge should not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days, in the same manner as above provided, and the same proceeding shall thereupon be had.

Kerr, C. C. P., 1150.

5121. Exemption from further arrest—Judgment remains in force.

SEC. 179. The prisoner, after being so discharged, shall be forever exempt from arrest and imprisonment for the same debt; but the judgment against him shall remain in full force against any estate, present or future, of the prisoner, not exempt from execution.

Kerr, C. C. P., 1151, 1152.

5122. Plaintiff may order discharge.

SEC. 180. The plaintiff in the action may, at any time, order the prisoner

to be discharged, and he shall not thereafter be liable to imprisonment for the same cause of action.

Kerr, C. C. P., 1153.

5123. Plaintiff must advance jailer's costs.

SEC. 181. Whenever a person is committed to jail on a judgment recovered in a civil action, the creditor, his agent, or attorney, shall advance to the jailer immediately upon such commitment, sufficient money to pay for the support of said prisoner for at least two weeks, at the rate of two dollars and a half per day, and in case the money should not be so advanced, the jailer shall forthwith discharge such prisoner from custody, and such discharge shall be a bar against imprisonment for the same debt. At the expiration of such two weeks, should such creditor refuse to advance a like sum, the prisoner will be discharged as above provided, and with the same effect.

Kerr, C. C. P., 1154, 1237–1264.

CHAPTER 20

CLAIM AND DELIVERY

5124. Delivery may be claimed before answer.
5125. Requirements of affidavit.
5126. Order to sheriff indorsed on affidavit.
5127. Undertaking, sheriff to take property and serve papers.
5128. Defendant may except to sureties, notice, justification, waiver.
5129. Redelivery to defendant on giving bond.
5130. Plaintiff may except to sureties—Notice.
5131. Qualifications of sureties and manner of justification.
5132. Concealed property may be taken by force after demand.
5133. Keeping and delivery of property on payment of fees.
5134. Claimed by other person—Plaintiff to indemnify officer.
5135. Return to be made within twenty days.

5124. Delivery may be claimed before answer.

SEC. 182. The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him as provided in this chapter.

Kerr, C. C. P., 509.

When replevin lies. As a general principle the owner of a chattel may take it by replevin from any person whose possession is unlawful, unless it is in the custody of the law or unless it has been taken by replevin from him by the party in possession. Buckley v. Buckley, 9 Nev. 373.

Description of property in replevin. In replevin the description of the property must be so clear that an officer can identify it. Idem.

Replevin of goods in hands of plaintiff in other replevin. Where personal property in the hands of the plaintiff in a suit of claim and delivery is claimed by a third person, the latter is not obliged to intervene in the pending action, but may institute an original action of claim and delivery. Idem.

Right to maintain replevin. In an action for the recovery of specific personal property, it is necessary for the plaintiff to show that he is entitled to the immediate possession. Hilger v. Edwards, 5 Nev. 85.

Replevin—Practice. When the plaintiff in an action of replevin has introduced evidence showing that he had purchased the property and became vested with the legal title thereto, the defendants cannot raise the question of fraud in the sale, or of want of delivery, until they have shown some right or interest in the property, or some lien upon it that entitles them to attack the sale. West v. Humphrey, 21 Nev. 80 (25 P. 446).

Action of replevin—Demand not necessary. Not indispensably necessary to show a demand upon the defendant to return the property before suit brought. A demand serves no purpose, except to establish a conversion or a wrongful detention. Perkins v. Barnes, 3 Nev. 557, approved; Whitman M. C. v. Tritle, 4 Nev. 494.

Demand not necessary in trover. Ward v. C. R. W. Co., 13 Nev. 45.

Demand—When not necessary. Hanson v. Chiatovich, 13 Nev. 395.

Replevin—Measure of damages in—Value of property involved in—Fluctuation of valuation during litigation. When the value of the cattle—the subject of the litigation—had fluctuated during the pendency of the action, an instruction that plaintiff could recover the highest value between the taking and the trial was erroneous. The value

at the time of the trial is the only competent indemnity. Gardner v. Brown, 22 Nev. 156 (37 P. 240).

Replevin—Recovery of possession primary object of. Idem.

Form of judgment in replevin. An absolute judgment for value, not allowing defendant to satisfy judgment by return of property with costs and damages, is erroneous. Lambert v. McFarland, 2 Nev. 58.

Replevin—Gift from deceased person set up by defendant—Declaration of party as part of res gestæ. Rollins v. Strout, 6 Nev. 150.

Questions involved on replevin against a United States marshal. Where a replevin suit was commenced in a state court against a marshal for goods seized by him under attachment process from a United States court: Held, that the state court could not extend its inquiry beyond the question as to whether the federal process was valid; and if so, that the question of title to the goods was irrelevant. Feusier v. Lammon, 6 Nev. 209.

If the goods have been taken from the marshal, court has jurisdiction to return them to him. Idem.

Verdict in replevin — Requisites — Judgment and execution. Carson v. Applegarth, 6 Nev. 187.

Primary object of action of replevin. The recovery of damages in a proper case is as much a primary object of the action of replevin as is the recovery of the property in specie. Buckley v. Buckley, 12 Nev. 423.

Replevin for sheep—Right to recover increase and wool—Indemnity. Idem.

Measure of damages—Action of trover. Value of the article when converted, with interest on that value to the time of trial. O'Meara v. North American M. Co., 2 Nev. 112. Rule explained at length. Idem; approved in Carlyon v. Lannan, 4 Nev. 156; Ward v. C. R. W. Co., 13 Nev. 44.

Replevin for timber cut—Tenants in common. When one tenant in common sells the right to a stranger to cut timber off of the common property, another tenant in common of the same property cannot maintain replevin for the timber after it has been cut. Alford v. Bradeen, 1 Nev. 228.

Trover for wood cut—Title to land, when immaterial—Place and time of conversion—Liability of bailee. Ward v. C. R. W. Co., 13 Nev. 44.

Trover—Allegation of value material. If not denied it need not be proven. Hixon v. Pixley, 15 Nev. 475.

Time of conversion immaterial—Notice and demand—Instruction. Idem.

Trover for mining stock against assignee for benefit of creditors. Boylan v. Huguet, 8 Nev. 345.

Trover — Form of — Verdict. Swan v. Smith, 13 Nev. 257.

5125. Requirements of affidavit.

SEC. 183. Where a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof.

2. That the property is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof according to his best knowledge, information, and belief.

4. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff, or, if so seized, that it is by statute exempt from such seizure; and,

5. The actual value of the property.

Kerr, C. C. P., 510.

5126. Order to sheriff indorsed on affidavit.

SEC. 184. The plaintiff or his attorney may thereupon, by indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant.

Kerr, C. C. P., 511.

5127. Undertaking, sheriff to take property and serve papers.

SEC. 185. Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property, in gold coin of the United States, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendants, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, in

gold coin of the United States, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or if neither have any known place of abode, by putting them in the nearest postoffice, directed to the defendant.

Kerr, C. C. P., 512.

5128. Defendant may except to sureties, notice, justification, waiver.

SEC. 186. The defendant may, within two days after the service of a copy of the affidavit and the undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner as upon bail on arrest; and the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they justify. If the defendant except to the sureties he cannot reclaim the property, as provided in the next section.

Kerr, C. C. P., 513.

5129. Redelivery to defendant on giving bond.

SEC. 187. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, in gold coin of the United States, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for payment to him of such sum, in gold coin of the United States, as may for any cause be recovered against the defendant. If a return of the property be not so required within five days after the taking and serving of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 192.

Kerr, C. C. P., 514.

An action on an undertaking given to the sheriff upon a return of property replevied, should be brought in the name of the real party at interest; and when the name of the sheriff was joined with his as plaintiff: Held, that the complaint was clearly demurrable for misjoinder of parties.

Though this section requires the undertaking given on return of property replevied to be delivered to the sheriff, the officer has no interest in it, and is not a proper party in a suit on it. McBeth v. Van Sickle, 6 Nev. 134, 135.

5130. Plaintiff may except to sureties—Notice.

SEC. 188. The defendant's sureties, upon notice to the plaintiff of not less than two or more than five days, shall justify before the judge or the clerk in the same manner as upon bail on arrest; and upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until the justification is completed or expressly waived, and may retain the property until that time. If they or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

Kerr, C. C. P., 515.

5131. Qualifications of sureties and manner of justification.

SEC. 189. The qualifications of sureties and their justification shall be such as are prescribed by this act in respect to bail upon an order of arrest.

Kerr, C. C. P., 516.

5132. Concealed property may be taken by force after demand.

SEC. 190. If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession, and, if necessary, he may call to his aid the power of his county.

Kerr, C. C. P., 517.

5133. Keeping and delivery of property on payment of fees.

SEC. 191. When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto upon receiving his lawful fees for taking, and necessary expenses for keeping the same.

Kerr, C. C. P., 518.

5134. Claimed by other person—Plaintiff to indemnify officer.

SEC. 192. If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim by an undertaking, made payable in gold coin of the United States, by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property, as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders in the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff unless so made.

Kerr, C. C. P., 519.

5135. Return to be made within twenty days.

SEC. 193. The sheriff shall file the notice, undertaking and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

Kerr, C. C. P., 520.

CHAPTER 21

INJUNCTION

5136. Injunction defined, granted by court or judge.
5137. In what cases injunction may be granted.
5138. Injunction, when granted—Complaint verified.
5139. Injunction not allowed after answer except on notice—Restraining order.
5140. Undertaking required upon injunction.
5141. Court or judge may order hearing before granting injunction—Affidavits used.
5142. Injunction to suspend business of corporation—Notice—Exception when state a party.
5143. Motion to dissolve or modify injunction—Notice—Hearing.
5144. Supreme court may prescribe rules.
5145. Injunction refused or dissolved—Bond given, when — Receiver appointed, when.
5146. Bond instead of dissolution.

5136. Injunction defined, granted by court or judge.

SEC. 194. An injunction is a writ or order requiring a person to refrain from a particular act. The order or writ may be granted by the court in which the action is brought, or by a judge thereof, and when made by a judge may be enforced as the order of the court.

Kerr, C. C. P., 525.

Under this section an injunction can only be granted after notice, or after an order to show cause; and an order refusing an injunction will not be disturbed on appeal if the record does not show such notice or order to show cause. Lady Bryan G. and S. M. Co. v. Lady Bryan M. Co., 4 Nev. 414, 415.

As a general rule an injunction will not

be granted upon a pleading alone, whose material averments are denied by the pleadings of the opposite party. Idem.

An injunction can only be granted after notice, or after an order to show cause; and an order refusing an injunction will not be dismissed on appeal if the record does not show such notice or order to show cause. Idem.

A temporary restraining order, to continue during the pendency of the application for an injunction, may be granted without notice or order to show cause; but it seems that an appeal is authorized only from an order granting or refusing an injunction properly so called. Idem.

Cited, W. U. Tel. Co. v. A. & P. S. T. Co., 5 Nev. 110.

Injunction will not issue where there is a full, complete and adequate remedy at law. Conley v. Chedic, 6 Nev. 222.

Injunction, a preventive remedy. An injunction is only issued to prevent apprehended injury or mischief, and affords no redress for wrongs already committed. Sherman v. Clark, 4 Nev. 138 (97 A. D. 516).

Probability of injury to justify injunction. To make out a case for injunction, it must appear that there is at least a reasonable probability, not merely a bare possibility, that a real injury will occur if the writ is not granted. Idem.

Acts not authorizing injunction. Idem.

Injunction—Proper practice by court. Hawthorne v. Smith, 3 Nev. 182 (93 A. D. 397).

No injunction on complaint alone when fully denied by answer — General rule. Magnet M. Co. v. P. & P. S. M. Co., 9 Nev. 346.

Discretion in granting preliminary injunctions. When it is granted on a complaint exhibiting a prima facie case, and there is no answer put in, and no showing made that any defense on the merits exists, the order will not be disturbed. Hobart v. Ford, 6 Nev. 77; Sierra Nevada M. Co. v. Sears, 10 Nev. 346.

Sufficiency of complaint — Insolvency of defendant. Idem.

Injunction auxiliary to controverted legal right. Parties have a right to have legal right determined by a jury before injunction can properly issue. Ophir Co. v. Carpenter, 4 Nev. 534 (97 A. D. 550).

Injunction—Escaping water—Prescriptive right. Where, in an action against the owner of a ditch, for escape of water therefrom onto the plaintiff's land, defendants claim a prescriptive right, which would in time ripen into an adverse right, plaintiff prevailing is entitled to an injunction. Shields v. Orr Ditch Co., 23 Nev. 349 (47 P. 194).

Remedy at law — Continuing trespass. Where no appreciable injury will be done by the acts of defendants, that are threatened to be continued, and the defendants are solvent and able to respond in damages, an injunction will not be granted, although the title of plaintiff is undisputed. To justify the issuance of an injunction there must be cause to fear irreparable damage for which courts of law furnish no adequate remedy. Thorne v. Sweeney, 12 Nev. 251.

Injunction in actions of trespass. The foundation of the jurisdiction in a court of equity to issue an injunction, in aid of the action of trespass, is the probability of irreparable injury; the inadequacy of pecuniary compensation; or the prevention of a multiplicity of suits. Idem.

Pleadings—Irreparable injury. It is not sufficient that the complaint alleges that the injury would be irreparable. The plaintiff must affirmatively state the necessary facts to show the court that the injury will be irreparable. Idem. Affirmed, Rivers v. Burbank, 13 Nev. 398; Thorne v. Sweeney, 13 Nev. 415; Hoye v. Sweetman, 19 Nev. 376 (12 P. 504).

No injunction where motion affords remedy. Hamer v. Kane, 7 Nev. 61.

When injunction will not issue to restrain collection of taxes. No court of equity will allow its injunction to issue to restrain the collection of a tax, except when actually necessary to protect the rights of citizens who have no plain, speedy and adequate remedy at law. W. F. & Co. v. Dayton, 11 Nev. 161.

Before an injunction will be granted, it must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, if the property is real estate, throw a cloud upon the title of complainant, or there must be some allegation of fraud. Idem.

Insolvency of assessor. The mere allegation of the insolvency of the assessor is not sufficient to authorize the court to grant an injunction to restrain the collection of a tax. Idem.

Injunction too late to restrain act already done. Warrants already issued by a county auditor are beyond the reach of an injunction suit brought to restrain him from issuing such warrants. Webster v. Fish, 5 Nev. 190.

Injunction not the proper remedy—Assignment of undertaking on attachment or commencement of action thereon. Elder v. Shaw, 12 Nev. 78.

5137. In what cases injunction may be granted.

SEC. 195. An injunction may be granted in the following cases:

1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff.

3. When it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

Kerr, C. C. P., 526.

May enjoin bank examiner from closing solvent bank, sec. 675.

An injunction is only issued to prevent apprehended injury or mischief, and affords no redress for wrongs already committed. Sherman v. Clark, 4 Nev. 141 (97 A. D. 516).

Under this section the court may, in its sound discretion, grant a temporary injunction where the rights of the parties under the circumstances may be better protected thereby. Rhodes M. Co., v. Belleville P. M. Co., 32 Nev. 230 (106 P. 561).

5138. Injunction, when granted—Complaint verified.

SEC. 196. The injunction may be granted at the time of issuing the summons upon the complaint, and at any time afterwards, before judgment, upon affidavits or other evidence. The complaint in the one case, and the affidavits or other evidence in the other, shall show satisfactorily that sufficient grounds exist therefor. No injunction shall be granted on the complaint unless it be verified by the oath of the plaintiff, or some one in his behalf, that he, the person making the oath, has read the complaint, or heard the complaint read, and knows the contents thereof, and the same is true of his own knowledge, except the matters therein stated on information and belief, and that as to those matters he believes it to be true. When granted on the complaint, a copy of the complaint and verification attached shall be served with the injunction; when granted upon affidavit, without notice, a copy of the affidavit shall be served with the injunction.

Kerr, C. C. P., 527.

Where the verification to the complaint is in the form required by this section, it is sufficient. Sierra Nev. M. Co. v. Sears, 10 Nev. 346, 353.

5139. Injunction not allowed after answer except on notice—Restraining order.

SEC. 197. An injunction shall not be allowed after the defendant has answered, unless upon notice, or upon an order made as provided in section 199, but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

Kerr, C. C. P., 528.

5140. Undertaking required upon injunction.

SEC. 198. On granting an injunction, or a restraining order, the court or judge must require, except when the state, a county, or municipal corporation, or a married woman in a suit against her husband, is a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto. Within five days after the service of the injunction, the defendant may except to the sufficiency of the sureties. If he fails to do so he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days must justify before a judge or county clerk in the same manner as upon bail on arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the order granting an injunction shall be dissolved.

Kerr, C. C. P., 529.

5141. Court or judge may order hearing before granting injunction—Affidavits used.

SEC. 199. If the court or judge deem it proper that the defendant, or any of several defendants, should be heard, before granting the injunction, an order shall be made fixing a time and place for hearing the application for the injunction, a copy of which order shall be served upon the person or persons designated therein, and the defendant may in the meantime be restrained. Upon the hearing, the parties may use affidavits, other written evidence, and oral testimony.

Kerr, C. C. P., 530.

5142. Injunction to suspend business of corporation—Notice—Exception—When state a party.

SEC. 200. An injunction or restraining order to suspend the general and ordinary business of a corporation shall not be granted without due notice of the application therefor, to be served in the manner prescribed for service of the summons in the action, except when the state is a party to the proceeding.

Kerr, C. C. P., 531.

Under this section, in a proceeding by stockholders to appoint a receiver for a bank, and to enjoin its further operation, the directors of the bank must be made parties to the proceeding, and notice commanding an appearance forthwith to show cause why a receiver should not be appointed is not a sufficient notice, and all orders made in such a proceeding without making the directors parties are void. Golden v. District Court, 31 Nev. 250, 261 (101 P. 1021).

5143. Motion to dissolve or modify injunction—Notice—Hearing.

SEC. 201. If an injunction be granted without notice, the defendant, at any time before the trial, may apply, upon reasonable notice, to the judge who granted the injunction, or to the court in which the action is pending, or a judge thereof, to dissolve or modify the same. The application may be made upon the complaint and the affidavit or affidavits on which the injunction was granted, if any were used, or upon affidavits or other testimony on the part of the defendant, with or without the answer. If the application be made upon affidavit, or other evidence, on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to the affidavits on which the injunction was granted, and the defendant may then, in proper cases, introduce rebutting affidavits or other evidence; *provided,* that for the purpose of allowing the plaintiff to introduce further evidence, the answer or verification thereto attached shall be deemed an affidavit.

Kerr, C. C. P., 532.

5144. Supreme court may prescribe rules.

SEC. 202. The supreme court may prescribe by rule the time when and the cases in which the service of affidavits to be used upon applications for injunctions, and motions to dissolve injunctions, shall be made; and may also provide by rule for the giving of notice before such hearing of the kind of testimony to be used, and make all needful rules on the subject of injunctions not in conflict with this or other acts.

5145. Injunction refused or dissolved — Bond given, when — Receiver appointed, when.

SEC. 203. If, upon the hearing of an application for an injunction, or for the dissolution of an injunction, it does not satisfactorily appear that there is a sufficient cause for an injunction, or if it appear that the extent of the injunction is too great, it shall be refused, dissolved, or modified, as the case may be, and upon all such applications, in actions respecting mines,

or in actions respecting or involving the question of the irrigation of lands, the court or judge hearing the same may, instead of granting or continuing the injunction, make an order requiring the party against whom the application is made, to give a bond in an amount fixed by such court or judge, with sufficient sureties, to be approved by such court or judge, conditioned for the payment to the plaintiff of all damages which he may sustain by reason of the use or occupation of the mine or other acts complained of by the party giving the bond, his or its agents, servants, employees, grantees or other persons by his or its consent, pending the litigation. If the plaintiff finally recover, or if upon failure to give such bond within the time prescribed in the order, the injunction shall be granted or continued, as the case may be, or the court or judge may appoint a receiver to take charge of the mine, or the proceeds thereof, pending litigation.

Kerr, C. C. P., 530–533.

The district court has the power to appoint a receiver, on an ex parte application, when a proper showing is made, as in this case. Maynard v. Railey, 2 Nev. 313.

The court will appoint receiver, when one partner excludes his copartner from a participation in the affairs of the partnership. So, too, when both partners have assigned their respective interests, and the assignees cannot agree. Idem.

When suit is brought and summons issued, the court has power to appoint a receiver before the summons is served on defendants. But the appointment of a receiver ought not to be made without notice, except in cases of emergency. Idem.

Injunction, when to be dissolved—Denial of equities. An injunction granted upon a complaint, the allegations of which have been fully and fairly denied by the answer, should on motion and in the absence of further showing be dissolved, unless in exceptional cases when good reason appears for continuing it. Magnet v. P. & P. S. M. Co., 9 Nev. 346.

Motion to dissolve injunction on complaint and answer. On a motion to dissolve an injunction, heard upon complaint and answer alone, the full and fair denials of the answer are taken as true. Idem.

Where no evidence to sustain complaint, injunction must be dissolved. Where the main allegations of a complaint for injunction, made upon information and belief, were fully and positively denied by the answer; and on motion to dissolve an injunction granted thereon without notice, the evidence entirely failed to sustain any of the material allegations of the complaint: Held, that a denial of such motion was too erroneous to admit of discussion. Perley v. Forman, 7 Nev. 309.

5146. Bond instead of dissolution.

SEC. 204. It shall be good cause, in the discretion of the court or judge, for the dissolution of an injunction that the plaintiff is doing, or causing, or permitting to be done, some act pending the litigation which, if continued, will be injurious to the defendant if he finally recover, or to the property in dispute. But the court or judge hearing a motion to dissolve an injunction, may, instead of granting such motion, direct by order that the plaintiff give to the parties restrained a bond conditioned, as provided in section 203, or upon his failure to do so within the time prescribed in such order, that the injunction shall be dissolved.

Kerr, C. C. P., 530–533.

CHAPTER 22

ATTACHMENT

5147. Attachment of property of defendant —When allowed.
5148. Clerk to issue writ of attachment upon affidavit—Contents.
5149. Undertaking required before writ issues.
5150. Writ directed to sheriff—Contents—To different counties.
5151. Property subject to attachment.
5152. Writ, how executed.
5153. Idem—Property in the hands of other persons—Service.
5154. Liability of other persons for property —Garnishment.
5155. Examination of defendant and others —Order for delivery.
5156. Officer to make inventory—Statement of persons served—Costs.
5157. Perishable property to be sold—Proceeds—Debts to be collected—Sheriff's receipt.
5158. Property attached may be sold under execution, when.
5159. Judgment, how satisfied — Notice of sale—Sale for balance due.
5160. Deficiency—Collected as upon execution—Redelivery.
5161. Action on defendant's undertaking.

5162. Proceedings when defendant recovers judgment.
5163. Application to discharge or modify on giving bond.
5164. Undertaking for release—Justification of sureties.
5165. Motion to discharge writ for irregularity.
5166. Idem—When made upon affidavits.
5167. Writ improperly issued, discharged—Amendment of writ.
5168. Return of writ by sheriff—Contents.

5147. Attachment of property of defendant, when allowed.

SEC. 205. The plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment as hereinafter provided in the following cases:

1. In an action upon a judgment or upon a contract, express or implied, for the direct payment of money, which is not secured by mortgage, lien or pledge upon real or personal property situated or being in this state; or if originally so secured, when such security has, without any act of the plaintiff or the person to whom the security was given, become valueless or insufficient in value to secure the sum due the plaintiff, in which case the attachment shall issue only for the unsecured portion of the amount due the plaintiff, or excess of the amount due the plaintiff above the value of the security as the same has become so insufficient.

2. In an action against a defendant not residing in this state.

3. In an action by a resident of this state for the recovery of the value of property, where such property has been converted by a defendant without the consent of the owner.

4. Where a defendant has absconded, or is about to abscond with the intent to defraud his creditors.

5. Where a defendant conceals himself so that service of summons cannot be made upon him.

6. Where a defendant is about to remove his property, or any part thereof, beyond the jurisdiction of the court, with the intent to defraud his creditors.

7. Where a defendant is about to convert his property, or any part thereof, into money, with the intent to place it beyond the reach of his creditors.

8. Where a defendant has assigned, removed, disposed of, or is about to dispose of his property, or any part thereof, with the intent to defraud his creditors.

9. Where a defendant has fraudulently or criminally contracted the debt or incurred the obligation for which suit has been commenced.

Kerr, C. C. P., 537.

The attachment law of 1861 was not repealed by the amendment of 1864–5. The old law remains unimpaired as to debts contracted prior to the amendment, while the amendments have application only to liabilities incurred since their enactment. Williams v. Glasgow, 1 Nev. 533.

An amendment of an attachment act continues the old law in full force so far as it relates to prior contracts. Idem. Bowers v. Beck, 2 Nev. 157–159.

This section is somewhat similar to section 143, Stats. 1861, 337, which section has had the following citations:

The district court has the power to appoint a receiver on an ex parte application, where a proper showing is made. Maynard v. Railey, 2 Nev. 313, 315.

Cited, Lake Bigler R. Co. v. Bedford, 4 Nev. 404.

Where an affidavit was made on October 5th, stating the necessary facts to justify the issuance of an attachment, but it was not filed until the 16th, on which day the attachment was issued: Held, this was sufficient to justify the issuance of the writ. It having been shown that the debt was past due and unpaid on the 5th, the presumption of law is it still remains so on the 16th, there being no showing to the contrary. O'Neil v. N. Y. & S. P. M. Co., 3 Nev. 141, 150–153.

The process of attachment creates a lien upon the property of the debtor that is seized thereunder, and it is thereafter held as security for the satisfaction of any judgment that may be obtained by the plaintiff

in the action. Gaudette v. Roeder, 13 Nev. 347.

An attachment is a mere ancillary remedy, and in all cases an action must be commenced or must be pending at the time the writ is issued. Levy v. Elliot, 14 Nev. 438.

Cited, Sadler v. Tatti, 17 Nev. 435 (30 P. 1082).

Under the provisions of the ninth clause of this section an attachment will lie where the cause of action arose out of a rape on plaintiff's daughter. Kuehn v. Paroni, 20 Nev. 206 (19 P. 273).

An affidavit reciting that an action had been brought to recover a sum of money for goods sold and delivered at defendant's request, and that defendant was indebted to plaintiff in such sum over and above all set-offs or counterclaims, and averring the existence of two grounds for attachment, was sufficient to warrant the issuance of an attachment. Pratt v. Stone, 25 Nev. 365, 372 (60 P. 514).

After reciting the facts, in an action against the voluntary unincorporated association and its members where damages for injuries to plaintiff's business by boycott, etc., wherein the affidavit for attachment recites subdivision 9 above as the ca se therefor: Held, that the affidavit states a good cause of action for attachment upon the grounds stated. Held, also, that it was not necessary that all the specific acts alleged to have been committed in pursuance of the conspiracy be in themselves of a criminal nature, or that it be determined whether each and every specific act is unlawful. Branson v. I. W. W., 30 Nev. 271, 286, 293 (95 P. 354).

When a party acts in good faith, he is not guilty of constructive fraud in commencing an attachment suit upon a stated account for a greater sum than is actually due. His attachment to the extent of the amount actually due him is valid against subsequent attaching creditors. Mendes v. Freiters, 16 Nev. 388.

An objection to the validity of an attachment on the ground that the affidavit and the undertaking were defective, cannot be raised by a third party in a collateral proceeding. Moresi v. Swift, 15 Nev. 215.

Wood cut by contractor not attachable as his property. Hilger v. Edwards, 5 Nev. 84.

Bill of sale subsequent to attachment is not admissible in evidence because the case upon the facts necessarily turned upon the question as to whether the property was liable to attachment. Tognini v. Kyle, 17 Nev. 209 (45 A. R. 442, 30 P. 829).

5148. Clerk to issue writ of attachment upon affidavit—Contents.

SEC. 206. The clerk of the court shall issue the writ of attachment upon receiving and filing an affidavit by or on behalf of the plaintiff showing the nature of the plaintiff's claim, that same is just, the amount which the affiant believes the plaintiff is entitled to recover, and the existence of any one of the grounds for an attachment enumerated in the preceding section.

Kerr, C. C. P., 538.

When an attachment is issued upon a claim incurred prior "to the taking effect of a new attachment act," the affidavit is sufficient if it conforms to the requirements of the old act, and need not contain the averments required by the new act. Williams v. Glasgow, 1 Nev. 533, 538.

Great strictness in the form of the affidavit should not be required. The defendant is protected by bond. Bowers v. Beck, 2 Nev. 140.

See Pratt v. Stone, 25 Nev. 365, 372 (60 P. 514), under sec. 205 of this act.

5149. Undertaking required before writ issues.

SEC. 207. Before issuing the writ the clerk shall require a written undertaking on the part of the plaintiff payable in gold coin of the United States, in a sum not less than two hundred ($200) dollars; and not less than one-fourth of the amount claimed by plaintiff, and not exceeding five thousand ($5,000) dollars, with two or more sureties to the effect that if said plaintiff dismiss such action or if the defendant recover judgment the plaintiff will pay in gold coin of the United States all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment including attorney's fees, not exceeding the sum specified in the undertaking. Each of the sureties shall annex to the undertaking an affidavit that he is a resident and householder or freeholder within the state, and worth double the sum specified in the undertaking over and above all his debts and liabilities, exclusive of property exempt from execution. Upon showing by the defendant after notice to the plaintiff, the court may require an additional bond.

Kerr, C. C. P., 539.

Cited, Bowers v. Beck, 2 Nev. 149.

5150. Writ directed to sheriff—Contents—To different counties.

SEC. 208. The writ shall be directed to the sheriff of any county in which property of such defendant may be, and require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, unless the defendant give him security by the undertaking, of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, in the money or currency of the contract, in which case to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties.

Kerr, C. C. P., 540.

When sureties, not knowing that a writ of attachment had been levied upon the property of the defendant, execute an undertaking to prevent the levy of an attachment, and the property that had previously been levied upon is subsequently released from the attachment: Held, in an action against sureties, that their promise was only to prevent a levy of the writ of attachment, and that they could not be held liable for the release of the property after the attachment had been levied. Laveaga v. Wise, 13 Nev. 296, 301.

An undertaking under this section is not a "special promise to answer for the debt, default or miscarriage of another." Lightle v. Berning, 15 Nev. 389.

Such an undertaking is not void because the consideration is not expressed therein The release of property from an attachment constitutes a sufficient consideration for the undertaking. Idem.

An attachment must be served by the sheriff of the county where the property is situated, except in cases where one county is attached to another for judicial purposes. Sadler v. Tatti, 17 Nev. 435 (30 P. 1082).

Cited, State ex rel. N. T. G. & T. Co. v. Grimes, 29 Nev. 59 (84 P. 1061).

5151. Property subject to attachment.

SEC. 209. The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profits therein, and all debts due such defendant, and all other property in this state of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.

Kerr, C. C. P., 541.

Regarding preferred claims for wages, see section 5494; and preferred lien on bullion for ore, section 5492.

5152. Writ, how executed.

SEC. 210. The sheriff to whom the writ is directed and delivered shall execute the same without delay, and if the undertaking mentioned in section 208 be not given, as follows:

1. Real property shall be attached by leaving a copy of the writ with the occupant thereof; or, if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the recorder of the county.

2. Personal property capable of manual delivery shall be attached by taking it into custody.

3. Stock or shares, or interest in stock or shares, of any corporation or company, domestic or foreign, shall be attached by leaving with the president, or other head of the corporation or company, or secretary, cashier or managing agent thereof, a copy of the writ, and a notice stating the stock or interest of the defendant is attached in pursuance of such writ. If the corporation or company have no president or other head, or secretary, cashier or managing agent in this state, and is doing business in this state, upon whom a copy of the writ and notice may be left, the attachment may be made by service of the writ and notice in the manner allowed for the service of summons. Any transfer or attempt to transfer stock so attached shall be deemed a contempt of court and punished accordingly.

4. Debts and credits, due or to become due, and other personal property,

not capable of manual delivery, shall be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits or other personal property, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ.

Kerr, C. C. P., 542.

Neglect of sheriff in attachment, sec. 1651.

Where a sheriff seized and sold on execution out of a district court goods which were held by a constable on attachment out of a justice's court: Held, that the sheriff, though he was responsible to the constable, was not so to the creditor in the attachment suit. Foulks v. Pegg, 6 Nev. 136.

An officer who has seized goods upon attachment has a special property in them, coupled with the right of possession; and any interference therewith gives him a right of action against the wrongdoer. Idem.

In an estate, where no order for distribution has been made, neither the executor nor administrator is liable to the process of garnishment, nor can an allowed and approved claim against the estate be levied upon and sold under an execution, against the claimant. Norton v. Clarke, 18 Nev. 247, 250 (2 P. 529).

5153. Idem—Property in the hands of other persons—Service.

SEC. 211. Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to defendant, the sheriff shall serve upon such person a copy of the writ, and a notice that such credits or other property or debts, as the case may be, are attached in pursuance of such writ.

Kerr, C. C. P., 543.

Debts not actually due or owing but depending on a contingency, cannot be reached by garnishment. Reinhart v. Hardesty, 17 Nev. 141, 145 (30 P. 694).

5154. Liability of other persons for property—Garnishment.

SEC. 212. All persons, including municipal and other corporations, having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice as provided in the last two sections, shall be, unless such property is delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged or any judgment recovered by him be satisfied.

Kerr, C. C. P., 544.

See Norton v. Clarke, 18 Nev. 247, 250 (2 P. 529), under sec. 210 of this act; also, Reinhart v. Hardesty, 17 Nev. 141, 145 (30 P. 694), under sec. 211 of this act.

5155. Examination of defendant and others—Order for delivery.

SEC. 213. Any person owing debts to the defendant or having in his possession or under his control any credits or other personal property belonging to the defendant, may be required to attend before the court, or judge, or a referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property capable of manual delivery to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

Kerr, C. C. P., 545.

Where defendant in an attachment suit was examined under this section, and on its appearing that his only property subject to attachment consisted of mining stock which he had upon his person, a district judge ordered it delivered to the sheriff to be held subject to the result of suit, it was held that such order was not in excess of the

judge's jurisdiction. Bivins v. Harris, 8 Nev. 153–156.

The examination of the defendant, provided for in this section, contemplates the examination of defendant, not only as a witness in a proceeding against a garnishee, but in a direct proceeding against himself; and it authorizes a discovery of property concealed upon his own person and an application of it to his just debts. Idem.

Where a district judge, in proceedings under this section, made an order requiring a garnishee to deliver to the sheriff moneys in her hands claimed to belong to the attachment debtor, it was held that, as the statute conferred upon the judge full jurisdiction over person and subject-matter, his order, however erroneous, could not be reviewed on certiorari. Birchfield v. Harris, 9 Nev. 382–386.

Plaintiff having attached property of defendant in the hands of a pledgee thereof, and having obtained a judgment against defendant, cannot apply the attached property to the satisfaction of his judgment by proceeding under this section; he must move by direct proceeding against the pledgee under sec. 365, et seq., of this act to prevent disposition of the property by the pledgee, pending an action to determine the rights in the property. Persing v. Reno B. Co., 30 Nev. 342, 350 (96 P. 1054).

Such plaintiff may, to convert to the satisfaction of the judgment property in the hands of a third person, proceed under this section, where the title to the property is undisputed, and the facts clearly show that it belongs to defendant and that the third person claims no interest therein. Idem.

5156. Officer to make inventory—Statement of persons served—Costs.

SEC. 214. The sheriff shall make a full inventory of the property attached and return the same with the writ. To enable him to make such returns as to debts and credits attached, he shall request at the time of service the party owing the debt, or having the credit, to give him a memorandum stating the amount and description of each; and if such memorandum be refused, he shall return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the costs of any proceeding taken for the purpose of obtaining information respecting the amount and description of such debt or credit.

Kerr, C. C. P., 546.

An order imposing costs against a garnishee who had refused to make a statement, is not a "tax, impost, assessment, or municipal fine" within the meaning of those words as used in Const., sec. 321, ante. Wearne v. Haynes, 13 Nev. 104, 105.

A contention, under this section and sec. 221 of this act, that, in giving an undertaking, only property in the hands of the sheriff could be released and not property in a bank which had been garnisheed, was of no merit. Goldfield-Mohawk M. Co. v. Frances-Mohawk M. & L. Co., 31 Nev. 349, 358 (102 P. 963).

5157. Perishable property to be sold—Proceeds—Debts to be collected—Sheriff's receipt.

SEC. 215. If any of the property attached be perishable, the sheriff shall sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him shall be retained by him to answer any judgment that may be recovered in the action, unless sooner subject to execution upon another judgment recovered previous to the issuing of the attachment. Debts and credits attached may be collected by him, if the same can be done without suit. The sheriff's receipt shall be a sufficient discharge for the amount paid.

Kerr, C. C. P., 547.

The term "perishable property" applies only to property which is necessarily subject to immediate decay. Newman v. Kane, 9 Nev. 234.

5158. Property attached may be sold under execution, when.

SEC. 216. Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court, or a judge thereof, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court to abide the judgment of the action. Such order can be made only upon notice to the adverse party or his attorney.

Kerr, C. C. P., 548.

When a sheriff attaches personal property he is not allowed, under the statute, to consider the element of expense in its preservation or keeping, but is bound to have it ready to be disposed of according to the judgment, unless compelled to sell on account of its being perishable; and it is no excuse for a failure to have it so ready that the best interests of the parties were subserved by a sale. Newman v. Kane, 9 Nev. 238.

5159. Judgment, how satisfied—Notice of sale—Sale for balance due.

SEC. 217. If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached by him which has not been delivered to the defendant or a claimant, as hereinafter provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment;

2. If any balance remain due, and an execution shall have been issued on the judgment, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notice of the sales shall be given, and the sales conducted as in other cases of sales on execution.

Kerr, C. C. P., 550.

Cited, Gaudette v. Roeder, 13 Nev. 347.

5160. Deficiency—Collected as upon execution—Redelivery.

SEC. 218. If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting the fees, to the payment of the judgment, any balance shall remain due, the sheriff shall proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

Kerr, C. C. P., 551.

5161. Action on defendant's undertaking.

SEC. 219. If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section 208 or section 222, or he may proceed as in other cases upon the return of an execution.

Kerr, C. C. P., 552.

5162. Proceedings when defendant recovers judgment.

SEC. 220. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, shall be delivered to the defendant or his agent; the order of attachment shall be discharged and the property released therefrom.

5162 A '13 30

Kerr, C. C. P., 553.

The adjudication of bankruptcy dissolves an attachment and vests the title to the property in the assignee. The sheriff is not thereafter entitled to recover any costs for keeping the property. Baker v. McLeod, 14 Nev. 148.

See Newman v. Kane, 9 Nev. 238, under sec. 216 of this act.

A judgment for defendant vacates the attachment, and an order of the court refusing to vacate and dismiss such judgment is a nullity and is not appealable. Ranft v. Young, 21 Nev. 401, 402 (30 P. 490).

The fact that there was a new trial pending did not tend to keep the attachment in force. Idem.

In such case defendant's remedy was by a proceeding against the sheriff, on his refusal to deliver the property, to recover it or its value. Idem.

5163. Application to discharge or modify on giving bond.

SEC. 221. Whenever the defendant shall have appeared in the action,

he may apply, upon reasonable notice to the plaintiff, to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment, wholly or in part, upon the execution and filing of the undertaking mentioned in the next section. Such order may be granted directing the release from the operation of the attachment, upon the filing of such undertaking and the justification of the sureties thereon, if required by the plaintiff, of all or any part of the property, money, debts, or credits attached, as the case may be. All the proceeds of sales and moneys collected by the sheriff, and all the property attached remaining in his hands, so released, shall be delivered or paid to the defendant upon the filing of such undertaking and making such justification, if required by the plaintiff.

Kerr, C. C. P., 554.

Where sureties, not knowing that a writ of attachment has been levied upon property of defendant in an attachment suit, execute an undertaking to prevent the levy of an attachment, and the property that had been previously levied upon is subsequently released from the attachment, it was held, in an action against the sureties, that their promise was only to prevent levy of a writ of attachment, and that they could not be held liable for the release of the property after the attachment had been levied. Laveaga v. Wise, 13 Nev. 296, 301.

See Goldfield-Mohawk M. Co. v. Frances-Mohawk M. & L. Co., 31 Nev. 348, under sec. 214 of this act.

This does not mean that the defendant can apply for the discharge only at the time he appears, and no later. Goldfield-Mohawk M. Co. v. Frances-Mohawk M. & L. Co., 31 Nev. 348, 354, 357 (102 P. 963).

5164. Undertaking for release—Justification of sureties.

SEC. 222. On granting such order, the court or the judge shall require an undertaking on behalf of the defendant, with at least two sureties, residents and freeholders, or householders, in the county, which shall be filed to the effect, in case the value of the property or the amount of money, debts, or credits sought to be released shall equal or exceed the amount claimed by the plaintiff in the complaint, that the defendant will pay to the plaintiff the amount of the judgment which may be recovered in favor of the plaintiff in the action not exceeding the sum specified in the undertaking, which shall be at least double the amount so claimed by the plaintiff, and in the money or currency of the contract; or to the effect, in case the value of the property or the amount of money, debts, or credits sought to be released shall be less than the amount so claimed by the plaintiff, that the defendant will pay the amount of such judgment, to the extent of the value of the property, or amount of money, debts, or credits sought to be released, not exceeding the sum specified in the undertaking, which shall be at least double the amount of such property, money, debts, or credits, and in the money or currency of the contract. The value of the property sought to be released, if disputed, shall be determined, in the money or currency of the contract, by the court or judge thereof, upon proof or by a sworn appraiser or sworn appraisers, not exceeding three, to be appointed by the court or judge for that purpose. Before filing the undertaking, the defendant shall serve a copy thereof upon the plaintiff, and if the plaintiff require a justification by the sureties, he shall give notice thereof to the defendant within two days; or at the time of giving notice of motion for an order to discharge the attachment, the defendant may in his notice name the sureties, and if the plaintiff require them to justify he shall give notice thereof at the hearing of the motion. If required, the sureties shall justify before the court in which the suit is pending, or the judge thereof, after reasonable notice.

Kerr, C. C. P., 555.

There is nothing in the policy of the law to forbid a bond, given to release property from attachment, being enforced according to the strict letter of its condition. Bowers v. Beck, 2 Nev. 139.

Facts held not to discharge surety on bond given to release property attached. Seawell v. Cohn, 2 Nev. 308.

See Laveaga v. Wise, under sec. 221 of this act.

One keeping house with a hired servant doing the cooking and housework for him in a house in which he made his home and residence, and which he rented from a corporation bearing his name, in which he owned a majority of the stock and controlling interest, was a "householder" so as to qualify him as a surety on a bond for the discharge of an attachment. Goldfield-Mohawk M. Co. v. Frances-Mohawk M. & L. Co., 31 Nev. 348 (102 P. 963).

One whose rights depended on a quit-claim deed in possession, and who was not shown to have secured the government title, was none the less a freeholder so as to qualify him on such a bond. Idem.

An objection that the trial court should not have granted a motion for the discharge of attachment because a similar motion was pending and undetermined was of no merit, the earlier motion having been denied before or at the time the later one was granted. Idem.

5165. Motion to discharge writ for irregularity.

SEC. 223. The defendant may also, any time before the time of answering expires, apply upon motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, for the discharge of the attachment, on the ground that the writ was improperly issued.

Kerr, C. C. P., 556.

See Bowers v. Beck, under sec. 205 of this act.

On a motion to dissolve, where plaintiff had levied two attachments, his counsel stated that plaintiff claimed nothing under the second writ; it was held that such statement was a confession of error and the second writ should have been discharged. Kuehn v. Paroni, 20 Nev. 203, 206 (19 P. 273).

Where an attachment is issued under a statute allowing the writ where the liability was criminally incurred, an affidavit denying the averments of plaintiff's complaint constituting the cause of action, will not support a motion to dissolve, as that would necessitate a decision on the merits. Idem.

5166. Idem—When made upon affidavits.

SEC. 224. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the writ of attachment was issued.

Kerr, C. C. P., 557.

5167. Writ improperly issued, discharged—Amendment of writ.

SEC. 225. If upon such application it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged; *provided*, that such attachment shall not be discharged if at or before the hearing of such application the writ of attachment or the affidavit or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter.

Kerr, C. C. P., 558.

5168. Return of writ by sheriff—Contents.

SEC. 226. The sheriff shall return the writ of attachment with the summons, if issued at the same time; otherwise within twenty days after its receipt, with a certificate of his proceeding indorsed thereon or attached thereto.

CHAPTER 23

GARNISHMENT

5169. Garnishment issuable with attachment or afterward.
5170. When garnishee ordered to appear.
5171. Writ issued by the officer—Form.
5172. Names of garnishees inserted in writ—Service and return—Alias writ.
5173. Service and return of writ give court jurisdiction.
5174. Garnishee to answer under oath—Fee—Substance of interrogatories.
5175. Property to be delivered to sheriff—Sale—Judgment against garnishee.
5176. Garnishee may deliver property or money—Release—Return.
5177. Judgment against garnishee on failure to answer.
5178. Answer of garnishee—Reply.
5179. New matter in plaintiff's reply deemed denied—Trial—Judgment—Costs.

5180. Third person may be interpleaded—Notice—Proceedings.
5181. Garnishee may deduct sums due him by either party—Record.
5182. Judgment acquits garnishee for the amounts paid.
5183. Discharge of garnishee does not bar action by defendant.
5184. Judgment against garnishee for debt not due—Execution deferred.
5185. Property pledged to garnishee delivered on payment.
5186. Idem—If held to secure performance, plaintiff may perform.
5187. Idem—Disposal of proceeds—Plaintiff reimbursed.
5188. Garnishee liable for contempt.
5189. Costs taxed in discretion of court—Garnishee paid witness fee.
5190. Garnishment after judgment—Procedure—Liberal construction.
5191. New trials and appeals as in other cases.

5169. Garnishment issuable with attachment or afterward.

SEC. 227. At the time of issuing a writ of attachment in an action, or at any time thereafter, the plaintiff may have a writ of garnishment issue, and thereupon attach the credits, effects, debts, choses in action, and other personal property of the defendant in the possession or under the control of any third person, as garnishee, for the security of any judgment the plaintiff may recover in such action against the defendant.

Colo., Mills, An. C. (1896), 118; Utah, 3090.

5170. When garnishee ordered to appear.

SEC. 228. Whenever, in any action pending in any court of record, a writ of attachment has been issued and delivered to the proper officer, and the officer after diligent search shall not be able to find property of the defendant sufficient to satisfy the claim of plaintiff, the officer shall, upon the request of plaintiff, his agent, or attorney, summon such person or persons as the plaintiff may direct as garnishees to appear before the court wherein such action is pending.

Colo., Mills, An. C. (1896), 119; Utah, 3091.

5171. Writ issued by the officer—Form.

SEC. 229. The writ of garnishment shall be issued by the officer to whom the writ of attachment is delivered, and may be in substance as follows:

In the.....Judicial District Court of the State of Nevada, in and for the County of.....

....., Plaintiff, vs....., Defendant.

The State of Nevada, to....., garnishee, Greeting:

You are hereby notified that you are attached as garnishee in the above-entitled action, and you are commanded not to pay any debt due or to become due from yourself to the said....., defendants, or either of them, and that you must retain possession and control of all personal property, effects and choses in action of said....., defendants, or either of them, in order that the same may be dealt with according to law; you are required to answer the interrogatories attached hereto within ten days from the date of the service of this writ upon you if you are served in the county in which said action is brought, otherwise within twenty days from the date of such service. In case of your failure within the time aforesaid, the plaintiff may apply to the court for relief against you.

Given under my hand this.....day of....., 19.....

Colo., Mills, An. C. (1896), 120; Utah, 3092.

5172. Names of garnishees inserted in writ—Service and return—Alias writ.

SEC. 230. The names of as many individuals, corporations, or other persons as are sought to be charged as garnishees may be inserted in the same or different writs of garnishment; and the writ shall be served and returned by the officer issuing the same, in the same manner as a summons

in the action; and in like manner alias writs may be issued, served, and returned.

Colo., Mills, An. C. (1896), 121; Utah, 3093.

5173. Service and return of writ give court jurisdiction.

SEC. 231. It shall not be necessary for the sheriff to return the writ of attachment before serving the writ of garnishment, but the return of the latter writ, showing due service on the person therein named as garnishee, shall give the court jurisdiction to proceed against such garnishee as hereinafter provided.

Colo., Mills, An. C. (1896), 122; Utah, 3094.

5174. Garnishee to answer under oath—Fee—Substance of interrogatories.

SEC. 232. The garnishee shall answer the interrogatories in writing upon oath or affirmation; but in no case shall the garnishee be required to answer any interrogatories unless and until he is paid or tendered by the plaintiff in the action or the officer serving the writ, a fee of two dollars, and unless such sum is paid or tendered to him or to the person making the answer in his behalf, no answer can be required of such garnishee or any person acting for him. In case such fee is paid or tendered, it is hereby made the duty of the officer serving the writ of garnishment to administer such oath or affirmation and to take and return such answer with the writ, or the garnishee after receiving the fees aforesaid may answer in like manner before anyone authorized to administer oaths and affirmations, and in the latter case it shall be the duty of the garnishee to file his answer, or to cause the same to be filed, in the proper court within the proper time required by the writ, or he shall be deemed in default.

The interrogatories may be in substance as follows:

1. Are you in any manner indebted to the defendants, or either of them, either in property or money, and is the same now due? If not due, when is the same to become due? State full particulars.

Answer.....

2. Have you in your possession, in your charge, or under your control, any property, effects, goods, chattels, rights, credits, or choses in action of said defendants, or either of them, or in which he is interested? If so, state what is the value of the same, and state fully all particulars.

Answer.....

I (insert the name of the garnishee), do solemnly swear (or affirm) that the answers to the foregoing interrogatories by me subscribed are true.

..... Signature of garnishee.

Subscribed and sworn to before me, this.....day of....., 19....

Colo., Mills, An. C. (1896), 123; Utah, 3095.

5175. Property to be delivered to sheriff—Sale — Judgment against garnishee.

SEC. 233. If the answer of the garnishee shows that he has personal property of any kind in his possession, or under his control, belonging to the defendant, the court shall enter judgment that the garnishee deliver the same to the sheriff, and if the plaintiff recover judgment against the defendant in the action, such property or so much thereof as may be necessary shall be sold as upon execution, and the proceeds applied toward the satisfaction of such judgment, together with the costs of the action and proceedings, and if there be a surplus of such property, or of the proceeds thereof, it shall be restored to the defendant. If the answer shows that the garnishee is indebted to the defendant, then, if the plaintiff recover judgment against the defendant in the action, the court shall also enter judgment in favor of the defendant for the use of the plaintiff against the

garnishee for the amount of the indebtedness admitted in the answer; *provided*, that the judgment against the garnishee shall not be for a greater sum than is necessary to satisfy the judgment of the plaintiff against the defendant, together with costs as aforesaid; and in no case shall the garnishee be chargeable with costs unless his answer shall be successfully controverted as hereinafter provided.

Colo., Mills, An. C. (1896), 124; Utah, 3096.

A third person in possession of property attached as property of a defendant is liable to plaintiff for any property or credits of defendant which he may hold after his own rights, if any, are satisfied. Persing v. Reno B. Co., 30 Nev. 342, 350 (96 P. 1054).

5176. Garnishee may deliver property or money—Release—Return.

SEC. 234. In all cases the garnishee, upon making answer, may deliver to the officer serving the writ the property belonging to the defendant, together with the money due to the defendant, as shown by the answer, and the officer shall make return of such property and money with the writ to the court, to be dealt with as provided in the foregoing section; and thereupon the garnishee shall be relieved from further liability in the proceedings, unless his answer shall be successfully controverted as hereinafter provided.

Colo., Mills, An. C. (1896), 125; Utah, 3097.

5177. Judgment against garnishee on failure to answer.

SEC. 235. If the garnishee, having been duly served with the writ of garnishment and interrogatories, and having been paid or tendered the fee of two dollars, and the fact of such payment or tender is duly certified by the officer who served the writ over his official signature, or such fact is made to appear by the person serving the writ under oath, by affidavit, and after such payment or tender, when duly certified or proved as above provided fails or refuses to answer the interrogatories, within the time required, the plaintiff may commence an action against him in the manner other civil actions are commenced to recover a judgment against such garnishee. The plaintiff may, prior to the institution of such action, have a citation issued out of the court and served upon the said garnishee requiring him to appear before the court for examination and to testify as to any liability upon his part to the defendant in the action and may likewise require other witnesses upon subpena to appear at the same time and testify as to such liability. Upon the complaint and summons being served upon the garnishee, the action shall proceed as in other civil cases. If the plaintiff obtain a verdict or decision against the garnishee, the plaintiff may have judgment entered the same as if the garnishee had answered in accordance with such verdict or decision; and if a verdict or decision charge the garnishee with any liability, the plaintiff may recover costs of the proceedings against the garnishee.

Colo., Mills, An. C. (1896), 126; Utah, 3098.

5178. Answer of garnishee—Reply.

SEC. 236. If the garnishee answer, as required by the writ, the plaintiff may, within ten days after the expiration of the time allowed for the filing of such answer, reply to the whole or any part thereof by an affidavit traversing the same; the plaintiff may also in his reply allege any matters which would charge the garnishee with liability according to the provisions of this chapter, and such affidavit may be upon information and belief. If the plaintiff fail to reply within the time aforesaid, he shall be deemed to have accepted the answer of the garnishee as true, and judgment may be entered accordingly.

Colo., Mills, An. C. (1896), 127; Utah, 3099.

5179. New matter in plaintiff's reply deemed denied—Trial—Judgment—Costs.

SEC. 237. New matter in the affidavit replying to the answer of the garnishee shall be taken as denied or avoided, and the matter thus at issue without further pleadings shall be tried in the same manner as other issues of like nature, and upon the verdict or finding thereon, judgment shall be entered the same as if the garnishee had answered according to such verdict or finding; *provided*, that if the verdict or finding be as favorable to the garnishee as his answer, he shall recover costs of the proceeding against the plaintiff, otherwise the plaintiff may recover costs against the garnishee.

Colo., Mills, An. C. (1896), 128; Utah, 3100.

5180. Third person may be interpleaded—Notice—Proceedings.

SEC. 238. When the answer of the garnishee shall disclose that any other person than the defendant claims the indebtedness or property in his hands, and the name and residence of such claimant, the court may on motion order that such claimant be interpleaded as a defendant to the garnishee action; and that notice thereof, setting forth the facts, with a copy of such order, in such form as the court shall direct, be served upon him, and that after such service shall have been made, the garnishee may pay or deliver to the officer or the clerk such indebtedness or property, and have a receipt therefor, which shall be a complete discharge from all liability to any party for the amount so paid or property so delivered. Such notice shall be served in the manner required for service of a summons in a civil action. Upon such service being made, such claimant shall be deemed a defendant to the garnishee action, and shall answer within ten days, setting forth his claim, or any defense which the garnishee might have made. In case of default, judgment may be rendered which shall conclude any claim upon the part of such defendant.

N. Dak. (1895), 5397; Utah, 3101.

5181. Garnishee may deduct sums due him by either party—Record.

SEC. 239. Every garnishee shall be allowed to retain or deduct out of the property, effects, or credits of the defendant in his hands all demands against the plaintiff and all demands against the defendant of which he could have availed himself if he had not been summoned as garnishee, whether the same are at the time due or not, and he shall be liable for the balance, only after all mutual demands between himself and plaintiff and defendant are adjusted, not including unliquidated damages for wrongs and injuries; *provided*, that the verdict or finding as well as the record of the judgment shall show in all cases against which party, and the amount thereof, any counterclaim shall be allowed, if any shall be allowed.

Colo., Mills, An. C. (1896), 130; Utah, 3102.

5182. Judgment acquits garnishee for amounts paid.

SEC. 240. The judgment against a garnishee shall acquit him from all demands by the defendant for all goods, effects, and credits paid, delivered, or accounted for by the garnishee by force of such judgment.

Colo., Mills, An. C. (1896), 132; Utah, 3104.

5183. Discharge of garnishee does not bar action by defendant.

SEC. 241. If the person summoned as garnishee is discharged the judgment shall be no bar to an action brought against him by the defendant for the same demand.

Colo., Mills, An. C. (1896),'133; Utah, 3105.

5184. Judgment against garnishee for debt not due—Execution deferred.

SEC. 242. When the judgment is rendered against any garnishee and

it shall appear that the debt from him to the defendant is not yet due, execution shall not issue until the debt shall have become due.

Colo., Mills, An. C. (1896), 134; Utah, 3106.

5185. Property pledged to garnishee delivered on payment.

SEC. 243. When any personal property, choses in action, or effects of the defendant in the hands of a garnishee are mortgaged or pledged, or in any way liable for the payment of a debt to him, the plaintiff may, under an order of the court for that purpose, pay or tender the amount due to the garnishee, and thereupon the garnishee shall deliver the personal property, choses in action, and effects to the sheriff, as in other cases.

Colo., Mills, An. C. (1896), 135; Utah, 3107.

5186. Idem—If held to secure performance, plaintiff may perform.

SEC. 244. If the personal property or effects are held for any purpose other than to secure the payment of money, and if the contract, condition, or other thing to be done or performed is such as can be performed by the plaintiff without damage to the other parties, the court may make an order for the performance thereof by him, and upon such performance, or a tender of performance the garnishee shall deliver the personal property and effects to the sheriff, as in other cases.

Colo., Mills, An. C. (1896), 136; Utah, 3108.

5187. Idem—Disposal of proceeds—Plaintiff reimbursed.

SEC. 245. All personal property, choses in action, and effects received by the sheriff under either of the two preceding sections shall be disposed of in the same manner as if they had been delivered by the garnishee without condition, except that the plaintiff shall, out of the proceeds thereof, be first repaid the amount paid by him to the garnishee for the redemption of the same, or shall be indemnified for any other act or thing by him done or performed, pursuant to the order of the court for the redemption of the same.

Colo., Mills, An. C. (1896), 137; Utah, 3109.

5188. Garnishee liable for contempt.

SEC. 246. If any garnishee refuses or neglects to deliver any personal property, choses in action, or effects in his hands, when thereto lawfully required by the court, he shall be liable to be attached or punished for contempt.

Colo., Mills, An. C. (1896), 138; Utah, 3110.

See Persing v. Reno B. Co., under sec. 233 of this act.

5189. Costs taxed in discretion of court—Garnishee paid witness fee.

SEC. 247. The court may order the costs of the proceedings in any garnishment to be paid by the plaintiff, or out of the effects or credits garnished, or by the garnishee, or may apportion the same as shall appear to be just and equitable. The garnishee shall be entitled to fees and mileage as a witness, where he does not improperly resist or make costs.

Colo., Mills, An. C. (1896), 139; Utah, 3111.

5190. Garnishment after judgment—Procedure—Liberal construction.

SEC. 248. Any person having a judgment remaining unsatisfied in any court of record in the state, upon which execution has been issued and delivered, and which remains in the hands of the proper officer uncollected and unsatisfied, may have a writ of garnishment issued, and thereupon attach the credits, effects, debts, choses in action, and other personal property of the judgment debtor in the possession or under the control of any third person as garnishee, for the security of such judgment, and all rights, remedies, and proceedings under this chapter are hereby made

specially available and applicable for the relief and security of such judgment creditor, the same as for a plaintiff in attachment, and the same are also made especially available and applicable for the protection and security of the judgment debtor and the garnishee, the same as for the defendant and garnishee in attachment; and the forms of all affidavits, interrogatories, writs, answers, oaths, orders, trials, judgments, and other process and proceedings hereinbefore provided for cases of garnishment before judgment, with appropriate variations, shall apply to cases of garnishment after judgment; and all courts shall be liberal in allowing amendments, and in construing this chapter so as to promote the objects thereof.

Colo., Mills, An. C. (1896), 140; Utah, 3112.

5191. New trials and appeals as in other cases.

SEC. 249. Motions for new trial may be made in the same time and manner and shall be allowed for the same grounds in garnishment proceedings as in other civil trials; and appeals may be taken and prosecuted from any final judgment or order in such proceedings as in other civil cases.

Colo., Mills, An. C. (1896), 141; Utah, 3113.

CHAPTER 24

DEPOSIT IN COURT

5192. When deposit or delivery of money or property required.

SEC. 250. When it is admitted, by the pleading or examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court, or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

Kerr, C. C. P., 572.

A mining lease required the lessee to deliver the ore to the lessor, who should ship or mill the same, and pay to the lessee a specified per cent of the proceeds of the smelter or mill returns. The lessor sued the lessee for damages for violation of the lease, and admitted that it had in its possession a specified sum representing the proceeds of ore, which sum belonged to the lessee. Held, that the lessor was trustee for the lessee for such sum, and under this section the court could on motion of the lessee, require the lessor to pay such sum into court.

A lessor in a mining lease, having in its possession as trust funds money belonging to the lessee as the proceeds of ore mined and delivered by the lessee under provisions of the lease, cannot retain such funds in order that he may offset against the same an amount of damages due him for a violation of the lease by the lessee, for a debt accruing to one in his individual capacity cannot be set off against a debt due from him as trustee.

Where a lessor, in a mining lease stipulating that he should dispose of the ore mined and delivered to the lessee a specified per cent of the proceeds, admitted, in an action against the lessee for damages for violation of the lease, that it held proceeds of ore belonging to the lessee, and alleged that a considerable portion of the proceeds was derived from ore wrongfully taken by the lessee from ground expressly reserved from the lease, the virtual admission of defendant's right to such proceeds, less some indefinite portion thereof, was sufficient to give the court jurisdiction to order the lessor to pay such proceeds into court. Florence-Goldfield Mining Co. v. District Court, 30 Nev. 391, 399 (97 P. 49).

CHAPTER 25

RECEIVERS

5193. Appointment of a receiver—When may be made.

SEC. 251. A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property,

or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In all other cases where receivers have heretofore been appointed by the usages of the courts of equity.

Kerr, C. C. P., 564.

For dissolved corporation, see secs. 1194, 1195, 1199.

For mutual fire insurance company, see secs. 1301, 1302.

The district court has the power to appoint a receiver on an ex parte application, when a proper showing is made. Maynard v. Railey, 2 Nev. 313.

The court will appoint a receiver when one partner excludes his copartner from a participation in the affairs of a partnership. So, too, when both partners have assigned their respective interests and the assignees cannot agree. Idem.

When suit is brought and summons issued the court has power to appoint a receiver before the summons is served, but the appointment of a receiver ought not to be made without notice except in cases of emergency. Idem.

During the pendency of an appeal for an order restoring possession of property, the court can appoint a receiver to preserve the property. Lake Bigler R. Co. v. Bedford, 3 Nev. 404.

A receiver appointed by the trial court is an officer of that court, and accountable to it, and any compensation to be allowed him as costs on appeal must be allowed by the trial court, and not by the supreme court. McKenzie v. Coslett, 28 Nev. 220, 221 (80 P 1070).

CHAPTER 26

PROVISIONAL REMEDIES ON BEHALF OF DEFENDANT

5194. Defendant asking affirmative relief may have provisional remedies.

SEC. 252. When the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, his right to a provisional remedy is the same as in an action brought by him against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment; and for the purpose of applying to such a case the provisions of this act relating to provisional remedies, the defendant is deemed the plaintiff, the plaintiff is deemed the defendant, and the counterclaim so set forth in the answer is deemed the complaint.

Utah, 3123; Mont. Civ. P., 981.

CHAPTER 27

ISSUES, MODE OF TRIAL AND POSTPONEMENT

5195. Issues defined—Law—Fact.
5196. Issue of law arises upon demurrer.
5197. Issue of fact—Arises, how.
5198. Issue of law, how tried.
5199. Issue of fact, how tried—Issue of law first disposed of.
5200. Calendar, how made up—Rules.
5201. Either party may bring issue to trial.
5202. Continuance for absence of evidence—Admission.
5203. Idem—Testimony of witness present may be taken—Order, when mining case continued—Visitation a contempt.

5195. Issues defined—Law—Fact.

SEC. 253. An issue arises when a fact or conclusion of law is maintained by the one party, and controverted by the other. Issues are of two kinds:

1. Of law; and,
2. Of fact.

Kerr, C. C. P., 588.

5196. Issue of law arises upon demurrer.

SEC. 254. An issue of law arises upon a demurrer to the complaint, or an answer as to some part thereof.

Kerr, C. C. P., 589.

5197. Issue of fact—Arises, how.

SEC. 255. An issue of fact arises:

1. Upon a material allegation in the complaint, controverted by the answer; and
2. Upon new matter in the answer, except an issue of law is joined therein.

Kerr, C. C. P., 590.

Cited, in dissenting opinion of Talbot, J., Gulling v. Washoe County Bank, 29 Nev. 278 (89 P. 25).

5198. Issue of law, how tried.

SEC. 256. An issue of law shall be tried by the court, unless it is referred upon consent.

Kerr, C. C. P., 591.

5199. Issue of fact, how tried—Issue of law first disposed of.

SEC. 257. An issue of fact shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as provided in this act. Where there are issues, both of law and fact, to the same complaint, the issue of law shall be first disposed of.

Kerr, C. C. P., 592.

5200. Calendar, how made up—Rules.

SEC. 258. The clerk shall enter cases upon the calendar of the court according to the date of the issue, unless otherwise provided by rule of court.

Kerr, C. C. P., 593.

5201. Either party may bring issue to trial.

SEC. 259. Either party may bring the issue to trial, or to a hearing, and in the absence of the adverse party, unless the court for good cause otherwise direct, may proceed with his case and take a dismissal of the action, or a verdict, or judgment, as the case may require.

Kerr, C. C. P., 594.

5202. Continuance for absence of evidence—Admission.

SEC. 260. A motion to postpone a trial, on the ground of the absence of evidence, shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The court may also require the moving party to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed.

Kerr, C. C. P., 595.

Continuance—When not properly refused. When a party makes out a good prima facie case for a continuance on account of the absence of a material witness, the court is not justified in refusing the continuance because it may imagine the possible exist-

ence of facts which, if shown, would have been sufficient in avoidance of the case made by the party moving. Beatty v. Sylvester, 3 Nev. 228.

Continuance — Joint debtor defendant declared a bankrupt. Held, on motion for continuance as to other partner, trial could not proceed against him until a disposition of bankrupt proceedings of his copartner. Tinkum v. O'Neale, 5 Nev. 93.

Continuance—Power of court to impose conditions other than the payment of costs. Brown v. Warren, 17 Nev. 417.

Continuance—Error cured. Where witness afterwards appears and testifies, the error, if any was committed, is cured. Allen v. Reilly, 15 Nev. 452.

A motion for a continuance is always addressed to the sound discretion of the court, and should not be interfered with except where there has been a manifest abuse of that discretion. Choate v. Bullion M. Co., 1 Nev. 73, 74.

When an application is made for a continuance on the ground of the absence of a witness it is certainly in the discretion, if it is not the absolute duty, of the court to deny the application when the party opposing the motion will admit that the witness, if present, would swear to the facts as set out by the party applying for the continuance. O'Neil v. N. Y. S. P. M. Co., 3 Nev. 141, 144.

A continuance will not be granted by reason of the absence of witnesses residing outside of the state, though such witnesses have promised to appear and testify, as the party relying on their testimony should have taken their depositions. Yori v. Cohn, 26 Nev. 206, 225 (65 P. 945).

Where a motion for a continuance in an action for injuries was based on the absence of a witness who was not present when the injury occurred, and the testimony which he was expected to give in regard to other matters was not only immaterial, but could have been supplied by other witnesses, there was no abuse of discretion in refusing continuance. Taylor v. N. C. O. R. R., 26 Nev. 415 (69 P. 858).

5203. Idem—Testimony of witness present may be taken—Order when mining case continued—Violation a contempt.

SEC. 261. The party obtaining the postponement of a trial shall also, if required by the adverse party, consent that the testimony of any witness of such adverse party who is in attendance be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate, which shall accordingly be done, and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witnesses were produced. In actions involving the title to mining claims, if it be made to appear to the satisfaction of the court that in order that justice may be done, and the action fairly tried on its real merits, it is necessary that further developments should be made, and that the party applying has been guilty of no laches and is acting in good faith, the court shall grant the postponement of the trial of the action, giving the party a reasonable time in which to prepare for trial. And in granting such postponement, the court may, in its discretion, annex as a condition thereto an order that the party obtaining such postponement shall not, pending the trial of the action, remove from the premises in controversy any valuable earth or ore, and for any violation of an order so made, the court or the judge thereof may punish for contempt, as in the cases of violation of an order of injunction, and may also vacate the order of postponement.

Kerr, C. C. P., 596.

There is nothing in this section to show that it was intended to make actual developments the only, or even the best, evidence admissible. Silver M. Co. v. Fall, 6 Nev. 117, 124.

CHAPTER 28

TRIAL BY JURY

5204. Drawing of jury, number upon consent, examination of.
5205. Parties united must join in challenge—Four peremptory challenges.
5206. Grounds for challenge for cause.
5207. Challenges—How tried—Witnesses.
5208. Oath and custody of jury.
5209. Juror, when sick, procedure.
5210. Order of trial—Evidence, defense, instructions, argument.
5211. Jury may view property or premises.
5212. Charge to jury—Court must furnish in writing, upon request, points of law.

5213. Deliberation of jury, how and where conducted—Duty of officer in charge—Parties may appoint persons to remain with officer.
5214. Jury may take with them certain papers.
5215. Jury may come into court for further instructions.
5216. When prevented from giving verdict, the cause may be again tried.
5217. While jury absent, court may adjourn—Sealed verdict.
5218. Verdict, how declared.
5219. Proceedings when verdict informal.
5220. Clerk to record verdict—Jury assents.

5204. Drawing of jury, number upon consent, examination of.

SEC. 262. When the action is called for trial by jury the clerk shall prepare separate ballots containing the names of the jurors summoned who have appeared and not been excused, and deposit them in a box, the kind to be approved by the judge. He shall then, after thoroughly mixing the same, draw from the box twelve names, and the persons whose names are so drawn shall then be examined as to their qualifications to serve as jurors. If the ballots become exhausted before the jury is complete, or if for any cause a juror or jurors be excused or discharged, a sufficient number of additional jurors shall be drawn from the jury box and summoned as provided by law. The jury shall consist of twelve persons, unless the parties consent to a less number. The parties may consent to any number not less than four. Such consent shall be entered by the clerk in the minutes of the trial.

Kerr, C. C. P., 600.
The right of trial by jury is secured by the constitution, sec. 232.
General statutes concerning jurors and juries, secs. 4925–4942.
Juries in criminal cases, secs. 7124, 7129.

It is competent for the legislature to point out the mode of impaneling juries, and the forms of the common law in procuring a jury can be changed and made subject to statutory regulations. State v. McClear, 11 Nev. 39. See State v. Johnson 12 Nev. 124; State v. Crozier, 12 Nev. 300, 304. See also citations under Const., art. 1, sec. 3.

In a purely equity case, the calling of a jury is a matter of discretion with the judge and not a matter of right in the parties. Van Vliet v. Olin, 4 Nev. 95 (97 A. D. 513).

5205. Parties united must join in challenge—Four peremptory challenges.

SEC. 263. Either party may challenge the jurors; but when there are several parties on either side, they shall join in a challenge before it can be made, unless the court otherwise order or direct. The challenges shall be to individual jurors, and shall either be peremptory or for cause. Each party shall be entitled to four peremptory challenges.

Kerr, C. C. P., 601.

5206. Grounds for challenge for cause.

SEC. 264. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by statute to render a person competent as a juror.

2. Consanguinity or affinity within the third degree to either party.

3. Standing in the relation of debtor or creditor, guardian and ward, master and servant, employer and clerk, or principal and agent, to either party; or being a member of the family of either party or a partner, or united in business with either party; or being security on any bond or obligation for either party.

4. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action; or being then a witness therein.

5. Interest on the part of the juror in the event of the action, or in the main question involved in the action; except the interest of the juror as a member or citizen of a municipal corporation.

6. Having formed or expressed an unqualified opinion or belief as to

the merits of the action, or the main question involved therein; *provided,* that the reading of newspaper accounts of the subject-matter before the court shall not disqualify a juror either for bias or opinion.

7. The existence of a state of mind in the juror evincing enmity against or bias to either party.

Kerr, C. C. P., 602.

One who was a stockholder when suit was commenced against a corporation and would be liable for his share of any costs incurred while he remained a stockholder, would be disqualified as a juror. Fleeson v. Savage S. M. Co., 3 Nev. 157, 162.

The grounds of challenge to jurors for cause are pointed out by this section, and a party desiring to have such challenge tried must specify the grounds upon which he bases it. Estes v. Richardson, 6 Nev. 129.

Facts on which it was held that a challenge for cause was properly overruled. Idem.

Cited, Conley v. Chedic, 7 Nev. 336, 340.

Upon the facts of this case it is not shown that the juror challenged had either formed or expressed any unqualified opinion. Weill v. Lucerne M. Co., 11 Nev. 200, 206.

The general abstract bias which a juror may entertain when he expresses his sympathy for plaintiff in an injury case, because of his unfortunate condition resulting from the accident, where he believes that he can set aside such sympathy and render a just verdict on the evidence and instructions, is not sufficient to disqualify him. Burch v. S. P. R. R. Co., 32 Nev. 75, 100 (104 P. 225).

Even though the court errs in denying a challenge of a juror for cause, if the complaining party has peremptory challenges remaining, the peremptory challenging of the same juror cures the error, unless the party was thereby forced to exhaust its peremptory challenges, and was deprived of the substantial right to use the challenge on some other juror. Idem.

The relation of landlord and tenant between a juror and a party authorizes the sustaining of a challenge to a juror. Sherman v. S. P. R. R. Co., 33 Nev.—(111 P. 416).

Any error in sustaining a challenge to a juror is harmless if no objectionable persons are on a jury as finally constituted. Idem.

5207. Challenges—How tried—Witnesses.

SEC. 265. Challenges for cause shall be tried by the court. The juror challenged, and any other person, may be examined as a witness on the trial of the challenge.

Kerr, C. C. P., 603.

5208. Oath and custody of jury.

SEC. 266. As soon as the jury is completed, an oath or affirmation shall be administered to the jurors, in substance that they, each of them, will well and truly try the matter in issue between....., the plaintiff, and ....., the defendant, and a true verdict render according to the evidence. After the oath or affirmation has been administered and the jury has been fully impaneled, it shall be the duty of the court to order the jury into the custody of the sheriff, or other officer selected by the court, and the jurors shall not be allowed to separate or depart from the custody of the sheriff or other officer until they have been duly discharged, unless by the consent of the parties to the action. It shall be the duty of the sheriff, at the charge of the parties to the action, to prepare suitable and comfortable apartments, and prepare food for the jury pending the trial.

Kerr, C. C. P., 604.

5209. Juror, when sick, procedure.

SEC. 267. If, after the impaneling of the jury, and before verdict, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case, the trial may proceed with the other jurors, or a new juror may be sworn, and the trial begun anew; or the jury may be discharged, and a new jury then or afterwards impaneled.

Kerr, C. C. P., 615.

5210. Order of trial—Evidence, defense, instructions, argument.

SEC. 268. When the jury has been sworn, the trial must proceed in the following order, unless the judge, for special reasons, otherwise directs:

1. The pleadings shall be read by counsel for the plaintiff or of the

respective parties, as they may prefer, or, if not so read, counsel for plaintiff may state the issue. Counsel for the plaintiff and defendant, respectively, shall then make opening statements, if any they desire to make;

2. The plaintiff and defendant shall then, each respectively, offer the evidence upon his part;

3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

4. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, or unless a demand be made to have the jury instructed in advance of the argument as hereafter provided in this section, the plaintiff must commence and may conclude the argument;

5. If several defendants, having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;

6. The court may then charge the jury; *provided*, if either party demand it, the court must settle and give the instructions to the jury before the argument begins, but this shall not prevent the giving of further instructions which may become necessary by reason of the argument.

Kerr, C. C. P., 607.

Further regarding instructions to juries, see court rule 40, following section 4942.

5211. Jury may view property or premises.

SEC. 269. When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

Kerr, C. C. P., 610.

5212. Charge to the jury—Court must furnish in writing, upon request, points of law.

SEC. 270. In charging the jury the court shall 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 also inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge, or must sign, at the time, a statement of such points prepared and submitted by the counsel of either party.

Kerr, C. C. P., 608.

See Const., sec. 327, ante.

To inform the jury what the law is connected with the case in hand and show them how to apply it to the particular facts involved. State v. Levigne, 17 Nev. 435 (30 P. 1084).

It is proper for a court to refuse instructions containing correct principles of law, if there is no evidence before the jury making them applicable to the case on trial. Sherman v. Dilley, 3 Nev. 22.

Instructions at party's own request—Estoppel. Gillson v. Price, 18 Nev. 109 (1 P. 459); Meyer v. V. & T. R. Co., 16 Nev. 341.

When a court is laying down a general rule of law, it is not improper to notice exceptions to the general rule or such circumstances as will prevent its operation. Van Valkenburg v. Huff, 1 Nev. 142.

Facts proved and not controverted need not go to the jury. It is no error for a court in its charge to take from the consideration of the jury a fact proven by one party and not controverted by the other. Sharon v. Minnock, 6 Nev. 377.

Whole charge to jury to be considered as entirety. Caples v. C. P. R. Co., 6 Nev. 265; Allison v. Hagan, 12 Nev. 38; Solen v. V. & T. R. Co., 13 Nev. 106.

Instruction inapplicable to issue. A judg-

ment will not be reversed on account of an erroneous instruction, when it appears that it was not applicable to the issues and could not have injured. Brown v. Lillie, 6 Nev. 244.

Charge to jury—Error—In case of money account, bill of particulars. Huguet v. Owen, 1 Nev. 464.

Charge to jury—Error—Proper measure of damages. Harvey v. Sides S. M. Co., 1 Nev. 539.

An instruction of the court, assuming as a fact that A was a creditor of B, where this was a fact in issue in the case, was clearly erroneous. Gaudette v. Travis, 11 Nev. 149; Tognini v. Kyle, 17 Nev. 209.

Action for water right and mill site, error to charge that plaintiff must prove right to premises and damages. Dillon v. Sherman, 2 Nev. 67.

The rule that a judgment must be reversed where instructions on a material point are contradictory, is not an absolute and unqualified rule. Rule explained. Lobdell v. Hall, 3 Nev. 507.

Instructions given or refused by the lower court will not be inquired into on appeal, unless the record shows that the giving or refusal to give them was excepted to at the time. Idem.

Evident meaning versus literal language —Theory regarding ledge—Instruction that it must be conclusively established, error. Silver M. Co. v. Fall, 6 Nev. 116.

When a plaintiff claims water on the ground of prior appropriation, it is error in the court to refuse an instruction to this effect: "The plaintiff is not entitled to any greater quantity of the water of Desert creek than he actually appropriated prior to defendant's appropriation." Lobdell v. Simpson, 2 Nev. 274.

"Character" of injured person not involved in suit for negligence. An instruction submitting it to the jury for such purpose is error. Johnson v. Wells, Fargo & Co., 6 Nev. 224.

The presumption in all cases of jury trials is that the jury apply the law as given by the court, and upon such law and the evidence render their verdict; and no appellate court can decide the effect of the one separate from the other. Idem.

Action for counsel fees, traveling expenses, and time lost—Charge to jury. Hardy v. Ophir S. M. Co., 4 Nev. 304.

Error—Action on insurance policy. Gerhauser v. North British Co., 6 Nev. 15.

Reiterations in instructions may be stricken out. Gerhauser v. N. B. Ins. Co., 7 Nev. 174.

If an equity case is treated as an ordinary action at law, and submitted to a jury as such, and the court considers itself bound and controlled by the verdict as in an action at law, each party has the same right with respect to instructions as if it were a case at law. Van Vliet v. Olin, 4 Nev. 95 (97 A. D. 513).

Submitting rejected portions only partly obliterated. No error, unless objected to and rewriting refused. Allison v. Hagan, 12 Nev. 38.

Refusal of instructions. Held, error in such case. Idem.

Instructions as to the law under a certain state of facts are properly denied when the uncontroverted evidence shows such facts do not exist. Shields v. Ditch Co., 23 Nev. 349 (47 P. 194).

Instructions — Where no injury occurs. Court will not consider whether correct or not. Smith v. Lee, 10 Nev. 208.

When not prejudicial. When upon the appellant's own showing of facts, the judgment if rendered in his favor, would have to be reversed. Bishop v. Stewart, 13 Nev. 25; Gaudette v. Travis, 11 Nev. 149.

Stating to a jury a fact not controverted, not error. Menzies v. Kennedy, 9 Nev. 152.

Instructions calculated to mislead jury should be repressed. Thompson v. Powning, 15 Nev. 195.

The court is not required to instruct a jury upon any question not raised by the pleadings nor authorized by the evidence nor at issue in the case. Shafer v. Gilmer, 13 Nev. 330; Longabaugh v. V. & T. R. R. Co., 9 Nev. 271; Fulton v. Day, 8 Nev. 80; Schissler v. Chesshire, 7 Nev. 427; Tognini v. Hansen, 18 Nev. 61 (1 P. 198); Meyer v. V. & T. R. R. Co., 16 Nev. 341.

Unintelligible instruction was properly refused. Colquhorn v. Wells, Fargo & Co., 21 Nev. 459 (33 P. 977).

The rule in criminal cases, that where an instruction is refused for the reason that it has already been given, the court should so inform the jury, does not apply in civil cases. Gerhauser v. N. B. and M. Ins. Co., 7 Nev. 177.

Instruction as to veins apexing in mining location, held harmless error. Southern Nev. G & S. M. Co. v. Holmes, 27 Nev. 108 (103 A. S. 759, 73 P. 759).

Forfeit money breach of contract. Eager v. Mathewson, 27 Nev. 220 (74 P. 404).

An instruction cannot be reviewed on appeal where the record fails to disclose any objection made or exception taken thereto. McGurn v. McInnis, 24 Nev. 370 (55 P. 304); McNamee v. Nesbitt, 24 Nev. 400 (56 P. 37).

Use of whistle as warning. Powell v. N. C. O. R. R. Co., 28 Nev. 305 (82 P. 96).

Issues covered by charges given. Burch v. S. P. Co., 32 Nev. 75.

Court may refuse to give a partially erroneous instruction. Idem.

5213. Deliberation of jury, how and where conducted—Duty of officer in charge—Parties may appoint persons to remain with officer.

SEC. 271. After hearing the charge, the jury may either decide in court

or retire for deliberation. If they retire, they shall be kept together in a room provided for them, or some other convenient place under charge of one or more officers, until they agree upon their verdict or are discharged by the court. The officer shall, to the utmost of his ability, keep the jury separate from other persons. He shall not suffer any communication to be made to them, or make any himself, unless by order of the court or judge, except to ask them if they have agreed upon their verdict; and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon. Each party to the action may appoint one or more persons, one of whom on each side shall be entitled to remain with the officer or officers in charge of the jury, and to be present at all times when any communication is had with the jury, or any individual member thereof, and no communication, either oral or written, shall be made to or received from the jurors, or any of them, except in the presence of and hearing of such persons so selected by the parties; and in case of a written communication, it shall not be delivered till read by them.

Kerr, C. C. P., 613.

Expenses of jurors, sec. 2035.

Separation of a juror, when not prejudicial. Carnaghan v. Ward, 8 Nev. 30.

Difference between "treating" a juror and performing a mere act of humanity. Sacramento & M. M. Co. v. Showers, 6 Nev. 291.

"Treating" jury, verdict and judgment set aside. Idem.

What tampering with jury avoids verdict. Idem.

Treating jury to liquor, what will not violate verdict. Schissler v. Chesshire, 7 Nev. 427.

Drinking liquor by juror, when not furnished by prevailing party will not vitiate verdict. Richardson v. Jones, 1 Nev. 405.

Intoxication of jury avoids verdict. Davis v. Cook, 9 Nev. 134.

Separation of jury without objection, in the absence of showing of harm, verdict not disturbed. Menzies v. Kennedy, 9 Nev. 153.

5214. Jury may take with them certain papers.

SEC. 272. Upon retiring for deliberation, the jury may take with them all papers, except depositions, which have been received as evidence in the cause, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony, or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

Kerr, C. C. P., 612.

5215. Jury may come into court for further instructions.

SEC. 273. 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 of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of or after notice to the parties or counsel.

Kerr, C. C. P., 614.

5216. When prevented from giving verdict, the cause may be again tried.

SEC. 274. In all cases where a jury are discharged, or prevented from giving a verdict by reason of accident or other cause during the progress of the trial, or after the cause is submitted to them, the action may be again tried, immediately or at a future time, as the court shall direct.

Kerr, C. C. P., 616.

5217. While jury absent, court may adjourn—Sealed verdict.

SEC. 275. While the jury are absent, the court may adjourn from time to time in respect to other business, but it shall, nevertheless, be deemed open for every purpose connected with the cause submitted to the jury until

a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

Kerr, C. C. P., 617.

5218. Verdict, how declared.

SEC. 276. When the jury have agreed upon their verdict, they shall be conducted into court by the officer having them in charge; their names shall then be called, and they shall be asked by the court, or the clerk, whether they have agreed upon their verdict; and if the foreman answer in the affirmative, they shall, on being required, declare the same.

Kerr, C. C. P., 618.

5219. Proceedings when verdict informal.

SEC. 277. If the verdict be informal or insufficient in not covering the whole issue or issues submitted, the verdict may be corrected by the jury, under the advice of the court, or the jury may again be sent out.

Kerr, C. C. P., 619.

5220. Clerk to record verdict—Jury to assent to.

SEC. 278. When the verdict is given, and is not informal or insufficient, the clerk shall immediately record it in full in the minutes, and shall read it to the jury, and inquire of them whether it is their verdict. If more than one-fourth of the jurors disagree, the jury shall be again sent out; but if no disagreement be expressed, the verdict shall be complete, and the jury shall be discharged from the case.

The constitution provides that three-fourths of the jury may determine a civil case, sec. 232.
Kerr, C. C. P., 618.

CHAPTER 29

THE VERDICT

5221. General and special verdicts defined.
5222. When a general or special verdict may be rendered.
5223. Verdict in actions for recovery of money, or on counterclaim.
5224. Verdict in action to recover specific property.
5225. Entry of verdict.

5221. General and special verdicts defined.

SEC. 279. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict shall present the conclusions of fact, as established by the evidence, and not the evidence to prove them; and those conclusions of fact shall be so presented as that nothing shall remain to the court but to draw from them conclusions of law.

Kerr, C. C. P., 624.

A special verdict must expressly present all the material facts, so that nothing shall remain for the court but to draw from them the conclusions of law. Knickerbocker & N. S. M. Co. v. Hall, 3 Nev. 194, 280.

Upon a special verdict the court must find conclusions of law. Fitzpatrick v. Fitzpatrick, 6 Nev. 66.

If a verdict is absolutely defective under the pleadings, no legal judgment can be entered thereon. Brown v. Lillie, 6 Nev. 177.

5222. When a general or special verdict may be rendered.

SEC. 280. In an action for the recovery of money only, or specific real property, the jury, unless instructed by the court to render a special verdict, may in their discretion render a general or special verdict. In all cases the court must upon the request in writing of any of the parties, direct the jury to find a special verdict in writing upon all or any of the issues and in all

cases must instruct them upon the request in writing of any of the parties, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and must direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter and the court must give judgment accordingly.

Kerr, C. C. P., 625.

5223. Verdict in actions for recovery of money, or on counterclaim.

SEC. 281. When a verdict is found for the plaintiff, in an action for the recovery of money, or for the defendant, when a counterclaim is established, exceeding the amount of the plaintiff's claim as established, the jury shall also find the amount of the recovery.

Kerr, C. C. P., 626.

Cited, Knickerbocker & N. S. M. Co. v. Hall, 3 Nev. 201.

Where the verdict, though irregular, is sufficient to enable the court to understand it, and judgment is entered in accordance therewith, except as to rate of interest, it was held that the court had the right to allow interest on the amount found at the rate expressed in the note. Allen v. Reilly, 15 Nev. 452, 459.

5224. Verdict in action to recover specific property.

SEC. 282. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property, and may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

Kerr, C. C. P., 627.

As the value of the property at the time of the conversion is not the true measure of damage, a general finding of its value is not a sufficient assessment of the sum of money to be recovered by the successful party in an action for the wrongful conversion of such property. Knickerbocker & N. S. M. Co. v. Hall, 3 Nev. 194.

In replevin, where the property has not been delivered to plaintiff, the verdict and judgment in his favor are required to be in the alternative, and so also is the execution. Carson v. Applegarth, 6 Nev. 187, 189.

5225. Entry of verdict.

SEC. 283. Upon receiving a verdict, an entry shall be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and the verdict; and where a special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.

Kerr, C. C. P., 628.

CHAPTER 30

TRIAL BY THE COURT

5226. Jury trial may be waived, when and how.
5227. Decision of court, when filed—Modification of findings.
5228. Findings of fact may be waived.
5229. Judgment on issue of law, reference ordered, when—Chancery cases tried by court.

5226. Jury trial may be waived, when and how.

SEC. 284. Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court, in other actions, in the manner following:

1. By failing to demand the same at or before the time the cause is set for trial or to appear at the trial.

2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent in open court, entered in the minutes.

Kerr, C. C. P., 631.

5227. Decision of court, when filed—Modification of findings.

SEC. 285. Upon a trial of a question of fact by the court its decision must be given in writing, and filed with the clerk within thirty days after the cause is submitted for decision. The court may, however, at any time before a notice of appeal is served and filed, or before a motion for a new trial is ruled upon, if such motion is made, add to or modify the findings in any respect, so as to make the same conform to the issues presented by the pleadings, and to the evidence adduced at the trial. No such additions to or modifications of, the findings shall be made unless a notice in writing specifying generally the additions or modifications desired, shall have been served on the adverse party, or his attorney of record.

Kerr, C. C. P., 632.

Where a cause is tried by a court without a jury, the same weight and consideration is given to its findings as to a verdict; and the same rules apply as to reversing them on appeal on the ground of being contrary to evidence, as to a verdict of the jury. State v. Yellow Jacket M. Co., 5 Nev. 415.

When a finding of facts is defective, it must be excepted to in the court below, or this court will not reverse the case for such defect. Whitmore v. Shiverick, 3 Nev. 288.

It is not necessary for a court to find a fact which is admitted in the pleadings. Virgin v. Brubaker, 4 Nev. 31.

Judgment not sustained. Lockhart v. Mackie, 2 Nev. 294.

This is a modification of Stats. 1861, sec. 180, p. 343, and Stats. 1869, sec. 182, p. 224, which have had the following citations:

The written decision referred to in this section is something which must precede the judgment and upon which it is entered. Corbett v. Job, 5 Nev. 201.

The formal decision required to be filed after trial of an issue of fact by the court is different from the written opinion of the court mentioned in sec. 414 of this act. Reno W. L. & L. Co. v. Osburn, 25 Nev. 53, 68 (56 P. 945).

Though the court refused to make certain specific findings on the issues made by the pleadings, such refusal will not constitute reversible error, in the absence of any affirmative showing in the record that the court failed or refused to make findings of fact as required by this section, since a presumption of the regularity of the proceedings exists. Schwartz v. Stock, 26 Nev. 128, 142 (65 P. 351).

Specific findings of fact on the issues made by the pleadings, requested after the rendition of judgment, were properly refused, as the statute does not authorize such practice. Idem.

5228. Findings of fact may be waived.

SEC. 286. Findings of fact may be waived by the several parties to an issue of fact:

1. By failing to appear at the trial.
2. By consent in writing, filed with the clerk.
3. By oral consent, in open court, entered in the minutes.

Kerr, C. C. P., 634.

5229. Judgment on issue of law, reference ordered, when—Chancery cases tried by court.

SEC. 287. On a judgment upon an issue of law, if the taking of an account be necessary to enable the court to complete the judgment, a reference may be ordered. Chancery cases may be tried by the court, with or without the finding of a jury, upon issues formed by the court.

Kerr, C. C. P., 636.

When there are two distinct defenses, it is not proper practice to impanel one jury to try the equitable defense, and another the legal defense. It is, however, proper to keep the two defenses separate. The judge himself may first hear and determine the equitable side of the case; or, if in doubt, he may submit special issues to the jury who are to try the law side of the case. Low v. Crown Point, 2 Nev. 75.

CHAPTER 31

REFERENCES AND TRIALS BY REFEREES

5230. Reference ordered upon agreement of parties, in what cases.
5231. Reference ordered on motion, in what cases.
5232. Number of referees, qualifications.
5233. Either party may object, grounds for.
5234. Objections, how disposed of.
5235. Report of referees to stand as decision of court.

5230. Reference ordered upon agreement of parties, in what cases.

SEC. 288. A reference may be ordered upon the agreement of the parties, filed with the clerk, or entered in the minutes:

1. To try any or all of the issues in an action or proceeding whether of fact or of law, and to report a finding and a judgment thereon.

2. To ascertain a fact necessary to enable the court to proceed and determine the case.

Kerr, C. C. P., 638.

If a reference is general, the report stands as a decision of the court, and, upon filing, judgment should have been thereon entered, unless such decision had been altered or amended. If the reference is to find the facts, then the report stands as a special verdict, and upon that special verdict the court should have found conclusions of law. Fitzpatrick v. Fitzpatrick, 6 Nev. 65.

Referees appointed, in an action involving a leasehold, to try all issues and report, after trial and reporting in favor of defendant, had no further authority, and could not make a subsequent order suspending all proceedings pending motion for new trial about to be filed by plaintiffs. Cline v. Langan, 31 Nev. 239, 243 (101 P. 553).

5231. Reference ordered on motion, in what cases.

SEC. 289. When the parties do not consent, the court may upon the application of either, or of its own motion, direct a reference in the following cases:

1. When the trial of an issue of facts requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein.

2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise in any stage of the action; or,

4. When it is necessary for the information of the court in a special proceeding.

Kerr, C. C. P., 639.

The supreme court will, in an election contest involving a state office, where it is apparent some twenty-five thousand votes are to be counted, appoint a commissioner to segregate the disputed from the undisputed ballots and report to the court the ballots in dispute with the objections interposed to the same. Springmeyer v. Baker, 34 Nev. —; Legate v. Josephs, 34 Nev. —.

5232. Number of referees, qualifications.

SEC. 290. A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge shall appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection. When there are three referees, all shall meet, but two of them may do any act which may be done by all.

Kerr, C. C. P., 640.

5233. Either party may object, grounds for.

SEC. 291. Either party may object to the appointment of any person as referee on one or more of the following grounds:

1. A want of any of the qualifications prescribed by statute to render a person competent as a juror.

2. Consanguinity or affinity within the third degree to either party.

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of either party, or a partner in business with either party, or being security on any bond or obligation for either party.

4. Having served as a juror or been a witness on any trial between the same parties for the same cause of action, or being then a witness in the cause.

5. Interest on the part of such person in the event of the action, or in the main question involved in the action.

6. Having formed or expressed an unqualified opinion or belief as to the merits of the action.

7. The existence of a state of mind in such person evincing enmity against or bias to either party.

Kerr, C. C. P., 641.

5234. Objections, how disposed of.

SEC. 292. The objections taken to the appointment of any person or [as] referee shall be heard and disposed of by the court. Affidavits may be read and any person examined as a witness as to such objections.

Kerr, C. C. P., 642.

5235. Report of referees to stand as decision of court.

SEC. 293. The referees shall make their report within ten days after the testimony before them is closed. Their report upon the whole issue shall stand as the decision of the court, and upon filing the report with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court. The decision of the referees may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the report shall have the effect of a special verdict.

Kerr, C. C. P., 643–645.

Majority of referees may decide, sec. 5488.

Court may revoke order of continuance and appoint a referee. Young v. Clute, 12 Nev. 31.

Power of referee same as court would have to continue the hearing from time to time. Idem.

Removal of referee. If referee fails to make report in time ordered, he may be removed upon application of either party, but if not removed, his authority to hear the case does not expire. Rhodes v. Williams, 12 Nev. 20.

See Fitzpatrick v. Fitzpatrick, under sec. 288 of this act.

Cited, Maher v. Swift, 14 Nev. 332.

See Cline v. Langan, under sec. 288 of this act.

CHAPTER 32

JUDGMENT BY DEFAULT

5236. Judgment on failure to answer, how to be entered.

SEC. 294. Judgment may be had, if the defendant fail to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon the application of the plaintiff, shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant, or against one or more of several defendants, in the cases provided for in section 89.

2. In other actions, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk shall enter the default of the defendant; and

thereafter the plaintiff may apply at the first, or any subsequent term of the court, for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, be necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account, or hear the proof, or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages the examination of a long account be necessary, by a reference, as above provided.

3. In actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time, within which, by law the defendant is required to answer, may, upon proof of the publication, and that no answer has been filed, apply for judgment; and the court shall thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant be not a resident of the state, shall require the plaintiff, or his agent, to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover. The word answer used in this section shall be construed to include any pleading that raises an issue of law or fact, whether the same be by general or special appearance.

Kerr, C. C. P., 585.

Where defendant fails to appear in action for recovery of unliquidated damages, it is not necessary to call a jury to assess damages. Court may either hear proof itself or order a reference for that purpose. One of these modes must, however, be pursued. It is erroneous to render judgment by default without proof in such cases. Ballard v. Purcell, 1 Nev. 342, 343, 344.

Cited, Laird v. Morris, 23 Nev. 37, 38 (42 P. 11).

Appeal will not lie from a judgment by default. Paul v. Armstrong, 1 Nev. 82, 96.

Where a demurrer to a complaint has been overruled, an entry of default is not a prerequisite to the rendition of judgment. Winter v. Winter, 8 Nev. 130, 136.

A judgment entered by default should not be set aside by affidavits and an answer which failed to show that the defendant had a good and meritorious defense to the action. The judgment should not be set aside to enable the defendant to raise some technical objection. Ewing v. Jennings, 15 Nev. 379, 382.

A motion to quash summons does not stay proceedings, or deprive the clerk of the power to enter judgment on a money demand against defendant on his default. Higley v. Pollock, 21 Nev. 198, 209 (27 P. 895).

Judgment by default confined to prayer of complaint. Burling v. Goodman, 1 Nev. 314.

Judgment of dismissal, where no summons has been served, should be without prejudice. Cedar Hill M. Co. v. J. Little M. Co., 15 Nev. 302.

Default improperly taken. The defendant ought, if an opportunity is presented during the term at which it was taken, to apply to the court below for relief. Kidd v. Four-Twenty M. Co., 3 Nev. 381.

Judgment by default—Inexcusable negligence. Harper v. Mallory, 4 Nev. 448.

Judgment by default—Excusable negligence. State v. Con. Va. M. Co., 13 Nev. 194.

CHAPTER 33

JUDGMENT ON DISMISSAL OR NONSUIT

5237. Dismissal of action or nonsuit, in what cases granted.

SEC. 295. An action may be dismissed, or a judgment of nonsuit entered in the following cases:

1. By the plaintiff himself at any time before trial, upon the payment of costs, if a counterclaim has not been made. If a provisional remedy has been allowed, the undertaking shall thereupon be delivered by the clerk to the defendant, who may have his action thereon.

2. By either party upon the written consent of the other.

3. By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

4. By the court when upon trial and before the final submission of the case the plaintiff abandons it.

5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the court or jury. The dismissal mentioned in the first two subdivisions shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly. In every other case the judgment shall be rendered on the merits.

Kerr, C. C. P., 581, 582.

The grounds urged for a nonsuit must be as specifically designated as any other exceptions or objections taken in the course of a trial. Sharon v. Minnock, 6 Nev. 377.

Where an action for ejectment for the recovery of a mining claim is dismissed by stipulation that each party pay his own costs and plaintiff be released from all liability on his injunction bond, and the defendant conveys his interest to plaintiff, it was held that the judgment of dismissal is a bar to any other suit between the same parties on the identical cause of action, and that an action for mesne profits, founded upon the same title, could not thereafter be maintained. Phillpotts v. Blasdel, 10 Nev. 19, 23.

A nonsuit can only be granted upon the grounds stated and in the manner provided. Burns v. Rodefer, 15 Nev. 59, 63.

The dismissal of a party defendant at the instance of plaintiff before trial, in a case where no counterclaim has been made, is not a judgment on the merits and is not a bar to further proceedings against the dismissed defendant upon the cause of action stated in the complaint. James v. Leport, 19 Nev. 175, 177 (8 P. 47).

The fact that respondent makes a counterclaim that even her counsel admits cannot be set up in proceeding, does not change the situation. It is precisely the same as if a counterclaim had not been made. State ex rel. Miles v. Wedge, 28 Nev. 39 (78 P. 760).

This section does not change the inflexible rule that a judgment of nonsuit is not a judgment on the merits, and such judgment of nonsuit is no bar to another suit upon the same cause of action. Laird v. Morris, 23 Nev. 37, 38 (42 P. 11).

The only purpose of the section was to determine in what cases nonsuits or dismissals should be entered. The statute is in affirmance of the common law, and, though by a consolidation of sections it is subject to criticism for uncertainty, the presumption is that no change was intended in the law. Idem.

History of this section explained. Idem.

The words "sufficient case for the jury" are not words of limitation as to cases which were only tried before a jury, but were intended to prescribe the test of the sufficiency of the evidence; and hence the court's right to grant a nonsuit extended to equity cases, and was not limited to those only which were triable by a jury. McCafferty v. Flinn, 32 Nev. 269 (107 P. 225).

In considering a motion for nonsuit at the close of plaintiff's case, every fact essential to plaintiff's recovery that his evidence tends to prove and all legal presumptions arising from such evidence must be taken as established. Fox v. Meyers, 29 Nev. 169; Burch v. S. P. R. R. Co., 32 Nev. 75; Patchen v. Keeley, 19 Nev. 409; Brown v. Warren, 16 Nev. 231.

CHAPTER 34

JUDGMENT IN GENERAL

5238. Judgment defined.
5239. Judgment, how given, for or against whom.
5240. Judgment, joint or several, when given.
5241. Relief to be awarded to plaintiff.
5242. Actions against sheriff for official acts —Notice to sureties.

5238. Judgment defined.

SEC. 296. A judgment is the final determination of the rights of the parties in the action or proceeding.

Kerr, C. C. P., 577.

The jurisdiction of a court to render judgment in a cause is coextensive with its authority to inquire into the facts. Feusier v. Lammon, 6 Nev. 209.

The decision of the court is the judgment; the entry by the clerk is the evidence of it merely. Cal. State Tel. Co. v. Patterson, 1 Nev. 150.

A judgment may be final, although it is not recorded in a judgment book or entered in a judgment docket. Idem.

The question whether a judgment is final must be determined with reference to the facts presented by the record. Idem.

A judgment is none the less final because some future orders of the court may become necessary to carry it into effect. Idem.

A judgment is a judicial act of the court, and it is as final when pronounced by the court as when it is entered and recorded by the clerk as required by the statute, the entry being the ministerial act of the clerk. Central Trust Co. v. Holmes, 30 Nev. 437 (97 P. 390).

There cannot be two final judgments in the same action. Low v. C. P. M. Co., 2 Nev. 75.

A judgment rendered at a time and place other than those appointed by law, is no

judgment; it is not merely erroneous; it is void. Dalton v. Libby, 9 Nev. 192.

Judgment, how set aside. Idem.

Judgment entered in vacation on demurrer is irregular and void. Champion v. Sessions, 1 Nev. 478.

Judgment void for want of jurisdiction. A judgment by a justice of the peace against a nonresident, where the affidavit or order of publication is insufficient and there is no personal service nor any appearance, is absolutely void. Little v. Currie, 5 Nev. 90.

See Forsyth v. Chambers, 30 Nev. 337 (96 P. 930).

Judgment in equity case—Special issues. A judgment based on a general verdict in such an action is erroneous. Hulley v. Chedic, 22 Nev. 127 (58 A. S. 729, 36 P. 783).

Power of court over its judgment. When a judgment has once been rendered, the court has no right to set it aside, except in case of error in some respect, or injustice in the result. Scott v. Haines, 4 Nev. 426.

Wrong reason does not vitiate correct judgment. A wrong reason for a judgment, which is in itself correct, will not vitiate or affect it. Idem.

Clerical error may be amended when the error is shown by the record, and there is no necessity to resort to other evidence than is afforded by the record to correct the error. Sparrow v. Strong, 2 Nev. 362, 368.

There is a great conflict of authority as to whether an inferior court can amend its record whilst the case is pending, on writ of error, in a superior court: Held, that the pendency on the writ of error is not an impediment to the amending of the record so as to correct clerical errors. Idem.

Judgment, when under control of court. During the term in which the judgment is rendered the court has complete control of it, and on proper showing may set it aside. Ballard v. Purcell, 1 Nev. 342.

Jurisdiction over judgment after expiration of term. To continue full and complete jurisdiction in the court over the case beyond the term, some order must be made or proceeding taken in accordance with statute. State v. First National Bank, 4 Nev. 358; State v. Fourth District Court, 16 Nev. 371; Daniels v. Daniels, 12 Nev. 118.

Amendment of judgment after adjournment of term. The court has no power to amend a judgment after the adjournment of the term unless there is something in the record to amend by. Solomon v. Fuller, 14 Nev. 63.

Judgment not a bar when not on merits, nor can it be used as evidence in another action to establish the facts constituting the merits of the action in which it was rendered. Van Vliet v. Olin, 1 Nev. 495.

Proceedings not conclusive without a judgment on the merits. Idem.

Judgment conclusive. A judgment of a court of competent jurisdiction, between the same parties, and upon the same issues, is as a plea, a bar, or as evidence, conclusive, not only of the rights which it establishes, but of the facts which it directly decides. McLeod v. Lee, 17 Nev. 103; Brown v. Ashley, 16 Nev. 311; Sherman v. Dilley, 3 Nev. 21.

Judgment—Finality of. Where a party has treated a judgment as final by appealing from it to the supreme court, which appeal has been entertained and decided upon its merits, he cannot afterwards claim that no final judgment has been entered in the case. State v. Com. Lander Co., 22 Nev. 71 (35 P. 300).

County — Judgment against, same as audited claim against. The rendition of a judgment against a county is an auditing of the claim within the meaning of the statute, and it becomes the duty of the commissioners to allow it as an audited claim, unless some sufficient defense exists to the judgment. It makes no difference in this rule whether in the action in which the judgment was obtained the county was plaintiff or defendant. Idem.

Guardianship matters—Judgment of courts in—How only to be resisted. The judgment of the district court on matters concerning persons or estates of minors cannot be successfully resisted until overruled or modified by some proceeding impeaching it. Deegan v. Deegan, 22 Nev. 185 (58 A. S. 742, 37 P. 360).

Rights claimed under judgment. When any rights are claimed by virtue of a judgment of a court of special and limited jurisdiction, all the facts necessary to confer jurisdiction must be affirmatively shown. Mallett v. Uncle Sam Mining Co., 1 Nev. 188.

Judgment must correspond with pleadings. A judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered. Frevert v. Henry, 14 Nev. 191.

Judgment must conform to the issue. A judgment must conform with, and be sustained by, the pleadings of the party in whose favor it is rendered. No court, jury or referee has any authority to find a fact or draw therefrom a legal conclusion which is outside the issue. Marshall v. G. F. G. & S. M. Co., 16 Nev. 156.

Presumption in favor of judgment. An appellate court will presume that the judgment of the lower court was sustained by the evidence in the absence of a showing to the contrary. Carpenter v. Johnson, 1 Nev. 332; Nesbitt v. Chisholm, 16 Nev. 39.

Judgment—Presumption of findings. In an action to reform a deed for mutual mistake, the existence of which is denied by defendant, it was the duty of the lower court to determine which contention was correct; and, by giving judgment in favor of plaintiff, the presumption is that the issue was implicitly found in his favor. Wilson v Wilson, 23 Nev. 267 (45 P. 1009).

Mistake in judgment should be corrected by motion of lower court. Howard v. Richards, 2 Nev. 128.

Error in calculation—Modification of judgment. Feusier v. Va. City, 3 Nev. 58.

Amendment of judgment of supreme court. A judgment rendered at a previous term of the supreme court can only be amended upon something appearing in the original record. Peacock v. Leonard, 8 Nev. 247.

Action on judgment, etc. Rogers v. Hatch, 8 Nev. 35.

Sherman v. Dilley, 3 Nev. 21, criticized. The opinion expressed in Sherman v. Dilley, 3 Nev. 21, that a judgment cannot be pleaded in bar or operate by way of estoppel while the case is pending on appeal, is rather dictum than decision. Idem.

A judgment is final that disposes of the issues presented in the case, determines the costs, and leaves nothing for the future determination of the court. Perkins v. Sierra Nev. S. M. Co., 10 Nev. 411.

The question whether a judgment is final must be determined with reference to the facts presented by the record. Idem.

The sufficiency of the writing claimed to be a judgment should always be tested by its substance rather than its form. Humboldt M. & M. Co. v. Terry, 11 Nev. 237, 243; Terry v. Berry, 13 Nev. 514.

The entry of the judgment, as made by the clerk, is a final determination of the rights of the parties. Idem.

The court granted a decree of divorce with alimony in favor of plaintiff, and decreed the property in controversy to be the separate property of defendant. An appeal was taken by plaintiff from the portion of the decree "respecting the property rights of the respective parties." It was held that the appeal was properly taken from a part of the judgment. Lake v. Lake, 17 Nev. 230, 235 (30 P. 878).

When there is nothing before the court but the pleadings and papers constituting the judgment roll, and no error is disclosed therein, the judgment will be affirmed. Reinhart v. Company D, 23 Nev. 369 (47 P. 979).

An appellant may appeal from a judgment and, at the same time, prosecute a motion to vacate and set it aside, they being separate and independent remedies. Brooks v. Nickel Syndicate, 24 Nev. 311 (53 P. 597).

An appeal from a judgment does not operate to vacate or suspend it. Idem.

A judgment is binding upon the parties to a suit, and all persons whom they represent and claim under them, or as privy to them. Ahlers v. Thomas, 24 Nev. 407 (77 A. S. 820, 56 P. 93).

Attorney — Unauthorized action of, is ground for relief from judgment. Stanton-Thompson Co. v. Crane, 24 Nev. 171 (51 P. 116).

Right of action upon. Common-law rule prevails. Mandelbaum v. Gregovich, 24 Nev. 154 (50 P. 849).

Good cause for bringing action on. Idem.

Trust deed — Mortgage — Second lien — Foreclosure—Erroneous judgment. Gulling v. Washoe Co. Bank, 24 Nev. 477 (56 P. 580).

Certiorari—Scope of injury—Bar of proceedings. Wilson v. Morse, 25 Nev. 375 (60 P. 832).

Judgment of sister state is a bar to action in this state between the same parties and upon the same cause of action. Idem.

Conclusiveness — Persons included and affected—Codefendants. Gulling v. Washoe Co. Bank, 29 Nev. 257 (89 P. 25).

Where pleadings on their face and the judgment roll do not show the issue tried and determined between parties, it may be shown by extrinsic evidence. Idem.

Conclusiveness — Nature and requisites. Idem.

Evidence of judgment—Issues. Idem.

Order for judgment—Exception—Time of taking. Berry v. Equitable G. M. Co., 29 Nev. 451 (91 P. 537).

Entry by clerk without authority void. Idem.

General and special verdict, latter controls. Idem.

Decree on special verdict. Idem.

Justices of the peace—Process—Publication — Entry of judgment. Forsyth v. Chambers, 30 Nev. 337 (96 P. 930).

Indorsement of attorney's name on summons—Publication of summons—Idem.

Execution—Void judgment. Idem.

Vacating default judgment. State ex rel. Kerr v. District Court, 32 Nev. 189 (105 P. 1022).

Execution—Final judgment a prerequisite. Kapp v. District Court, 32 Nev. 264 (107 P. 95).

5239. Judgment, how given, for or against whom.

SEC. 297. Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

Kerr, C. C. P., 578.

The rule that a joint judgment has to be reversed in toto, if not good as an entirety, does not apply under our statutes and system of practice. Wood v. Olney, 7 Nev. 110, 115.

Cited, Lake v. Lake, 17 Nev. 235 (30 P. 878); Ronnow v. Delmue, 23 Nev. 33 (41 P. 1074).

5240. Judgment, joint or several, when given.

SEC. 298. In an action against several defendants, the court may, in its

discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper.

Kerr, C. C. P., 579.

Cited, Tinkum v. O'Neale, 5 Nev. 98.

Where a defendant is severally liable, a separate judgment against him may be entered upon his default, leaving the action to proceed against his codefendant. Evans v. Cook, 11 Nev. 69, 72, 75.

Cited, Ronnow v. Delmue, 23 Nev. 33 (41 P. 1074).

5241. Relief to be awarded to plaintiff.

SEC. 299. The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue. In any action involving the title to real property situate in this state or the specific performance of a contract to convey such real property, in which action the court shall determine that a party thereto holds title to, or an interest in, such real property which equitably belongs to and should be vested in or conveyed to another party to such action, the court shall have power by virtue of its judgment or decree alone to transfer such title or interest accordingly and vest it in the party so found to be entitled thereto; or the court may, in its discretion, direct the party so found to be wrongfully holding such title or interest to convey the same, within a specified time, to the party so found to be entitled thereto, and may further direct that, in default of such conveyance by said party, the clerk or other officer of the court who may be designated for that purpose in the judgment or decree shall make such conveyance. In all such cases, whether jurisdiction of the defendant is based on personal or constructive service of summons or whether the judgment or decree was heretofore or may be hereafter given or made, such judgment or decree of the court, or the conveyance of the clerk or other officer of the court so designated, as the case may be, is and shall be sufficient to transfer said title or interest to and vest the same in the party so found to be entitled thereto as fully and effectually as might be done by proper conveyance of the party so found to be wrongfully holding such title or interest.

Kerr, C. C. P., 580.

When judgment by default is taken, the plaintiff is confined to a recovery of the particular amount or thing demanded in the prayer of the complaint. Burling v. Goodman, 1 Nev. 314, 317.

Where the answer to a complaint is treated upon the trial as the answer to the petition for intervention, the case will be considered the same as if an answer to the petition had been filed. Marshall v. Golden Fleece M. Co., 16 Nev. 156, 173.

In such a case defendants cannot complain because the relief granted exceeded the demand in the petition, if that which was granted was consistent with the case made and was embraced within the issue. Idem.

Cited, Orr W. Co. v. Reno W. Co., 19 Nev. 65 (6 P. 72); Thompson v. Crockett, 19 Nev. 245 (3 A. S. 883, 9 P. 121).

A complaint praying for divorce, and that defendant be awarded custody of the children, does not authorize award of custody of the children to plaintiff and payments to her by defendant for support of plaintiff and the children. Mitchell v. Mitchell, 28 Nev. 110, 123 (79 P. 50).

Cited, in dissenting opinion of Talbot, J., Gulling v. Washoe Co. Bank, 29 Nev. 278 (89 P. 25).

5242. Actions against sheriff for official acts—Notice to sureties.

SEC. 300. If an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties, and the court or judge in vacation, may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.

Kerr, C. C. P., 1055.

Cited, Gaudette v. Glissan, 11 Nev. 184.

The provisions of this section can only be invoked by the sheriff. An order substituting the sureties as defendants in place of the sheriff was utterly null and void. Gaudette v. Roeder, 13 Nev. 341, 348.

CHAPTER 35

PARTIES NOT ORIGINALLY SUMMONED

5243. Parties not summoned in action on joint contract may be summoned after judgment.
5244. Idem—Summons, what to contain and how served.
5245. Affidavit to accompany summons.
5246. Answer, when filed—What may contain.
5247. What constitute the pleadings in the case.
5248. Issues, how tried—Verdict.

5243. Parties not summoned in action on joint contract may be summoned after judgment.

SEC. 301. When a judgment is recovered against one or more of several persons jointly indebted upon an obligation, by proceedings as provided in section 89, those who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons.

Kerr, C. C. P., 989.

Where there is a joint judgment in ejectment against several, a reversal as to one of the defendants necessarily reverses it as to all. Bullion M. Co. v. Croesus G. & S. M. Co., 3 Nev. 336.

5244. Idem—Summons, what to contain and how served.

SEC. 302. The summons, as provided in the last section, shall describe the judgment, and require the person summoned to show cause why he should not be bound by it, and shall be served in the same manner, and returnable within the same time, as the original summons. It shall not be necessary to file a new complaint.

Kerr, C. C. P., 990.

5245. Affidavit to accompany summons.

SEC. 303. The summons shall be accompanied by an affidavit of the plaintiff, his agent, representative or attorney, that the judgment, or some part thereof, remains unsatisfied, and shall specify the amount due thereon.

Kerr, C. C. P., 991.

5246. Answer, when filed—What may contain.

SEC. 304. Upon such summons, the defendant may answer within the time specified therein, denying the judgment or setting up any defense which may have arisen subsequently, or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the statute of limitations.

Kerr, C. C. P., 992.

5247. What constitute the pleadings in the case.

SEC. 305. If the defendant, in his answer, deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, shall constitute the written allegations in the case. If he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, shall constitute such written allegations.

Kerr, C. C. P., 993.

5248. Issues, how tried—Verdict.

SEC. 306. The issues formed may be tried as in other cases, but when

the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it shall be for the amount remaining unsatisfied on such original judgment, with interest thereon.

Kerr, C. C. P., 994.

CHAPTER 36

JUDGMENT BY CONFESSION

5249. Judgment by confession for debt due or contingent liability.

SEC. 307. A judgment by confession may be entered without action, either for money due or to become due or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

Kerr, C. C. P., 1132.

5250. Idem—Statement in writing, form of.

SEC. 308. A statement in writing shall be made, signed by the defendant, and verified by his oath, to the following effect:

1. It shall authorize the entry of judgment for a specified sum.

2. If it be money due, or to become due, it shall state concisely the facts out of which it arose, and shall show that the sum confessed therefor is justly due, or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and shall show that the sum confessed therefor does not exceed the same.

Kerr, C. C. P., 1133.

Where a statement and affidavit of confession authorizing the entry of judgment was filed with the clerk, who copied these papers in the judgment book and added "Judgment entered," with date and his name as clerk, and endorsed the same on back of statement, it was held that this constituted a valid judgment (Beatty, J., dissenting). Humboldt M. & M. Co. v. Terry, 11 Nev. 237, 241–247.

The statement and endorsement as entered in the judgment book was evidently intended as a determination of the rights of the parties to the confession and clearly shows in intelligible language, the relief granted. Idem.

In proceedings under this section there is no suit, no recovery or adjudication. It expressly authorizes the clerk to enter the judgment. He is not invested with any judicial functions. It is his duty to enter a judgment, and he can only enter such judgment as the parties themselves have expressly authorized by their statement. Idem.

5251. Filing statement, entering judgment.

SEC. 309. The statement shall be filed with the clerk of the court in which the judgment is to be entered, who shall indorse upon it, and enter in the judgment book a judgment of such court for the amount confessed, with ten dollars costs. The judgment and affidavit, with the judgment indorsed, shall thereupon become the judgment roll.

Kerr, C. C. P., 1134.

The authority to enter the judgment is derived from the statute and the statement. The statement with the endorsement and entry of the clerk, with sufficient certainty, exhibits the parties, the subject-matter, and the result, and substantially complies with the provisions of the statute. Humboldt M. & M. Co. v. Terry, 11 Nev. 238, 241–247.

CHAPTER 37

SUBMITTING CONTROVERSY WITHOUT ACTION

5252. Controversy, how submitted without action.

SEC. 310. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which should have jurisdiction if an action had been brought.

But it must appear, by affidavit, that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The court shall thereupon hear and determine the case and render judgment thereon, as if an action were pending.

Kerr, C. C. P., 1138.

Cited, State v. Tilford, 1 Nev. 243; Philips v. Eureka Co., 19 Nev. 348 (11 P. 32); Sadler v. Tatti, 17 Nev. 429 (30 P. 1082).

5253. Idem—Judgment on without costs—What constitutes judgment roll.

SEC. 311. Judgment shall be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment, shall constitute the judgment roll.

Kerr, C. C. P., 1139.

Cited, State v. Tilford, 1 Nev. 243.

5254. Judgment, how enforced—Appeal from.

SEC. 312. The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be in the same manner subject to appeal.

Kerr, C. C. P., 1140.

Cited, State v. Tilford, 1 Nev. 243.

CHAPTER 38

ARBITRATION

5255. What may be submitted to arbitration.
5256. Idem—How made.
5257. Submission to arbitration, how entered.
5258. Powers of arbitrators.
5259. Majority of arbitrators may determine—Must be shown.
5260. Award to be in writing—Judgment, when to be entered.
5261. Award may be vacated, when.
5262. Court may modify or correct award, when.
5263. Decision on motion, subject to appeal, but not judgment entered before motion.
5264. Submission revoked, what to be recovered.

5255. What may be submitted to arbitration.

SEC. 313. Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification shall not include questions relating merely to the partition or boundaries of real property.

Kerr, C. C. P., 1281.

Our statutory proceedings in cases of arbitration are in derogation of the common law, and must be strictly pursued.

Whenever a statute prescribes certain specific acts to be done as prerequisite to acquiring of jurisdiction, or the enforcement of a legal remedy, such acts must be substantially performed in the manner prescribed, in order to give validity to the proceeding.

The filing of the submission and the entry of the same in the clerk's register, in cases of arbitration, answer the purposes of the complaint and answer in ordinary actions, and like them must be filed before a hearing, trial, or judgment.

At common law scarcely any matter short of a want of power or jurisdiction appearing upon the face of an award is subject to a question or inquiry, and every reasonable intendment should be made to uphold it. But in statutory awards no such liberal interpretation can be invoked to its aid. Its validity must be determined by the provisions of the statute providing it. Steel v. Steel, 1 Nev. 27, 30–32.

5256. Idem—How made.

SEC. 314. The submission to arbitration shall be in writing, and may be to one or more persons.

Kerr, C. C. P., 1282.

5257. Submission to arbitration, how entered.

SEC. 315. It may be stipulated in the submission that it be entered as an order of the court, for which purpose it shall be filed with the clerk of the

court, where the parties, or one of them, reside. The clerk shall thereupon enter in his register of actions, a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award shall be made. When so entered the submission shall not be revoked without the consent of both parties. The arbitrators may be compelled by the court to make an award, and the award may be enforced by the court in the same manner as a judgment. If the submission be not made an order of the court, it may be revoked at any time before the award is made.

Kerr, C. C. P., 1283.
See Steel v. Steel, 1 Nev. 32, under sec. 313 of this act.

5258. Powers of arbitrators.

SEC. 316. Arbitrators shall have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon.

Kerr, C. C. P., 1284.

5259. Majority of arbitrators may determine—Must be sworn.

SEC. 317. All the arbitrators shall meet and act together during the investigation, but, when met, a majority may determine any question. Before acting, they shall be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding.

Kerr, C. C. P., 1285.
See sec. 5488.

5260. Award to be in writing—Judgment, when to be entered.

SEC. 318. The award shall be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award shall be filed with the clerk and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit showing that notice of filing the award has been served on the adverse party or his attorney at least four days prior to such application, and that no order staying the entry of judgment has been served, the award shall be entered by the clerk in the judgment book and shall thereupon have the effect of a judgment.

Kerr, C. C. P., 1286.

5261. Award may be vacated, when.

SEC. 319. The court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing, before the same arbitrators, or not, in its discretion:

1. That it was procured by corruption or fraud.

2. That the arbitrators were guilty of misconduct or committed gross error in refusing, on cause shown, to postpone the hearing or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced.

3. That the arbitrators exceeded their powers in making their award; or that they refused or improperly omitted to consider a part of the matters submitted to them; or, that the award is indefinite, or cannot be performed.

Kerr, C. C. P., 1287.

5262. Court may modify or correct award, when.

SEC. 320. The court may, on motion, modify or correct the award where it appears:

1. That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some person or property therein.

2. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matter submitted.

3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

Kerr, C. C. P., 1288.
See Steel v. Steel, 1 Nev. 30, under sec. 313 of this act.

5263. Decision on motion subject to appeal, but not judgment entered before motion.

SEC. 321. The decision upon the motion shall be subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before a motion is made shall not be subject to appeal.

Kerr, C. C. P., 1289.
See Steel v. Steel, 1 Nev. 30, under sec. 313 of this act.

5264. Submission revoked, what to be recovered.

SEC. 322. If a submission to arbitration be revoked, and action be brought therefor, the amount to be recovered shall only be the costs and damages sustained in preparing for and attending the arbitration.

Kerr, C. C. P., 1290.

CHAPTER 39

OFFER OF COMPROMISE

5265. Proceedings on offer of defendant to compromise after suit brought.

SEC. 323. The defendant may at any time before trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum, or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the clerk shall thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer shall be deemed withdrawn, and shall not be given in evidence; and if the plaintiff fail to obtain a more favorable judgment he shall not recover costs, but shall pay the defendant's costs from the time of the offer.

Kerr, C. C. P., 997.

CHAPTER 40

MANNER OF GIVING AND ENTERING JUDGMENT

5266. Judgment to be entered, when.
5267. Either party may bring case before court for argument.
5268. When counterclaim exceeds plaintiff's demand.
5269. Replevin, judgment to be in alternative and with damages.
5270. Judgment book to be kept by clerk.
5271. Judgments, how computed—Interest.
5272. If party die after verdict, judgment, effect of.
5273. Judgment roll, what to constitute.
5274. Judgment lien, how long same runs.
5275. Docket, how kept, and what to contain.
5276. Docket to be open for inspection without charge.
5277. Transcript to be filed in any county, judgment to become lien there.
5278. Interest and costs must be included by clerk in judgment.

5266. Judgment to be entered, when.

SEC. 324. When trial by jury has been had, judgment shall be entered

by the clerk in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

Kerr, C. C. P., 664.

When there was a verdict for plaintiff, and defendant moved for judgment non obstante veredicto and obtained it: Held, that such a motion, if allowable at all under the practice act, was only a motion for plaintiff, and that the action of the court was erroneous. Brown v. Lillie, 6 Nev. 177, 180.

Cited, Howard v. Richards, 2 Nev. 134.

A judgment is as final when pronounced by the court as when it is entered and recorded by the clerk as required by this section; the judgment is the judicial act of the court; the entry is the ministerial act of the clerk. Cal. State Tel. Co. v. Patterson, 1 Nev. 150.

The decision of the court is the judgment, the entry by the clerk is the evidence of it merely. Idem.

The right of appeal does not depend upon the entry or perfection of the judgment of the lower court, but upon its rendition Idem.

See Central Trust Co. v. Holmes, 30 Nev. 437 (97 P. 390).

5267. Either party may bring case before court for argument.

SEC. 325. When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument.

Kerr, C. C. P., 665.

5268. When counterclaim exceeds plaintiff's demand.

SEC. 326. If a counterclaim, established at the trial, exceed the plaintiff's demand, so established, judgment for the defendant shall be given for the excess; or, if it appear that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly.

Kerr, C. C. P., 666.

5269. Replevin, judgment to be in alternative and with damages.

SEC. 327. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had, and damages for the detention or the value of the use thereof. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same, or the value of the use thereof. In an action on a contract or obligation for the direct payment of money, payable in a specified or agreed kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, or decision of the court or referee, may follow the contract or obligation, and be made payable in the kind of money or currency therein specified or thereby agreed. And in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff, whether the same be by default or after verdict, or decision of the court or referee, may be made payable in the same kind of money or currency so received by such person; and in all cases of damage the judgment shall be for gold coin.

Kerr, C. C. P., 667.

In an action of replevin, the judgment must be for the return of the property, and an alternative judgment for its value if not returned. An absolute judgment for its value, not allowing defendant to satisfy the judgment by return of the property with costs and damages, is erroneous. Lambert v. McFarland, 2 Nev. 58, 59; Sierra Nev. M. Co. v. Sears, 10 Nev. 352.

The proper method of ascertaining and computing damages in replevin discussed. Buckley v. Buckley, 12 Nev. 429, 431, 445.

In a replevin case, where the property has not been delivered to plaintiff, a verdict and judgment in his favor are required to be in the alternative and so also is the execution. Carson v. Applegarth, 6 Nev. 187, 189; Clarke v. Nev. L. & M. Co., 6 Nev. 203, 208.

A judgment for gold coin in a trespass suit is in conformity with the statute, which is constitutional. Treadway v. Sharon, 7 Nev. 38, 46, 47.

The amendments to the act of 1861, 314,

by the act of 1865, 84, were commonly known as "the specific contract" act, and the latter act was construed in the following cases: Milliken v. Sloat, 1 Nev. 573; Mitchell v. Bromberger, 1 Nev. 604, 607; Burling v. Goodman, 1 Nev. 314, 315; Hastings v. Burning Moscow Co., 2 Nev. 93, 96; Linn v. Minor, 4 Nev. 462, 463; Wells, Fargo & Co. v. Van Sickle, 6 Nev. 45, 50.

5270. Judgment book to be kept by clerk.

SEC. 328. The clerk shall keep among the records of the court a book for the entry of judgments, to be called the "Judgment Book," in which each judgment shall be entered, and shall specify clearly the relief granted, or other determination of the action.

Kerr, C. C. P., 668.

Where a judge orders a judgment in a cause, and that order is entered on the journal or minutes of the court, and no further facts are to be ascertained to determine the extent, amount and character of their judgment, but there simply remains the clerical duty of entering in the judgment book that which the court has determined and ordered to be entered, this is a final judgment from which an appeal lies. Cal. State Tel. Co. v. Patterson, 1 Nev. 150.

Cited, Humboldt M. & M. Co. v. Terry, 11 Nev. 243, 246.

5271. Judgments, how computed—Interest.

SEC. 329. In all judgments and decrees, rendered by any court of justice, for any debt, damages, or costs, and in all executions issued thereon, the amount shall be computed, as near as may be, in dollars and cents, rejecting smaller fractions, and no judgment, or other proceedings, shall be considered erroneous for such omission. When no rate of interest is provided by contract or otherwise by law or specified in the judgment, the judgment shall draw interest at the rate of seven per centum per annum from the time of the entry of the judgment until satisfied.

See secs. 2497-2500, interest.

5272. If party die after verdict, judgment, effect of.

SEC. 330. If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be payable in the course of administration on his estate.

Kerr, C. C. P., 669.

5273. Judgment roll, what to constitute.

SEC. 331. Immediately after entering the judgment, the clerk must attach together and file the following papers, which constitute the judgment roll:

1. In case the complaint is not answered by any defendant, the summons, with the affidavit or proof of service; the complaint with memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; and in case where the service so made be by publication, the affidavit for publication of summons, and the order directing the publication of summons must also be included.

2. In all other cases, the pleadings, a copy of the verdict of the jury, or finding of the court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer or relating to the change of parties, and a copy of the judgment; if there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service on such defendant, must also be added to the other papers mentioned in this subdivision; and if the service of such defaulting defendant be by publication, then the affidavit for publication, and the order directing the publication of the summons in such cases must also be included.

Kerr, C. C. P., 670.

The judgment roll is the first and best evidence in the way of estoppel or otherwise. Low v. C. P. M. Co., 2 Nev. 79.

A cost bill is no part of the judgment roll and when there is no statement or bill of exceptions, the appellate court cannot pass on its correctness. Howard v. Richards, 2 Nev. 136.

Cited, Botsford v. Van Riper, 32 Nev. 214 (106 P. 441).

Cited, in dissenting opinion of Hawley, C. J., Quillen v. Arnold, 12 Nev. 251.

The summons, with the affidavit or proof of service, is as much a part of the record as the judgment. Lonkey v. Keyes S. M. Co., 21 Nev. 318 (17 L. R. A. 351, 31 P. 57).

Findings of fact and conclusions of law are no part of the judgment roll, and are no part of the record on appeal when not made so by a statement of the case or bill of exceptions. Peers v. Reed, 23 Nev. 404, 406 (48 P. 897); Schwartz v. Stock, 26 Nev. 128, 143 (65 P. 351).

Cited, Brandon v. West, 29 Nev. 135, 138 (85 P. 449).

Cited, Humboldt M. & M. Co. v. Terry, 11 Nev. 248.

The special orders that may be appealed from after final judgment, are those made subsequent to its rendition, of which a copy must be made a part of the judgment. Lake v. Lake, 17 Nev. 236 (30 P. 878).

5274. Judgment lien, how long same runs.

SEC. 332. Immediately after filing a judgment roll the clerk shall make the proper entries of the judgment, under appropriate heads, in the docket kept by him, and from the time the judgment is docketed it shall become a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for three years, unless the judgment be previously satisfied. But the time during which the execution of the judgment is suspended by appeal or action of the court or defendant shall not be computed.

Kerr, C. C. P., 671.

Under this section, as a general rule, every money judgment may be immediately docketed and become a lien; but such is not the effect of the docketing of a personal judgment in a foreclosure case, for the reason that such judgment is suspended until after the equitable remedy against the mortgaged property is exhausted. Weil v. Howard, 4 Nev. 384, 392.

If a plaintiff in a foreclosure suit simply takes a decree in equity without a common-law judgment, and the mortgaged property falls short of paying the entire debt, he may take out an execution for the balance. Idem.

5275. Docket, how kept and what to contain.

SEC. 333. The docket mentioned in the last section is a book which the clerk shall keep in his office, with each page divided into columns: Judgment debtors; judgment creditors; judgment; time of entry; where entered in judgment book; appeals; when taken; judgment of appellate court; satisfaction of judgment; when entered. If judgment be for the recovery of money or damages, the amount shall be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted shall be stated. The names of the defendants shall be entered in the docket in alphabetical order.

Kerr, C. C. P., 672.

Cited, Humboldt M. & M. Co. v. Terry, 11 Nev. 245.

When the proper entries for the docketing of a judgment are prematurely made, it is unnecessary for the clerk to make them over again; when the proper time arrives at which they should be made, they become operative and effectual. Weil v. Howard, 4 Nev. 384, 394.

A mistake in the heading of the columns does not affect the lien. Idem.

5276. Docket to be open for inspection without charge.

SEC. 334. The docket kept by the court shall be open at all times during office hours for the inspection of the public, without charge; and it shall be the duty of the clerk to arrange the several dockets kept by him in such a manner as to facilitate their inspection.

Kerr, C. C. P., 673.

Cited, State ex rel. N. T. G. & T. Co. v. Grimes, 29 Nev. 60.

5277. Transcript to be filed in any county, judgment to become lien there.

SEC. 335. A transcript of the original docket certified by the clerk, may be filed with the recorder of any other county, and from the time of the filing the judgment shall become a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for three years, unless the judgment be previously satisfied. But the time during which the execution of the judgment is suspended by appeal, or action of the court or defendant, shall not be computed.

Kerr, C. C. P., 674.
Cited, State ex rel. N. T. G. & T. Co. v. Grimes, 29 Nev. 58.

5278. Interest and costs must be included by clerk in judgment.

SEC. 336. The clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket of the judgment.

Kerr, C. C. P., 1035.
Principal only draws interest after judgment, sec. 2500.

CHAPTER 41

SATISFACTION OF JUDGMENT

5279. Satisfaction of judgment, entry of.

SEC. 337. Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or within one year after the judgment, by the attorney, unless a revocation of his authority be previously filed. Whenever a judgment shall be satisfied in fact, otherwise than upon execution, it shall be the duty of the party or attorney to give such acknowledgment, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it.

Kerr, C. C. P., 675.

It is only when a judgment is satisfied "otherwise than upon execution" that a court may order a judgment creditor to make acknowledgment of that fact. Sweeney v. Hawthorne, 6 Nev. 129, 131.

Upon an execution of sale, when the judgment creditor bid in the property, but refused to pay, and the property had to be offered again, it was held that the execution was not satisfied. Idem.

CHAPTER 42

EXECUTION

5280. Within what time execution may issue.
5281. Execution, who may issue—Form—To whom directed—Requirements of.
5282. Judgment on joint contract, how satisfied.
5283. Execution, when returnable.
5284. Money judgments and others, how enforced.
5285. Execution may issue after death of party.
5286. Execution, how and to whom issued.
5287. What liable to execution, not to be affected until levy made.
5288. What exempt from execution.
5289. Writ, how executed.
5290. Notice of sale under execution, how given.
5291. Selling without notice, liability for—Penalty for defacing notice.
5292. Sale under execution, how made.
5293. Purchaser refusing to pay bid, what proceedings.
5294. Proceedings against party refusing to pay bid.
5295. Liability of officer.
5296. Personal property capable of manual delivery, how delivered.

5297. Idem—Not capable of manual delivery, how sold and delivered.
5298. Real estate subject to redemption—Certificate of sale to state, what.
5299. Real property sold subject to redemption, who may redeem.
5300. Time and conditions of redemption.
5301. Subsequent redemptions, conditions of, sheriff's deed, who entitled.
5302. Payment of redemption money.
5303. What redemptioner must do in order to redeem.
5304. Until expiration of redemption period court may restrain waste—Waste defined.
5305. Rents and profits, how disposed of.
5306. Purchaser may recover from judgment creditor, when.

5280. Within what time execution may issue.

SEC. 338. The party in whose favor judgment is given, may, at any time within six years after the entry thereof, issue a writ of execution for its enforcement, as prescribed in this chapter.

Kerr, C. C. P., 681.

Cited, Humboldt M. & M. Co. v. Terry, 11 Nev. 248; Mandelbaum v. Gregovich, 24 Nev. 160 (50 P. 849).

Under the provisions of sec. 214, Stats. 1861, 350, no writ of restitution could be issued on a judgment after the lapse of five years from the entry thereof. Perkins v. S. N. S. M. Co., 10 Nev. 406, 415, 416.

An execution must be authorized by the judgment, and must follow it in every essential particular, not only as to material matters of form, but also as to the amount for which it is rendered. Hastings v. Johnson, 1 Nev. 613; Solen v. V. & T. R. R. Co., 14 Nev. 405.

5281. Execution, who may issue—Form—To whom directed—Requirements of.

SEC. 339. The writ of execution shall be issued in the name of the State of Nevada, sealed with the seal of the court, and subscribed by the clerk, and shall be directed to the sheriff; and shall intelligently refer to the judgment, stating the court, the county where the judgment roll is filed, the names of the parties, the judgment, and if it be for money, the amount thereof, and the amount actually due thereon; and if made payable in a specified kind of money or currency, as provided in section 327, the execution shall also state the kind of money or currency in which the judgment is payable, and shall require the sheriff substantially as follows:

1. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment with interest, out of the personal property of such debtor, and, if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed; or, if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or at any time thereafter.

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment, with interest, out of such property.

3. If it be against the person of the judgment debtor, it shall require the sheriff to arrest such debtor, and commit him to the jail of the county until he pay the judgment, with interest, or be discharged according to law.

4. If it be issued on a judgment made payable in a specified kind of money or currency, as provided in section 327, it shall also require the sheriff to satisfy the same in the kind of money or currency in which said judgment is made payable, and the sheriff shall refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he shall refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution; the sheriff collecting money or currency in the manner required by this act shall pay to the plaintiff, or party entitled to recover

the same, the same kind of money or currency received by him, and in case of neglect or refusal so to do, he shall be liable on his official bond to the judgment creditor in three times the amount of money so collected.

5. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the sheriff to satisfy any costs, damages, rents, or profits, recovered by the same judgment out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein; if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of real property, as provided in the first subdivision of this section.

Kerr, C. C. P., 682.

Cited, Solen v. V. & T. R. R. Co., 15 Nev. 313, 327.

See Lambert v. McFarland, 2 Nev. 59, under sec. 327.

The sheriff has no authority to put a party in possession of land not prescribed in the complaint or judgment. Bullion M. Co. v. Croesus G. & S. M. Co., 2 Nev. 168.

5282. Judgment on joint contract, how satisfied.

SEC. 340. When a writ of execution is issued on a judgment recovered against two or more persons, in an action upon a joint contract, in which action all the defendants were not served with summons, or did not appear, it shall direct the sheriff to satisfy the judgment out of the joint property of all the defendants, and the individual property only of the defendants who were served, or who appeard in the action. In other respects the writ shall contain the directions specified in subdivisions 1 and 4 of the last section.

5283. Execution, when returnable.

SEC. 341. The execution may be returnable at any time not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment roll is filed.

Kerr, C. C. P., 683.

Act of 1861, 350, sec. 214, cited, Perkins v. Sierra Nev. S. M. Co., 10 Nev. 416.

5284. Money judgments and others, how enforced.

SEC. 342. Where a judgment requires the payment of money, or the delivery of real or personal property, the same shall be enforced in those respects by execution. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced.

Kerr, C. C. P., 684.

5285. Execution may issue after death of party.

SEC. 343. Notwithstanding the death of a party after the judgment, execution thereon may be issued, in case of the death of the plaintiff, the same as if he were living, upon the application of his executor or administrator, or successor in interest, to the court in which the judgment was rendered, and in case of the death of the defendant, if the judgment be for the recovery of real or personal property, execution may be issued against such property, in the same manner and with the same effect as if he were still living.

Kerr, C. C. P., 686.

5286. Execution, how and to whom issued.

SEC. 344. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the state. Where it requires the delivery of real or personal property, it shall be issued to the

sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties.

Kerr, C. C. P., 687.
Cited, In re Rourke, 13 Nev. 256.

5287. What liable to execution, not be affected until levy made.

SEC. 345. All goods, chattels, moneys, and other property, real and personal, of the judgment debtor, or any interest therein of the judgment debtor not exempt by law, and all property and rights of property seized and held under attachment in the action, shall be liable to execution. Shares and interests in any corporation or company, and debts and credits, and other property not capable of manual delivery, may be attached in execution, in like manner as upon writs of attachment. Gold dust and bullion shall be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property shall not be affected by the execution.

Kerr, C. C. P., 688.

In an estate, where no order for distribution has been made, neither the executor nor administrator is liable to the powers of garnishment, nor can an allowed and approved claim against the estate be levied upon and sold under execution against the claimant. Norton v. Clark, 18 Nev. 247, 250 (2 P. 529).

5288. What exempt from execution.

SEC. 346. The following property is exempt from execution, except as herein otherwise specially provided:

1. Chairs, tables, desks and books to the value of two hundred dollars, belonging to the judgment debtor.

2. Necessary household, table, and kitchen furniture belonging to the judgment debtor, including one sewing machine, stove, stove pipe and furniture, wearing apparel, beds, bedding, and bedsteads, hanging pictures, oil paintings and drawings drawn or painted by any member of the family, and the family portraits and their necessary frames, provisions and fuel actually provided for individual or family use, sufficient for three months, and three cows and their suckling calves, four hogs with their suckling pigs, and food for such cows and hogs for one month; also, one piano, one shotgun, and one rifle.

3. The farming utensils or implements of husbandry of the judgment debtor, not exceeding in value the sum of one thousand dollars; also, two oxen, or two horses, or two mules, and their harness, one cart or buggy and two wagons, and food for such oxen, horses, or mules, for one month; also, all seed, grain, or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars; and seventy-five beehives, one horse and vehicle belonging to any person who is maimed or crippled, and the same is necessary in his business.

4. The tools or implements of a mechanic or artisan, necessary to carry on his trade; the notarial seal, records, and office furniture of a notary public; the instruments and chests of a surgeon, physician, surveyor, or dentist, necessary to the exercise of their profession, with their professional libraries and necessary office furniture; the professional libraries of attorneys, judges, ministers of the gospel, editors, school teachers, and music teachers, and their necessary office furniture, including one safe and one typewriter; also, the musical instruments of music teachers, actually used by them in giving instructions, and all the indices, abstracts, books, papers, maps and office furniture, of a searcher of records necessary to be used in his profession; also, the typewriters, or other mechanical contrivances employed for writing in type, actually used by the owner thereof for making his living; also one bicycle, when the same is used

by its owner for the purpose of carrying on his regular business, or when the same is used for the purpose of transporting the owner to and from his place of business.

5. The cabin or dwelling of a miner or prospector, not exceeding in value the sum of five hundred dollars; also, his sluices, pipes, hose, windlass, whim, derrick, cars, pumps, tools, implements, and appliances necessary for carrying on any mining operations, not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules, asses, or oxen with their harness, and food for such horses, mules, asses, or oxen for one month, when necessary for use by him in working any mining claim or in prospecting for minerals, or when necessary to be used on any whim, windlass, derrick, car, pump or hoisting gear; and also his mining claim actually worked by him not exceeding in value the sum of one thousand dollars.

6. Two horses, two oxen, or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack, or carriage, for one or two horses by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living; and one horse, with vehicle and harness or other equipments, used by a physician, surgeon, constable, or minister of the gospel, in the legitimate practice of his profession or business; with food for such oxen, horses, or mules for one month.

7. Poultry not exceeding in value seventy-five dollars.

8. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of his family, residing in this state, supported in whole or in part by his labors; but where debts are incurred by any such person, or his wife or family, for the common necessaries of life, or have been incurred at a time when the debtor had no family, residing in this state, supported in whole or in part by his labor, the one-half of such earnings above mentioned is nevertheless subject to execution, garnishment, or attachment to satisfy debts so incurred.

9. All fire engines, hooks and ladders, with the carts, trucks and carriages, hose, buckets, implements, and apparatus thereunto appertaining, and all furniture and uniforms of any fire company or department organized under the laws of this state.

10. All arms, uniforms, and accouterments required by law to be kept by any person, and also one gun, to be selected by the debtor.

11. All courthouses, jails, public offices, and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the courthouse, jail, and public offices belonging to any county of this state and all cemeteries, public squares, parks, and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament, or public use, or for the use of any fire, or military company organized under the laws of this state.

12. All material not exceeding one thousand dollars in value, purchased in good faith for use in the construction, alteration, or repair of any building, mining claim or other improvement, as long as in good faith the same is about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement.

13. All machinery, tools and implements, necessary in and for boring, sinking, putting down and constructing surface or artesian wells; also the engines necessary for operating such machinery, implements, tools, etc.; also all trucks necessary for the transportation of such machinery, tools,

implements, engines, etc.; *provided*, that the value of all the articles exempted under this subdivision shall not exceed one thousand dollars.

14. All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance, if the annual premium paid do not exceed five hundred dollars, and if they exceed that sum, a like exemption shall exist which shall bear the same proportion to the moneys, benefits, privileges, and immunities so accruing or growing out of such insurance that said five hundred dollars bears to the whole annual premium paid.

15. And the homestead as provided for by law.

No article, however, or species of property, mentioned in this section, is exempt from execution issued upon a judgment to recover for its price, or upon a judgment of foreclosure of a mortgage or other lien thereon.

Kerr, C. C. P., 690.
See Const., sec. 243.
See secs. 5492–5494.
Money due from mutual insurance company for death or disability, exempt, sec. 1318.
Seal and records of district mining recorder, exempt, secs. 5822, 5824.
Specimen cabinets, exempt, secs. 5822, 5824.
See secs. 2864–2866, salaries of public officers.
Military property exempt, sec. 4086.
Materials for construction, repair or alteration of a building exempt, sec. 2225.

A teamster need not necessarily drive his team. One is a teamster who is engaged with his own team or teams in the business of teaming, that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family. Elder v. Williams, 16 Nev. 416–424.

It is the right and privilege of the debtor (a teamster) to select and designate his exempt property, and, when so selected and pointed out, the law will recognize and protect them as exempt, and such selection may be made without regard to the quality or value of the property selected. Idem.

If plaintiff fraudulently concealed other property and refused to surrender the same in execution, equal in amount to the value of the property claimed as exempt, that fact does not deprive him of an otherwise valid claim of exemption. Idem.

The business of a livery-stable keeper is plainly distinguishable from that in which cartmen, hucksters, peddlers, or teamsters are engaged, and a livery-stable keeper is not an "other laborer." Edgecomb v. Creditors, 19 Nev. 149, 152, 155 (7 P. 533).

A stallion kept for breeding purposes, and not used as a work horse, is not exempt from execution. The legislature intended to exempt to the debtor such animals as will be useful in assisting him to gain a livelihood by farming as ordinarly conducted. Kraig v. Fellows, 21 Nev. 307, 310 (30 P. 994).

5289. Writ, how executed.

SEC. 347. The sheriff shall execute the writ against the property of the judgment debtor by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorneys so much of the proceeds as will satisfy the judgment, or depositing the amount with the clerk of the court. Any excess in the proceeds over the judgment and the sheriff's fees shall be returned to the judgment debtor. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and the sheriff's fees within the view of the sheriff, he shall levy only on such part of the property as the judgment debtor may indicate; *provided*, that the judgment debtor may indicate at the time of the levy such part; *and, provided*, that the property indicated be amply sufficient to satisfy such judgment and fees.

Kerr, C. C. P., 691.
See sec. 5494.

Damages—Seizure of property, exempt from execution—Certain evidence held inadmissible. Hammersmith v. Avery, 18 Nev. 225 (2 P. 55).

An execution creditor, under whose direction a levy is unlawfully made, is liable and may be sued with the sheriff in an action to recover damages for the trespass. Elder v. Frevert, 18 Nev. 446 (5 P. 69).

In an action against a judgment creditor for the unlawful seizure of property exempt from execution, the defendants cannot set up the judgment, under which the seizure was made, as a counterclaim to the action. Idem.

5290. Notice of sale under execution, how given.

SEC. 348. Before the sale of property on execution, notice thereof shall be given as follows:

1. In cases of perishable property, by posting written notice of the time and place of sale in three public places of the township or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property.

2. In case of other personal property, by posting a similar notice in three public places of the township or city where the sale is to take place, not less than five nor more than ten days, successively, and, in case of sale on execution issuing out of a district court, by the publication of a copy of said notice at least once a week, for the same period, in a newspaper, if there be one, in the county.

3. In case of real property, by posting a similar notice particularly describing the property, for twenty days, successively, in three public places of the township or city where the property is situated, and also where the property is to be sold; and also by publishing a copy of said notice once a week, for the same period, in a newspaper, if there be one, in the county; *provided,* that the cost of such publication shall in no case exceed the sum of two dollars and fifty cents per square for the first insertion, and one dollar per square for each subsequent insertion; *and provided further,* that in any case where the paper authorized by this act to publish such notice of sale shall neglect or refuse, from any cause, to make such publication, then the posting of notices, as provided in the preceding section of this act, shall be deemed sufficient notice; *provided, further,* notices of the sale of property on execution, upon a judgment for any sum less than five hundred dollars, exclusive of costs, shall be given only by posting in three public places in the county, one of which notices shall be posted at the courthouse.

Kerr, C. C. P., 692.

5291. Selling without notice, liability for—Penalty for defacing notice.

SEC. 349. An officer selling without the notice prescribed by the last section, shall forfeit five hundred dollars to the aggrieved party, in addition to his actual damages; and a person wilfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment if the judgment be satisfied before sale, shall forfeit five hundred dollars to the aggrieved party.

Kerr, C. C. P., 693.

5292. Sale under execution, how made.

SEC. 350. All sales of property under execution shall be made at auction to the highest bidder, and shall be made between the hours of nine in the morning and five in the afternoon. After sufficient property has been sold to satisfy the execution, no more shall be sold. Neither the officer holding the execution nor his deputy shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery, it shall be in view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately, or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be thus sold. All sales of real property shall be made at the courthouse of the county in which the property or some part thereof, is situated. If the land to be sold under execution consists of a single parcel, or two or more contiguous parcels, situated in two or more counties, notice of the sale must be posted and published in each of such counties, as provided in this act. The judgment debtor, if present at the sale, may also

direct the order in which property, real or personal, shall be sold. When such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, the sheriff shall be bound to follow such directions.

Kerr, C. C. P., 694.
Sheriff not to become purchaser, sec. 1655.

5293. Purchaser refusing to pay bid, what proceedings.

SEC. 351. If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property to the highest bidder, after again giving the notice hereinbefore provided; and if any loss be occasioned thereby from the purchaser refusing to pay his bid, the officer may recover the amount of such loss, with costs, for the benefit of the party aggrieved, by motion upon previous notice of five days to such purchaser, before any court of competent jurisdiction.

Kerr, C. C. P., 695.

When a judgment creditor, to whom property is struck off at execution sale, refuses to consummate his purchase, there should be a resale, the same as in the case of any other purchaser. Sweeney v. Hawthorne, 6 Nev. 130.

Where the judgment creditor is the purchaser at execution sale, it does not follow that he need not pay any money—the officer may require payment when the fees are due, or to become due to him, and in default of payment may resell. Idem.

If the highest bidder at a sheriff's sale fails to pay the amount of his bid, the next highest bidder is not bound by his bid. Dazet v. Landry, 21 Nev. 291, 295 (30 P. 1064).

5294. Proceedings against party refusing to pay bid.

SEC. 352. Such court shall proceed in a summary manner in the hearing and disposition of such motion, and give judgment and issue execution therefor forthwith, but the refusing purchaser may claim a jury. And the same proceedings may be had against any subsequent purchaser who shall refuse to pay, and the officer may, in his discretion, thereafter reject the bid of any person so refusing.

Kerr, C. C. P., 696.
See Sweeney v. Hawthorne, under sec. 351 of this act.

5295. Liability of officer.

SEC. 353. The two preceding sections shall not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

Kerr, C. C. P., 697.

5296. Personal property capable of manual delivery, how delivered.

SEC. 354. When the purchaser of any personal property capable of manual delivery shall pay the purchase money, the officer making the sale shall deliver to the purchaser the property, and if desired shall execute and deliver to him a certificate of the sale and payment. Such certificate shall convey to the purchaser all the right, title, and interest which the debtor had in and to such property on the day the execution was levied.

Kerr, C. C. P., 698.

5297. Idem—Not capable of manual delivery, how sold and delivered.

SEC. 355. When the purchaser of any personal property not capable of manual delivery shall pay the purchase money, the officer making the sale shall execute and deliver to the purchaser a certificate of sale and payment. Such certificate shall convey to the purchaser all right, title, and interest which the debtor had in and to such property on the day the execution was levied.

Kerr, C. C. P., 699.

5298. Real estate subject to redemption—Certificate of sale to state, what.

SEC. 356. Upon a sale of real property, the purchaser shall be substituted to and acquire all the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases the real property shall be subject to redemption as provided in this chapter. The officer shall give to the purchaser a certificate of the sale containing:

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. When subject to redemption it shall be so stated; and when the judgment, under which the sale has been made, is made payable in a specified kind of money or currency, the certificate shall also state the kind of money or currency in which said redemption may be made, which shall be the same as that specified in the judgment. A duplicate of such certificate shall be filed by the officer in the office of the county recorder of the county.

Kerr, C. C. P., 700.

Cited, Adams v. Smith, 19 Nev. 259, 272 (3 A. S. 888, 9 P. 337); Rosina v. Trowbridge, 20 Nev. 105, 121 (17 P. 751).

The certificate shows color of title in the purchaser. Nesbitt v. Delamar's G. M. Co., 24 Nev. 274, 286 (77 A. S. 807, 177 U. S. 523, 52 P. 609).

Cited, State ex rel. N. T. G. & T. Co. v. Grimes, 29 Nev. 59.

5299. Real property sold subject to redemption, who may redeem.

SEC. 357. Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property.
2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.

Kerr, C. C. P., 701.

5300. Time and conditions of redemption.

SEC. 358. The judgment debtor or redemptioner may redeem the property by paying to the sheriff making the sale, within six months after the sale, the amount of the purchase price, in the kind of money or currency specified in the judgment, if any is specified, with one per cent per month thereon in addition, from the time of the sale to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid after the purchase, and a statement of which the purchaser shall file, before the time of redemption, with the officer making the sale, and interest on such amount; and if the purchaser is also a creditor, having a lien prior to that of the redemptioner, other than the judgment under which the purchase was made, the amount of such lien, with interest.

Kerr, C. C. P., 702.

5301. Subsequent redemptions, conditions of, sheriff's deed, who entitled.

SEC. 359. If the property is so redeemed by a redemptioner, either the judgment debtor or another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, by paying the sum paid on such last redemption with two per cent thereon in addition, and the amount of any assessments or taxes which the said last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition, the amount of any liens held by said last

redemptioner prior to his own, with interest; *provided*, that the judgment under which the property was sold need not be paid as a lien. The property may again, and as often as the debtor or redemptioner is disposed be redeemed from the officer making the sale, within sixty days after the last redemption, with two per cent thereon in addition, and the amount of any assessments or taxes which the last previous redemptioner shall have paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the said last redemptioner previous to his own, with interest. Written notice of the redemption must be filed with the recorder of the county; and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must be given to the sheriff and filed with the recorder; and if such notice is not filed, the property may be redeemed without paying such tax, assessment or lien. If no redemption is made within six months after the sale, the purchaser or his assignee is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner or his assignee is entitled to a sheriff's deed; but in all cases the judgment debtor shall have the entire period of six months from the date of the sale in which to redeem the property. If the debtor redeem, the effect of the sale is terminated and he is restored to his estate. Upon a redemption by the debtor, the sheriff to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or approved before an officer authorized to take acknowledgments of conveyances to real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale.

Kerr, C. C. P., 703.

Successor of sheriff or constable may execute deed, sec. 1662.

Plaintiff purchased from B the right of redemption to certain land and redeemed the same from the purchaser at a foreclosure sale. It was held that he was not entitled to the possession of the land against a lessee under a demise made subsequent to the mortgage. Gilson v. Boston, 11 Nev. 413, 414.

After redeeming, plaintiff had some estate in the land that B had before the sale and was as much bound by the lease as B would have been. Idem.

One who brings an action to recover real estate purchased under execution cannot show that the execution issued under a different judgment than the one recited on its face, nor can he contradict the recitals in the deed under which he claims. Zabriskie v. Mead, 2 Nev. 285.

If a defendant in execution has no title to premises in question, either at the date of sale, or at any time subsequent to the period when the judgment was rendered, as appears by the recitals in the execution, in the advertisement of sale, in the certificate of sale, and the sheriff's deed, a party claiming under such execution sale will not be allowed to show that the true date of the judgment under which the execution was issued was different from all those recitals. Idem.

5302. Payment of redemption money.

SEC. 360. The payments mentioned in the last two sections must be made to the sheriff who made the sale; when the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment. A redemptioner must serve with his notice to the sheriff:

1. A copy of the judgment under which he claims the right to redeem, certified by the clerk of the court or of the county where the judgment is docketed, or if he redeems upon a mortgage or other lien, a note of the record thereof, certified by the recorder.

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or his agent, or of a subscribing witness thereto.

3. An affidavit by himself or his agent, showing the amount then actually due on the loan.

Upon the payment to the sheriff of any money for the redemption of property as provided in this act the sheriff shall pay over the same to the person entitled thereto.

Kerr, C. C. P., 704–705.

5303. What redemptioner must do in order to redeem.

SEC. 361. A redemptioner shall produce to the officer or person from whom he seeks to redeem, and serve with his notice to the sheriff:

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed; or, if he redeem upon a mortgage or other lien, a note of the record thereof certified by the recorder.

2. A copy of an assignment necessary to establish his claim, verified by the affidavit of himself or of subscribing witnesses thereto; and, third, an affidavit by himself, or his agent, showing the amount then actually due on the lien.

Kerr, C. C. P., 705.

5304. Until expiration of redemption period court may restrain waste—Waste defined.

SEC. 362. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, or may appoint a receiver to take charge of the property, or the proceeds thereof, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it shall not be deemed waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family while he occupies the property.

Kerr, C. C. P., 706.

5305. Rents and profits, how disposed of.

SEC. 363. The purchaser from the time of a sale until a redemption, and a redemptioner from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof; *provided,* that in case the property shall be redeemed as provided in this chapter, the amount of such rents, and profits which may have been received by such purchaser or redemptioner, or which said purchaser or redemptioner may have been entitled to claim or receive, unless such claim shall be released to the person claiming such right of redemption, shall be deducted from the amount which said purchaser or redemptioner would be entitled to receive on such redemption.

Kerr, C. C. P., 707.

5306. Purchaser may recover from judgment creditor, when.

SEC. 364. If the purchaser of real property sold on execution, or his successor in interest, or a redemptioner be evicted therefrom in consequence of irregularities in the proceedings concerning the sale or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale, or because

the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on petition of such party in interest, or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore, and when so revived, the said judgment shall have the same effect as an original judgment of the said court of that date, and bearing interest as aforesaid, and any other or after acquired property, rents, issues, or profits of the said debtor shall be liable to levy and sale, under execution in satisfaction of such debt; *provided,* that no property of such debtor bona fide sold upon the filing of such petition, shall be subject to the lien of such judgment; *and, provided further,* that notice of the filing of such petition shall be made by filing a notice thereof in the office of the recorder of the county where such property is situated, and that said judgment shall be revived in the name of the original plaintiff or plaintiffs, for the use of said petitioner, the party in interest.

Kerr, C. C. P., 708.

CHAPTER 43

PROCEEDINGS SUPPLEMENTARY TO EXECUTION

5307. Debtor, required to answer concerning his property, when.
5308. Proceedings to compel debtor to appear—Arrest—Bail—Commitment.
5309. Debtor of judgment debtor may pay latter's creditor.
5310. Parties owing judgment debtor must answer concerning same.
5311. Witnesses required to testify.
5312. Judge may order property to be applied on execution.
5313. Proceedings on claim of other party to property or on denial of debt to judgment debtor.
5314. Disobedience of orders, how punished.

5307. Debtor required to answer concerning his property, when.

SEC. 365. When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he do not reside in this state, to the sheriff of the county where the judgment roll is filed, is returned unsatisfied, in whole or in part, the judgment creditor, at any time after such return is made, shall be entitled to an order from the judge of the court requiring such judgment debtor to appear and answer upon oath concerning his property, before such judge or a referee appointed by him at a time and place specified in the order; but no judgment debtor shall be required to attend before a judge or referee out of the county in which he resides, when proceedings are taken under the provisions of this chapter.

Kerr, C. C. P., 714.

5308. Proceedings to compel debtor to appear—Arrest—Bail—Commitment.

SEC. 366. After the issuing of an execution against property, and upon proof by affidavit of a party or otherwise, to the satisfaction of the court or of the judge thereof, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court, or judge, may by an order require the judgment debtor to appear at a specified time and place before such judge, or referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent, or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge.

Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the judge, or referee, as shall be directed during the pendency of proceedings, and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison.

Kerr, C. C. P., 715.

5309. Debtor of judgment debtor may pay latter's creditor.

SEC. 367. After the issuing of an execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

Kerr, C. C. P., 716.

5310. Parties owing judgment debtor must answer concerning same.

SEC. 368. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

Kerr, C. C. P., 717.

In proceedings supplementary to execution, the judgment creditor can, in a summary manner, compel the disclosure of any property belonging to the judgment debtor in the hands, or under the control of, any other person, and of any indebtedness due to the judgment debtor. Hagerman v. Lee, 12 Nev. 331–335.

The judge or referee can only order property to be applied to the satisfaction of the judgment when the debtor's title thereto is clear and undisputed. Idem.

If the debt is denied the only course for plaintiff is to apply for an order forbidding any transfer or other disposition of the debt, and for an order authorizing a commencement of an action in a proper court, as provided in sec. 371 of this act. Idem.

Notice of garnishment served upon a debtor, while giving a right of action against him for money owing to the defendant in the garnishment proceedings, does not constitute a lien upon money with which he may subsequently pay his debts, so as to enable the garnisher to follow the money into the hands of third persons to whom it has been paid. Hulley v. Chedic, 22 Nev. 127 (58 A. S. 729, 56 P. 783).

5311. Witnesses required to testify.

SEC. 369. Witnesses may be required to appear and testify before the judge, or referee, upon any proceeding under this chapter, in the same manner as upon the trial of an issue.

Kerr, C. C. P., 718.

5312. Judge may order property to be applied on execution.

SEC. 370. The judge or referee may order any property of the judgment debtor not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

Kerr, C. C. P., 719.

See Hagerman v. Lee, under sec. 368 of this act.

5313. Proceedings on claim of other party to property or on denial of debt to judgment debtor.

SEC. 371. If it appears that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may

authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

Kerr, C. C. P., 720.

See Hagerman v. Lee, under sec. 368 of this act.

Plaintiff must move by direct action under this chapter to prevent disposition of the property by the pledgee, pending an action to determine the rights in the property. Persing v. Reno S. B. Co., 30 Nev. 342, 351 (96 P. 1054).

5314. Disobedience of orders, how punished.

SEC. 372. If any person, party, or witness disobey an order of the referee, properly made in the proceedings before him under this chapter, he may be punished by the court or judge ordering the reference, for a contempt.

Kerr, C. C. P., 721.

CHAPTER 44

EXCEPTIONS

5315. Exception defined—When taken—Must be material.
5316. Exception, how taken—Proved before supreme court.
5317. No particular form required—Substance of evidence or documents may be stated.
5318. Matters deemed excepted to.

5315. Exception defined—When taken—Must be material.

SEC. 373. An exception is an objection upon a matter of law to the decision made by a court, judge, referee, or other judicial officer, in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in the next section. No exception shall be regarded on a motion for a new trial or on an appeal unless the exception be material and affect the substantial rights of the parties.

Utah, 3282.

Parol evidence as to written agreement admitted without objection is competent. Vietti v. Nesbitt, 22 Nev. 390 (41 P. 151).

Though the proceedings of the court are plainly irregular in point of practice, if no objection be made on that ground, such irregularity will not be considered in the supreme court. Fitzpatrick v. Fitzpatrick, 6 Nev. 63.

If evidence, secondary or hearsay in its character, be admitted without objection, no advantage can be taken of that fact afterward, and the jury may and should accept it as if it were admissible under the strictest rule of evidence. Sherwood v. Sissa, 5 Nev. 349; Watt v. N. C. R. R. Co., 23 Nev. 154 (62 A. S. 772, 44 P. 423).

If evidence is objected to because the pleadings are defective, the court should allow the pleadings to be amended. Jeffree v. Walsh, 14 Nev. 144.

A bill of exceptions, in order to be available on motion for a new trial or on appeal from judgment in a civil case, must be reduced to writing and settled by the judge at or before the conclusion of the trial. Burns v. Rodefer, 15 Nev. 59, 61.

The bill of exceptions cannot be reduced to writing and settled after the adjournment of the term at which the judgment is rendered, if there is no order of court made at such term extending the time therefor. Idem.

A general order, continuing "all matters in court not disposed of until the next term," did not extend the time for settling and signing a bill of exceptions. Idem.

Cited, State v. N. C. R. R., 26 Nev. 365 (68 P. 294).

The supreme court will consider objections to the admission of evidence only upon the grounds of objection as specified in the court below. Gooch v. Sullivan, 13 Nev. 78.

The particular ground of objection or exception taken in the course of a trial is required to be stated so that the court may decide intelligently upon it, and the opposite party be afforded an opportunity of obviating the objection if it be in his power to do so. Sharon v. Minnock, 6 Nev. 377, 382.

The only bills of exception which can be brought up by appeal are those taken during the progress of a cause before judgment. Weinrich v. Porteous, 12 Nev. 102, 104.

If an exception is actually taken at the trial but not drawn up in form for the judge's signature, and no note of it is made, either by the judge or clerk, still the party dissatisfied with the judgment has the right to make his statement on motion for a new

trial or on appeal, and in either of such statements he may show any exception that he really took during the trial, although there be no note of the same. Lobdell v. Hall, 3 Nev. 507, 529.

An objection to the introduction of evidence which specifies specifically the ground of objection; therefore, objecting to the introduction of evidence upon the general ground of irrelevancy in that it is inadmissible under the pleadings, is not specifically specific. Keys v. Grannis, 3 Nev. 548, 556.

The exceptions which may be contained in a bill of exceptions under Stats. 1885, 394, sec. 4, are governed by this section, and a bill of exceptions based on an order of a referee denying a motion to set aside his conclusions of law, and the specification of error relating thereto, made two or three weeks after the filing of his decision and order directing judgment, and in the absence of and without service on or notice to the adverse party, cannot be considered. Western E. and C. Co. v. Nev. A. Co., 33 Nev. — (110 P. 1129).

Under statutes relating to the making of records on which the rulings of a trial court may be reviewed, both parties may participate in making the record, and the supreme court ought not to rely on statements that the adverse party has not had an opportunity to amend or correct. Idem.

The findings of fact and conclusions of law of a referee cannot be considered on appeal when they are not included in any statement on appeal or motion for a new trial or proper bill of exceptions, because they are not a part of the judgment roll. Idem.

A simple reservation of exception is not sufficient; the point of it must be stated at the time the exception is taken or it will be disregarded. McGurn v. McInnis, 24 Nev. 370, 375 (55 P. 304).

5316. Exception, how taken—Proved before supreme court.

SEC. 374. The point of the exception shall be stated, and may be delivered in writing to the judge or taken by the stenographic reporter of the case, if there be one, or, if the party require it, shall be written down by the clerk. When delivered in writing or written down, as above, it shall be made conformable to the truth, or be at the time corrected until it is so made conformable. If the judge shall in any case refuse to allow an exception in accordance with the facts, any party aggrieved thereby may petition the supreme court for leave to prove the same, and shall have the right so to do, in such mode and manner and according to such regulations as the supreme court may prescribe, or by rules impose, and such exceptions as are allowed by said supreme court shall become a part of the record of the case.

In the absence of any statute upon the subject, the supreme court has no power to settle a statement on motion for a new trial in a criminal case when the district court refuses to settle such statement according to the facts claimed by the moving party. State v. Warren, 18 Nev. 459, 461 (5 P. 134).

See Lobdell v. Hall, under sec. 373 of this act.

When petitioner has failed to comply with this section the appellate court will not allow exceptions alleged to have been taken and refused where there is a conflict in the statement of witnesses based upon their memory of what occurred. Lewis v. Hyams, 25 Nev. 242, 258 (59 P. 376).

Cited, Finnegan v. Ulmer, 31 Nev. 525 (104 P. 17).

On an application to prove exceptions, a claim that a reporter's transcript of the proceedings does not give correctly petitioner's exceptions taken at the trial, is unsupported where the transcript is accompanied by affidavits of the reporter and others present at the trial as to its correctness. Lewis v. Hyams, 25 Nev. 242 (59 P. 376).

See Sharon v. Minnock, under sec. 373 of this act.

An exception to the rejection of certain evidence will not be considered where no point to the exception was stated. Schwartz v. Stock, 26 Nev. 128, 150 (65 P. 351).

5317. No particular form required—Substance of evidence or documents may be stated.

SEC. 375. No particular form of exception is required, and where the exception is taken to a ruling upon an objection the point of which has been stated, it is sufficient to note an exception to the ruling without repeating the point of objection. The exception must be stated, with so much of the evidence or other matter as is necessary to explain it. Documents on file in the action or proceedings may be copied, or the substance thereof stated, or a reference thereto sufficient to identify them may be made.

In the absence of a statement on motion for a new trial, the appellate court cannot review the action of the court below in refusing the same. Van Valkenburg v. Huff, 1 Nev. 142.

The act of 1865, 394, sec. 2, similar to the above, has had the following citations:

A defective finding of facts is not ground for reversing a judgment when that defect is not noticed or complained of in the court below. McClusky v. Gerhauser, 2 Nev. 52; Whitmore v. Shiverick, 3 Nev. 289, 312; State v. Manhattan S. M. Co., 4 Nev. 336; Warren v. Quill, 9 Nev. 259, 267; Smith v. Logan, 18 Nev. 149, 153(1 P. 678); Schwartz v. Stock, 26 Nev. 144 (65 P. 351); Weinrich v. Porteous, 12 Nev. 104.

An exception to a ruling granting a motion to strike out portions of the answer, taken three months after the trial, is not in time, and should be disallowed. Lewis v. Hyams, 25 Nev. 242, 256 (59 P. 376).

Orders denying motions to strike out and amend a judgment may be presented by statement on appeal, instead of by bill of exceptions. State ex rel. Equitable G. M. Co. v. Murphy, 29 Nev. 248, 256 (88 P. 335).

Cited, Finnegan v. Ulmer, 31 Nev. 525 (104 P. 17).

See Western E. and C. Co. v. Nev. A. Co., under sec. 373 of this act.

5318. Matters deemed excepted to.

SEC. 376. The verdict of the jury, the final decision in an action or proceeding, the findings of fact, conclusions of law made by the court, findings of the referee, an interlocutory order or decision finally determining the rights of the parties, or some of them; an order or decision from which an appeal may be taken; an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance; an order made upon ex parte application; and an order or decision made in the absence of a party, unless made with his consent, are deemed to have been excepted to.

Utah, 3283.

Cited, Robinson v. Kind, 25 Nev. 277 (59 P. 863).

CHAPTER 45

NEW TRIALS

5319. New trial defined.
5320. New trial, for what causes granted.
5321. New trial, application for, how made and determined — Verdict against evidence—Only two new trials.
5322. Memorandum of exceptions relied upon, verified by attorney to be well founded, must be served.
5323. Notice of intention to be filed and served, what must contain.
5324. Motion based on affidavits and counter affidavits.

5319. New trial defined.

SEC. 377. A new trial is a reexamination of an issue of fact in the same court after a trial and decision by a jury, court, or referee.

Utah, 3291.

The method of vacating judgments is regulated by statute, and its provisions must be complied with in order to authorize the court to act. The court has no jurisdiction to set aside a judgment upon a mere motion. State ex rel. Smith v. District Court, 16 Nev. 371, 373.

After a verdict rendered in the district court upon the trial of a case appealed from a justice's court, the district court has jurisdiction where a proper showing is made to grant a new trial. State ex rel. Koppe v. District Court, 23 Nev. 343, 345 (47 P. 100).

Cited, in dissenting opinion of Bonnifield, C. J., Bliss v. Grayson, 24 Nev. 459 (56 P. 231).

New trials and appeals in contested election cases are regulated by the civil practice act. Sweeney v. Karsky, 25 Nev. 197, 201 (58 P. 813).

See Western E. and C. Co. v. Nev. A. Co., under sec. 373 of this act.

If the newly discovered evidence brings to light some new fact bearing upon the main question, and it would be likely to change the result, a new trial should be granted. Gray v. Harrison, 1 Nev. 502.

That only is cumulative evidence which is in addition to or corroborative of what has been given at the trial. To render evidence subject to this objection, it must be cumulative, not with respect to the main issue between the parties, but upon some collateral or subordinate fact bearing upon that issue. Idem.

5320. New trial, for what causes granted.

SEC. 378. The former verdict or other decision may be vacated, and a

new trial granted on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, referee, or adverse party, or any order of the court, or referee, or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury or prevailing party.

3. Accident or surprise which ordinary prudence could not have guarded against.

4. Newly discovered evidence material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial.

5. Excessive damages appearing to have been given under the influence of passion or prejudice.

6. Insufficiency of the evidence to justify a verdict or other decision, or that it is against law.

7. Error in law occurring at the trial and excepted to by the party making the application.

Utah, 3292.

For history of this section, see Elder v. Frevert, 18 Nev. 284 (3 P. 237).

To justify a new trial on the ground of newly discovered evidence, three things must be shown: First, materiality of evidence; second, that it could not by due diligence have been produced at the first trial; third, that it is not cumulative. Howard v. Winters, 3 Nev. 539.

To justify the granting of a new trial on such ground, the party applying for relief should show clearly that the failure to produce evidence on the first trial was not the result of negligence on his part. Idem.

The rule that a judgment must be reversed where instructions on the material point are contradictory is not absolute and unqualified. If one party asks for an instruction which is given by the court, laying down a rule of law in language too broad and unqualified, and the other side then asks an instruction, which is also given, qualifying and limiting the former instruction, and to some extent contradicting it; if the second instruction contains only sound law, the conflict between the two is not an error of which the party who obtained the instruction which was too broad and unqualified can complain. Lobdell v. Hall, 3 Nev. 507, 519, 520.

Instructions given or refused by the lower court will not be inquired into on appeal, unless the record shows that the giving or refusal to give them was excepted to at the time. Idem.

Instructions given to a jury without objection are presumed to be with the consent of the parties, and such consent is a waiver of any right thereafter to question their correctness in that case. Idem.

A verdict or other decision cannot be set aside where no irregularity or error whatever is shown, and a verdict or decision is in accordance with and justified by the evidence. Scott v. Haines, 3 Nev. 426, 427.

When a judgment has once been rendered the court has no right to set it aside, except in case of error in some respect or injustice in the result. Idem.

A wrong reason for a judgment, which is in itself correct, will not vitiate or affect it, Idem.

The duty of determining the truth where the testimony is conflicting belongs almost exclusively to nisi prius courts, and should always be exercised and determined by an impartial judgment. Barnes v. Sabron, 10 Nev. 218, 248.

The findings of fact are like a special verdict of a jury, and must be taken in connection with the pleadings to support the judgment; they cannot be detached from each other, but must be read together for the purpose of ascertaining their meaning and, if there is any conflict or discrepancy between general and specific findings, the specific findings must control. Idem.

Under the sixth subdivision above the district court is authorized to decide whether the findings sustain the judgment, and its action in regard thereto can be reviewed on appeal from an order overruling motion for new trial. Idem.

Facts held not to indicate "passion or prejudice" on the part of the jury. Solen v. V. & T. R. R. Co., 13 Nev. 107, 137; Murphy v. S. P. R. R. Co., 31 Nev. 120, 123 (101 P. 322); Burch v. S. P. R. R. Co., 32 Nev. 75 (104 P. 239).

If the decision or finding of a court or referee is against law, a new trial is the proper remedy. The decision is against law if it is contrary to, or inconsistent with, the case made and embraced within the issue. Marshall v. Golden Fleece M. Co., 16 Nev. 157, 172, 174.

When the notice for motion for new trial specified, as one of the grounds relied upon, "that said decisions, findings and decree are against law," and the specification of error in the statement, which would have been proper if classed under this subdivision of error, was referred to as an error "committed by the court on the trial of the case," it was held that the specification was sufficient under proper subdivision of error. Jones v. Adams, 17 Nev. 84, 85 (28 P. 64).

Where a new trial is applied for upon the sixth and the seventh grounds above, the application must be made upon statements prepared as the statute requires. Simpson v. Ogg, 18 Nev. 28, 31 (1 P. 827).

The rule that the supreme court will not review the evidence upon an appeal from the judgment alone, for the purpose of determining its sufficiency to sustain the findings of the lower court, no motion for a new trial having been made, applies to suits in equity where the evidence is entirely documentary as well as all other actions. Burbank v. Rivers, 20 Nev. 81, 82 (16 P. 430).

Affidavits in support of motion for a new trial will be stricken from the record where not shown by indorsement of the judge or clerk to have been read or referred to on the hearing of the motion, and the requirement cannot be avoided by incorporating the affidavits in the body of the statement on motion for new trial, since unauthorized. Hoppin v. First Nat. Bank, 25 Nev. 84, 90 (56 P. 1121).

When the notice of intention to move for new trial designates subdivision 6 above, the sufficiency of the pleadings and errors appearing in the judgment roll may be considered on an appeal from an order denying a new trial (Bonnifield, C. J., dissenting). Bliss v. Grayson, 25 Nev. 329, 344, 345 (59 P. 888).

After a case was regularly called, evidence introduced and judgment regularly entered for plaintiff without defendant's appearance for trial, it was held that such was not a judgment by default which could be set aside on motion, but that defendant's remedy was by motion for a new trial under subdivision 3 above. Luke v. Coffee, 31 Nev. 165, 169 (101 P. 555).

Affidavits not filed until after the denial of a motion for a new trial for misconduct of parties could not be considered on appeal in reviewing the court's alleged error in denying the motion.

Where alleged misconduct of plaintiff's guide in conducting the jury to the mine in controversy for a view was immaterial if defendants' views of the law were sustained, and would probably have been remedied by an instruction by the court if promptly brought to its attention immediately after the jury returned, but was not called to the court's attention until by defendants' motion for a new trial, the court's refusal to grant the motion on that ground, was not error. Golden v. Murphy, 31 Nev. 395, 425 (103 P. 394).

See Western E. & C. Co. v. Nev. A. Co., under sec. 373 of this act.

Where a motion for a new trial is made on the ground of newly discovered evidence and also because the evidence was insufficient to sustain the judgment, and it appeared that there was a substantial conflict therein, an order granting the motion will not be disturbed on appeal. McCafferty v. Flinn, 32 Nev. 269 (107 P. 225).

The record on appeal from an order denying a new trial should contain only such papers as were used or referred to on the hearing of the motion. Botsford v. Van Riper, 32 Nev. 214 (106 P. 443).

The refusal of a trial judge to pass upon the sufficiency of the evidence when such ground is alleged in support of a motion for a new trial, is error. Goldfield-Mohawk M. Co. v. Frances-Mohawk M. & L. Co., 33 Nev. — (112 P. 43).

New trials not matters of discretion. The granting or refusing a new trial is not a matter of mere discretion. Sacto. & M. M. Co. v. Showers, 6 Nev. 291.

Liquor used by juror, during the progress of a trial, or after the case has been submitted, unless furnished by the party in whose favor the verdict is given, or unless it is shown that intoxicating effects were produced, is no ground for setting aside the verdict or awarding a new trial. Richardson v. Jones, 1 Nev. 405.

Every irregularity on the part of a jury does not authorize the verdict to be set aside, unless the party complaining shows, by reasonable presumption at least that he has been injured thereby. Idem.

Surplus matter in verdict no cause for new trial unless it appears from that surplus matter that the jury based their verdict on absurd reasoning or false premises. Gregory v. Frothingham, 1 Nev. 253.

Surprise. When a party applies for a new trial on the ground of surprise he must show that he has evidence which, if introduced on a second trial, will probably change the result; or at least has evidence tending to rebut the point made by the other side which he complains of as a matter of surprise. McClusky v. Gerhauser, 2 Nev. 47.

Accident and surprise—Affidavit when insufficient — Probative facts. Brown v. Warren, 17 Nev. 417 (30 P. 1078).

Mistake as to material facts. A new trial may be granted for a mistake as to a material fact if the defeated party had no knowledge thereof until after the case was closed and ready for submission to the jury. Sultan v. Sherwood, 18 Nev. 454 (5 P. 71).

Newly discovered evidence. If bears upon main question and would be likely to change result, new trial should be granted. Gray v. Harrison, 1 Nev. 502.

Newly discovered evidence—Materiality of. Wall v. Trainor, 16 Nev. 131.

New trial—Newly discovered evidence—Diligence. An affidavit for a new trial on the ground of newly discovered evidence which states that the attorney "diligently searched for testimony to establish the defense" is insufficient. It is too general. The acts performed should be particularly stated so as to enable the court to determine whether the conclusions stated are supported by the facts. Pinschower v. Hanks, 18 Nev. 99 (1 P. 454).

Newly discovered evidence — Diligence. Manning v. Gignoux, 23 Nev. 322 (46 P. 886).

Excessive damages. Barnes v. W. U. Tel. Co., 24 Nev. 125 (77 A. S. 791, 50 P. 438);

Roberts v. Webster, 25 Nev. 94, 125 (57 P. 180); Cutler v. Pittsburg Silver Peak G. M. Co., 34 Nev. — (116 P. 418).

No consideration of insufficiency of evidence on appeal where no motion for new trial. This rule settled beyond discussion. Conley v. Chedic, 7 Nev. 336; James v. Goodenough, 7 Nev. 324; Whitmore v. Shiverick, 3 Nev. 288; Cooper v. Pac. Mutual Ins., Co., 7 Nev. 116; Burbank v. Rivers, 20 Nev. 81.

New trial statement for insufficiency of evidence should show all the evidence. The statement will not be considered unless it affirmatively shows that it contains all the material evidence produced at the trial. Sherman v. Shaw, 9 Nev. 148.

Granting or refusing new trial—Sound discretion of trial judge not disturbed by appellate court. The granting or the refusal of a motion for a new trial on the ground that the evidence does not support the findings rests in the sound discretion of the trial judge, and such order will not be disturbed by appellate courts when based upon conflicting evidence, and made in the exercise of a sound discretion. Edwards v. Carson W. Co., 21 Nev. 469 (34 P. 381).

Conflict of evidence. If a new trial is granted upon the ground that the evidence is insufficient to sustain the verdict, the action of the court will be sustained by the appellate court, if there is a substantial conflict in the evidence. McLeod v. Lee, 14 Nev. 398; Margaroli v. Milligan, 11 Nev. 96; Worthing v. Cutts, 8 Nev. 118; Smith v. Mayberry, 13 Nev. 427; Phillpotts v. Blasdel, 8 Nev. 61; Treadway v. Wilder, 9 Nev. 67; Palmer v. Culverwell, 24 Nev. 114; State v. V. & T. R. R. Co., 24 Nev. 53; Roberts v. Webster, 25 Nev. 94.

Statement of new trial—Specification of insufficiency of evidence. On motion for new trial on the ground of insufficiency of the evidence, it is indispensable in the statement to designate the particulars in which the insufficiency consists. Caldwell v. Greely, 5 Nev. 258; Elder v. Shaw, 12 Nev. 78; Watt v. N. C. R. Co., 23 Nev. 156 (62 A. S. 772, 44 P. 425); Beck v. Thompson, 22 Nev. 109 (36 P. 562).

Verdict contrary to law—New trial. The court properly instructed the jury as to the measure of damages, and they brought in a verdict contrary to such instruction: Held, that the court properly granted a new trial. Hoffman v. Bosch, 18 Nev. 360 (4 P. 703).

Errors of law to be pointed out in statements. A statement on motion for new trial on the ground of errors in law must particularly designate the errors relied on, otherwise it will be disregarded. Caldwell v. Greely, 5 Nev. 258; McWilliams v. Herschman, 5 Nev. 263.

5321. New trial, application for—How made and determined—Verdict against evidence—Only two new trials.

SEC. 379. In an application for a new trial, it shall be sufficient for the party applying for the same to state, in the language of the statute only, or in language of similar import, one or more grounds as specified in the preceding section; *provided,* that when the application is made upon subdivisions 1, 2, 3, or 4 of the preceding section, it must be supported by affidavit. In all other cases it must be made upon the minutes of the court without statement or bill of exceptions. The application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court, and in other cases after the affidavits are filed. It may be brought to a hearing by either party upon five days' notice to the opposite party. On such hearing, reference may be had in all cases to the pleadings and the orders of the court, and, when the motion is made on the minutes, reference may also be had to the depositions, documentary evidence, and the stenographic notes or report of the testimony and the records of the court. The court or judge granting or refusing a new trial shall state, in writing, generally, the grounds upon which the same is granted or refused. The verdict of a jury may also be vacated and a new trial granted by the court in which the action is pending, on its own motion, without the application of either of the parties when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice, but not more than two new trials shall be granted by the court, upon its own motion, or otherwise upon the ground that the verdict is contrary to the weight of the evidence.

It would be error to grant a new trial where there is no affidavit and no statement in support of the motion for that object. Whitmore v. Shiverick, 3 Nev. 388.

See Simpson v. Ogg, under sec. 378 of this act.

The verdict of a jury or findings by a court will not be set aside on the ground that they are not supported by the evidence, unless it appears by the statement that all the evidence is before the court. Howard v. Winters, 3 Nev. 541.

The admission by respondent's attorney, that a statement on motion for new trial is correct, does not admit such statement to contain all the evidence offered, when the statement itself does not purport to contain it all. It can only be held to be an admission that so far as the evidence is stated it is stated correctly. It does not negative the order of other evidence being given. Idem.

A notice of motion for new trial, which fails to designate the grounds upon which the motion will be made, is insufficient. Street v. Lemon M. & M. Co., 9 Nev. 251, 253.

The trial court, in determining the right of a party to new trial, is not limited to the specific matters contained in the statement or affidavits on motion for new trial; and the original pleadings will be considered as part of the record on appeal, although not embodied in such statement, or identified as having been read or referred to on the hearing of the motion. Bliss v. Grayson, 24 Nev. 422, 459 (56 P. 231).

5322. Memorandum of exceptions relied upon, verified by attorney to be well founded, must be served.

SEC. 380. Where the motion is made upon the seventh cause mentioned in the preceding section, the party moving shall, within ten days after the service of notice of motion for a new trial, unless further time be obtained by stipulation or order of the court, serve upon the adverse party a memorandum of such errors excepted to as he intends to rely on upon the motion, and such memorandum shall contain a verified statement of his attorney that in the judgment of such attorney the exceptions so relied upon are well taken in the law. No other errors under subdivision 7 shall be considered either upon the motion for a new trial or upon appeal than those mentioned in such memorandum.

A verdict on conflicting evidence should not be disturbed, unless there is a clear preponderance of evidence against it, or the court can say that the jury was swayed by improper motions from rendering a just verdict. Burch v. S. P. R. R. Co., 32 Nev. 75 (104 P. 239).

Where no objection is made to a proposed amendment within the time specified, it is deemed to have been accepted by the adverse party and the statement is in effect agreed on by the parties, the same should be allowed and certified before being used on the motion. Collins v. Goodwin, 32 Nev. 342 (108 P. 4).

Where the parties submit a motion for a new trial on the statement as agreed on, they waive the objection that the statement was not properly allowed and certified. Idem.

See Botsford v. Van Riper, under sec. 378 of this act.

5323. Notice of intention to be filed and served, what must contain.

SEC. 381. The party intending to move for a new trial must, within five days after the verdict of the jury, if the action was tried by jury, or within ten days after notice of the decision of the court, or referee, if the action was tried without a jury, file with the clerk, and serve upon the adverse party, a notice of his intention, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or upon the minutes of the court.

See citations under sec. 389 of this act.

Under the former practice act it was held that findings are no portion of the judgment roll, and that there was no statutory provision for their introduction into the transcript on appeal; that they must therefore be brought up, if at all, by means of a statement, and, if not so brought up they could not be considered. Imperial S. M. Co. v. Barstow, 5 Nev. 254, 255, 263–268; Richards v. Howard, 2 Nev. 128; Corbett v. Job, 5 Nev. 201.

Sec. 198, Stats. 1861, 227, corresponding in part to this section, was cited in State v. C. P. R. R. Co., 17 Nev. 268 (30 P. 887).

5324. Motion based on affidavits and counter affidavits.

SEC. 382. If the motion is to be made upon affidavits, the moving party must, within five days after serving the notice, file such affidavits with the clerk, and serve a copy upon the adverse party, who shall have five days to file counter affidavits, a copy of which must be served upon the moving party.

Utah, 3295.

CHAPTER 46

APPEALS

5325. Judgment or order, how to be reviewed.
5326. Order made out of court, may be vacated or modified, how.
5327. Party aggrieved may appeal—Appellant and respondent defined.
5328. When motion for new trial must be made before appeal taken—When not necessary.
5329. Time within which an appeal may be taken.
5330. Appeal, how taken.
5331. Statement on appeal, how prepared, served, filed, amended, settled.
5332. Appeal from judgment and order denying new trial, one statement for both—Statement, what to contain.
5333. Idem—Testimony to be reduced to narrative form — When complete transcript may be furnished.
5334. Idem—Bill may be settled by referee—Judge or other judicial officer may settle after term expires—Refusal or death of judge, how settled then.
5335. If statement not made within time limited, same waived—Judge may correct misstatement of rulings appearing in statement.
5336. Idem—Further time may be given by judge.
5337. Statement to be signed by judge, when—By parties or their attorneys, when—To be filed with the clerk.
5338. Idem—When copy of statement to be attached to judgment roll or order—Appeal may be upon judgment roll alone—What errors considered.
5339. Idem—Appeals made from order based on affidavit must have copy of order annexed.
5340. Court may review on appeal—Intermediate orders affecting judgment.
5341. Appeal from agreed statement of facts, how taken.
5342. Findings contrary to judgment or order—Record on appeal.
5343. Bill of exceptions may be taken and settled at time of decision, order or ruling.
5344. Exhibits, when not included in the record—Originals.
5345. Judgment, when reversed for want of insufficiency of finding.
5346. Undertaking on appeal — Deposit — State and municipalities excepted.
5347. Undertaking for appeal from judgment or order directing payment of money, or dissolving attachment, form of.
5348. One undertaking only required for appeal from judgment or order denying new trial.
5349. Bond on appeal from order or judgment directing delivery of documents or personal property.
5350. Appeal from judgment or order directing execution of conveyance stays act.
5351. Appeal from judgment or order directing sale of property does not stay execution unless undertaking given—Mortgaged premises.
5352. Appeal stays further proceedings—In appeal by executor, trustee or administrator, court may dispense with or limit undertaking.
5353. Undertakings may be in one instrument in certain cases.
5354. Affidavit of sureties—Undertaking on appeal, waiver of—Deposit in lieu of undertaking.
5355. Appeal stays proceedings except on order directing sale of perishable property.
5356. Appeal from final judgment or order—Transcript of, what to consist.
5357. Transcript on appeal may be either printed or typewritten—Rule of costs.
5358. Appeals not to be dismissed except for substantial errors in proceeding.
5359. Power of appellate court on appeal.
5360. Judgment on appeal, how certified and entered.
5361. Execution for costs to be issued when remittitur filed.

5325. Judgment or order, how to be reviewed.

SEC. 383. A judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this title, and not otherwise.

Where the district court, in a case certified to it from a justice's court, renders judgment on an issue exclusively within the jurisdiction of the justice, the supreme court has no jurisdiction of an appeal from the judgment. Union Ditch Co. v. Leete, 24 Nev. 345 (54 P. 724).

When an error appears on the face of a judgment roll, in computation or anything of that character, which would have been corrected in the court before if attention had been called to it, and an appellant had an opportunity to do so, which he neglected, the supreme court will make the proper correction at the cost of the appellant, but costs will not be imposed if the appellant did not have such opportunity in the lower court. Flannery v. Anderson, 4 Nev. 444.

Where a fact, necessary to be proven to support a judgment, was found by a district court, and there is nothing in the record on appeal to negative such finding, it will be presumed to have been established by competent and satisfactory evidence. Idem.

Cited, Peters v. Jones, 26 Nev. 259, 263, 265, 266 (66 P. 745).

When an appeal is taken from an order made on affidavits, no statement is required, and those sections of the practice act making it the duty of the appellant to prepare a statement containing the grounds upon which he intends to rely on appeal, have no application to an appeal from such an order. Gray v. Harrison, 1 Nev. 502.

New trials and appeals in contested election cases are regulated by the civil practice act. Lynip v. Buckner, 22 Nev. 426, 435 (30 L. R. A. 354, 41 P. 762); Sweeney v. Karsky, 25 Nev. 197 (58 P. 813).

A statement on appeal must contain a specific statement of the particular errors or grounds relied on. Corbett v. Job, 5 Nev. 201, 204; Irwin v. Samson, 10 Nev. 383.

Where it is not shown that the statement on appeal was filed with the clerk, or that a copy of it was served, or that it was agreed to, or settled by the judge, it was held that it did not comply with any of the requirements of the statute and could not be considered. Baum v. Meyer, 16 Nev. 91, 92.

Cited, State v. Y. J. S. M. Co., 14 Nev. 240.

The court cannot consider an appeal where no notice of, or undertaking on, appeal has been filed, even though counsel by express stipulation waived the same. Marx v. Lewis, 24 Nev. 306, 307 (53 P. 600).

Cited, Kirman v. Johnson, 30 Nev. 146, 151, 152 (93 P. 500).

Marx v. Lewis, 24 Nev. 306, reversed, Hoffman v. Owens, 31 Nev. 481, 483 (103 P. 414).

5326. Order made out of court may be vacated or modified, how.

SEC. 384. An order made out of court, without notice to the adverse party, may be vacated or modified without notice, by the judge who made it or may be vacated or modified on notice, in the manner in which other motions are made.

Kerr, C. C. P., 937.

5327. Party aggrieved may appeal—Appellant and respondent defined.

SEC. 385. Any party aggrieved may appeal in the cases prescribed in this title. The party appealing shall be known as the appellant, and the adverse party as the respondent.

Kerr, C. C. P., 938.
Cited, Gaudette v. Glissan, 11 Nev. 185.

5328. When motion for new trial must be made before appeal taken—When not necessary.

SEC. 386. Where the appeal is based upon the ground that the evidence is insufficient to justify the verdict or decision of the court, or to support the findings, or upon alleged errors in ruling upon the evidence, or upon instructions claimed to be erroneous, a motion for a new trial must be made and determined before the appeal is taken. In all other cases the party aggrieved may appeal with or without first moving for a new trial; but by appealing without first moving for a new trial, the right to move for a new trial is waived.

5329. Time within which an appeal may be taken.

SEC. 387. An appeal may be taken:

1. From a final judgment in an action or special proceeding commenced in the court in which the judgment is rendered, within six months after the rendition of the judgment.

2. From an order granting or refusing a new trial, or refusing to grant or dissolve an injunction, or appointing or refusing to appoint a receiver, or dissolving or refusing to dissolve an attachment, or changing or refusing to change the place of trial, and from any special order made after final judgment, within sixty days after the order is made and entered in the minutes of the court.

3. From an interlocutory judgment, order or decree hereafter made or entered in actions to redeem real or personal property from a mortgage thereof or lien thereon, determining such right to redeem and directing an accounting, and from an interlocutory judgment in actions for partition which determines the rights and interests of the respective parties and

5329
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directs partition, sale or division to be made, within sixty days after the rendition of the judgment or order.

See secs. 319, 4833.

Appeals in probate proceedings, secs. 6089, 6112, 6133.

Cited, Cal. St. Tel. Co. v. Patterson, 1 Nev. 151, 155, 159.

Where the notice of appeal is filed one day before the expiration of the time limited for taking an appeal, but the undertaking is not filed until three days after the expiration of that time, but within five days after the filing of the notice of appeal, it was held that the appeal was taken within the year allowed by statute. Peran v. Monroe, 1 Nev. 484, 486.

An appeal is taken by the filing and serving of the notice, but it is effectual for no purpose until the undertaking is filed, and the failure to file such undertaking within the time prescribed renders the notice nugatory, but if filed within that time, it relates back to the time of filing and service of the notice of appeal. Idem.

Under this section an appeal is authorized from an order refusing to change the place of trial. Table Mt. G. & S. M. Co. v. Waller's Defeat S. M. Co., 4 Nev. 218 (97 A. D. 526).

An affidavit for change of venue, that affiant "verily believes and so says that the convenience of witnesses and the ends of justice would be promoted by the change of the place of trial," states mere conclusions, and not facts, and is clearly insufficient. Kercheval v. McKenney, 4 Nev. 294, 296.

Where an appeal, devoid of merit, appears to have been made for delay, damages in addition to costs will be imposed. Idem.

Cited, Peters v. Jones, 26 Nev. 264 (66 P. 745).

The practice act of this state allows an appeal from an order setting aside judgment. Ballard v. Purcell, 1 Nev. 342.

During the term in which judgment is rendered, the court has complete control of it, and upon a proper showing may set it aside. Idem.

The district court has jurisdiction in all chancery cases, whatever may be the amount in controversy. Wilde v. Wilde, 2 Nev. 308.

Under the statute providing for the payment of alimony pendente lite, the court cannot make an order for the payment of past expenses after the suit has been finally decided against the wife, although the motion was made before the decision of the case. Idem.

An appeal does not lie from the action of a district court in simply sustaining the demurrer; there must be a final judgment in such case before an appeal can be taken. Keyser v. Taylor, 4 Nev. 435, 436.

An order refusing to transfer a cause from a state district court to a United States court is not one of the orders contemplated by this section and no direct appeal lies therefrom. State ex rel. Comb. S. M. Co. v. Curler, 4 Nev. 445, 446.

Where the record on appeal discloses simply the sustaining of a demurrer, without showing a judgment, the appeal will be dismissed. Idem.

Where the clerk, in entering an order overruling defendant's motion for a new trial, enters defendant's name incorrectly, defendant is bound to take notice that the order was meant for his case, and, in the absence of proof that he was deceived or misled by the mistake, the time within which he must take an appeal begins to run from the date of such entry, and not from that of an order nunc pro tunc correcting the mistake. Burbank v. Rivers, 20 Nev. 159 (18 P. 753).

Cited, Ranft v. Young, 21 Nev. 402 (32 P. 490).

An appeal not taken within the time allowed by law must be dismissed. Paroni v. Simonsen, 33 Nev.—(115 P. 415).

Upon a writ of prohibition the appellate court cannot review an interlocutory order of the court below. That can only be reviewed on appeal from the final judgment. Low v. Crown Point M. Co., 2 Nev. 75, 79.

Cited, Peran v. Monroe, 1 Nev. 484.

Former section 330, act of 1869, 196, held not to allow an appeal from an order requiring a party to give a bond, nor from an order appointing a receiver. Meadow Valley M. Co. v. Dodds, 6 Nev. 261, 263.

Cited, Winter v. Winter, 8 Nev. 136.

Cited, Kehoe v. Blethen, 10 Nev. 446, 453.

The supreme court has appellate jurisdiction only in cases commenced or tried by a court. The legislature may enjoin upon a judge the performance of judicial functions in matters outside of actions or proceedings in courts, but, in such cases, there is nothing in the statutes authorizing an appeal from his orders. Lyon Co. v. Esmeralda Co., 18 Nev. 169 (1 P. 839).

If an appeal lies from an order refusing to open a default, under the provisions of sec. 330, Stats. 1869, 196, it must be taken within sixty days or the right of appeal therefrom is lost. Reinhart v. Company D, 23 Nev. 369, 371 (47 P. 979).

Where a suit to foreclose a mechanic's lien is brought in a justice's court and appealed to the district court, it was held that an appeal lies from the district court to the supreme court. Dickson v. Corbett, 10 Nev. 442, 446.

The supreme court has no appellate jurisdiction in cases of contempt, where the proceeding is purely criminal. Phillips v. Welch, 11 Nev. 189, 190.

An appeal from a special order made

after final judgment must be taken within sixty days after the order is made. Weinrich v. Porteous, 12 Nev. 104.

Under former sec. 330 (Stats. 1869, 196) it was held: If an appeal from the judgment is not taken within one year, it will be dismissed. Solomon v. Fuller, 13 Nev. 276, 278.

A party having the right to appeal may, within twenty days after the entry of the judgment or order, file his statement upon appeal and have it settled by the judge, and, within the time limited, jurisdiction of the case for that purpose is retained by the district court, even though the appeal be perfected before such statement is prepared. James v. Leport, 19 Nev. 175, 176 (8 P. 47).

Cited, in dissenting opinion of Belknap, J., Alexander v. Archer, 21 Nev. 32 (24 P. 373).

Under the former practice act an order changing the place of trial was not appealable, but was held properly brought before the court as an intermediate order involving the merits and necessarily affecting the judgment. State v. Shaw, 21 Nev. 222, 224.

Cited, Comstock M. & M. Co. v. Allen, 21 Nev. 325, 328 (31 P. 434); Marx v. Lewis, 24 Nev. 306 (53 P. 600).

Orders denying motions to strike out and amend a judgment may be presented by statement on appeal, instead of by bill of exceptions. State ex rel. Equitable G. M. Co. v. Murphy, 29 Nev. 248, 256 (88 P. 335).

An appeal from an order setting aside a default entered by the clerk is not within the cases in which sec. 330 (Stats. 1869, 196) provides that an appeal may be taken and therefore mandamus will not lie. State ex rel. Botsford v. Langan, 29 Nev. 459, 463, 464 (91 P. 737).

The time within which an appeal must be taken begins to run from the date the court made its decision and ordered judgment to be entered accordingly, though the judgment was not entered until later. Central Trust Co. v. Holmes M. Co., 30 Nev. 437, 439 (97 P. 390).

An order increasing alimony pendente lite is not appealable, not being embraced by sec. 330, Stats. 1869, 196, prescribing what judgments and orders may be appealed. Kapp v. Kapp, 31 Nev. 70, 72 (99 P. 1077).

Under sec. 330, Stats. 1869, 196, expressly requiring that appeals from judgments be taken within one year after the rendition thereof, one not so taken must be dismissed. Candler v. Washoe Lake Ditch Co., 28 Nev. 151, 162, 163 (80 P. 751); Luke v. Coffee, 31 Nev. 165, 167 (101 P. 555).

An appeal taken before the rendition of a judgment will be dismissed. Elko-Tuscarora M. Co. v. Wines, 24 Nev. 305 (53 P. 177).

5330. Appeal, how taken.

SEC. 388. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same or some specific part thereof, and within three days thereafter serving a similar notice or copy thereof on the adverse party or his attorney. When the appeal is from the judgment and from an order denying a motion for a new trial, one notice of appeal so specifying shall be sufficient. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing.

See annotations under sec. 389 of this act.

Cited, Cal. St. Tel. Co. v. Patterson, 1 Nev. 160.

A notice of appeal given orally to respondents, even if given in open court and entered on the minutes of the court, is not sufficient to make an appeal and dispense with the filing of a written notice. Lambert v. Moore, 1 Nev. 345–347.

The filing and service of a written notice of appeal must be followed by the filing of a proper undertaking, or the deposit in lieu thereof, within five days, or the notice becomes inoperative and a nullity. Idem.

See Peran v. Monroe, under sec. 387 of this act.

Where the notice of appeal specifies only a part of the judgment, and is served only upon the parties whose interests would not be affected by a reversal of the parts specified, it was held that the appellate court has no jurisdiction over the other parties, or over the judgment in so far as it affects them. Dick v. Bird, 14 Nev. 161, 163.

A copy of the notice of appeal, as filed, must be served before or at the time of filing the undertaking on appeal. Johnson v. Badger M. & M. Co., 12 Nev. 261.

The notice should state that appellants do appeal, not that they will appeal. Simpson v. Ogg, 18 Nev. 29 (1 P. 827).

A party may appeal from the whole or any part of a judgment. State v. C. P. R. R. Co., 21 Nev. 175 (26 P. 225).

Cited, Marx v. Lewis, 24 Nev. 306 (53 P. 600), which decision was reversed.

Notices of appeal are to be liberally construed and they will be held sufficient,

if, by fair construction or reasonable intendment, the court can say that the appeal is taken from a judgment or an order in a particular case. Bliss v. Grayson, 24 Nev. 422, 434 (56 P. 231).

Where codefendants have made a separate motion for new trial, the defendant whose motion is denied may appeal without serving a notice of appeal on his codefendants, whose motion has never been passed upon by the court, and who are not adverse parties to the appellant. Idem.

The time within which an appeal must be taken begins to run from the date the court made its decision and ordered judgment to be entered accordingly, though the judgment was not entered until later. Central Trust Co. v. Holmes M. Co., 30 Nev. 437, 439 (97 P. 390).

The order in which the notice is filed and served is immaterial. State ex rel. Jones v. Brown, 30 Nev. 495, 503, 504 (98 P. 371).

Service of notice of appeal, what held substantial compliance. Clark v. Strouse, 11 Nev. 76.

5331. Statement on appeal, how prepared, served, filed, amended and settled.

SEC. 389. When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall, within twenty days after the entry of such judgment or order, if he or his attorney was present at the time of the making or entry thereof, or if the appeal is from a judgment based upon a verdict, and in other cases within twenty days after receiving written notice of the entry of the judgment or order, prepare a proposed statement, and number the pages and lines thereof, which proposed statement shall specify the particular errors or grounds upon which he intends to rely on the appeal, and shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more, and shall file the same with the clerk and serve a copy thereof upon the adverse party, but only one copy need be served upon the parties who are represented by the same attorney in the action, and no service need be made upon any party whose default has been entered. The respondent may, within ten days thereafter, prepare and file amendments to the statement, referring to the page and line thereof, and shall serve a copy of the amendments on the appellant, who shall, within five days thereafter, give written notice to the party filing amendments if he declines admitting the amendments, or they shall be deemed accepted. If the amendments are so accepted, either party may incorporate them in a new statement, embodying all matter in the original statement not in conflict with the amendments, and present the same to the judge or referee for his approval; or if no amendments are served, or if served are accepted, the proposed statement may be presented with the amendments, if any, to the judge or referee for settlement without notice to the adverse party. If the amendments be not accepted, the statement and amendments shall be presented to the court, or to the judge or referee who tried or heard the case upon notice of two days to the respondent, and a true statement shall thereupon be settled by the court or such judge or referee. When the proposed statement and amendments are received by the clerk, and the appellant files the notice declining to admit the amendments, the clerk must immediately deliver the statement and amendments to the judge if he be in the county; if he be absent from the county, and either party desires the papers to be forwarded to the judge, the clerk must, upon notice in writing from such party, immediately forward them to the judge by mail or other safe channel. If not thus forwarded, the clerk must deliver them to the judge immediately after his return to the county. When received from the clerk, the judge must designate the time at which he will settle the statement, and the clerk must immediately notify the parties of such designation. At the time designated the judge must settle the statement.

As this act has dispensed with the necessity for any statement on motion for a new trial, and requires only a statement on appeal, in case an appeal is taken, reference is here made by analogy to the more important decisions regarding statements on motion for a new trial

which were required under the former practice, section 197 of the old act, and which generally served the purpose of a statement on appeal, as well as to cases relating to statements on appeal.

This section, corresponding to Stats. 1861, 346, sec. 195, has been construed in the following cases: Gregory v. Frothingham, 1 Nev. 253, 258–260; Hoopes v. Meyer, 1 Nev. 433, 439; Lockwood v. Marsh, 3 Nev. 138, 139; Whitmore v. Shiverick, 3 Nev. 288, 300; Lobdell v. Hall, 3 Nev. 507, 531.

Statement must be filed in time. A statement on motion for new trial which was not filed within the time allowed by law should, on motion, be stricken out. Williams V. Rice, 13 Nev. 235; Harrison v. Lockwood, 14 Nev. 263; Robinson v. Benson, 19 Nev. 331 (10 P. 441); G. F. M. Co. v. Cable Co., 15 Nev. 450.

Statement must be made within statutory time. Tull v. Anderson, 15 Nev. 426.

Assignment of error — Insufficiency of evidence—Findings of fact. Watt v. N. C. R. Co., 23 Nev. 156 (62 A. S. 772, 44 P. 423); Beck v. Thompson, 22 Nev. 109 (36 P. 562).

The method of making and settling statements on motion for new trial commented on. Levy v. Fargo, 1 Nev. 417; Bliss v. Grayson, 24 Nev. 422 (56 P. 231); Hoppin v. Cheney, 24 Nev. 222 (52 P. 12).

Meaning of "settled" in judge's certificate. The express requirement of the statute, that a judge's certificate to a settled statement on motion for a new trial shall affirm its correctness, does not preclude such presumptions as fairly arise from the language actually employed; so that when a judge certifies that he has settled a statement, he in effect certifies that it is a true and correct statement. Overman S. M. Co. v. American M. Co., 7 Nev. 312.

Stipulation of counsel ignoring the positive requirements of law will be disregarded. April Fool M. Co. v. Dooley, 24 Nev. 290 (52 P. 648).

New trial order reversed, if not supported. On appeal from an order granting a new trial, if the affidavits upon which it was granted are not identified so as to entitle them to be considered, the order, having no foundation, will be reversed. Dean v. Pritchard, 9 Nev. 232; Albion M. Co. v. Richmond Co., 19 Nev. 225 (8 P. 480); Hoppin v. First Nat. Bank, 25 Nev. 90.

Certificate of judge to statement. If it be stated in a statement that it contains all the material evidence, the certificate of the judge to the correctness of the statement is sufficient to establish that fact; but a certificate that a statement is correct does not show that it contains all the evidence when that fact is not stated in it. Sherwood v. Sissa, 5 Nev. 349.

Statement not containing all the evidence. Where the statement does not show that it contains all the evidence, it will be presumed that the findings were supported by the evidence. Gammans v. Roussell, 14 Nev. 171; Mandelbaum v. Liebes, 17 Nev. 131 (28 P. 1040); White Pine Co. v. Herrick, 19 Nev. 311 (10 P. 215); Howard v. Winters, 3 Nev. 539; Terry v. Berry, 13 Nev. 514; Greeley v. Holland, 14 Nev. 320; Bowker v. Goodwin, 7 Nev. 135; Libby v. Dalton, 9 Nev. 23; Lonkey v. Wells, 16 Nev. 271; McLeod v. Lee, 17 Nev. 103 (38 P. 124); Caples v. C. P. R. Co., 6 Nev. 265; In Re Winkleman, 9 Nev. 303; Bailey v. Papina, 20 Nev. 177 (19 P. 33).

Evidence to be inserted. When the appellant does not rely upon the "insufficiency of the evidence," it is only necessary to insert so much of the evidence as is necessary to explain the particular errors relied on. Rose v. Richmond M. Co., 17 Nev. 25 (37 P. 1105).

Statement—Particulars must be stated. A statement must specify the particulars in which the evidence is alleged to be insufficient, or it will be disregarded. Dick v. Bird, 14 Nev. 161; Lamance v. Byrnes, 17 Nev. 197 (30 P. 700); Rosina v. Trowbridge, 20 Nev. 105 (17 P. 751).

Objection to evidence—Grounds of must be stated. Rosina v. Trowbridge, 20 Nev. 105.

Findings — Documentary evidence must be embodied in a statement. Neither the findings of the court below, nor the documentary evidence admitted at the trial will be considered in the appellate court unless embodied in the statement or identified as required by statute. Hanson v. Chiatovich, 13 Nev. 395; Alderson v. Gilmore, 13 Nev. 84; Bowker v. Goodwin, 7 Nev. 135; Beck v. Truckee Lodge, 18 Nev. 246 (2 P. 390); Simpson v. Ogg, 18 Nev. 28 (1 P. 827); Imp. S. M. Co. v. Barstow, 5 Nev. 252; Corbett v. Job, 5 Nev. 201; Nesbitt v. Chisholm, 16 Nev. 400.

Judgment of nonsuit — Specification of error. Held, sufficient. Brown v. Warren, 16 Nev. 228.

Assignment of errors — When sufficient. Jones v. Adams, 17 Nev. 84 (28 P. 64).

Manner of inserting testimony in statement—Use of word "proved." Wilson v. Hill, 17 Nev. 401 (30 P. 1076).

Adjournment for term — Notice served. When notice of intention to move for new trial is served within two days after judgment, and followed up by statement, etc., as the statute prescribes, the court retains jurisdiction of the case so far as to be able to dispose properly of the motion for new trial, although the court may have adjourned for the term between the day judgment was rendered and the filing of notice, without making any order retaining the jurisdiction over the case. Killip v. Empire Mill Co., 2 Nev. 34.

But if term expires, and no notice of intention to move for a new trial is filed within the statutory time, then the court loses jurisdiction of the case. Idem.

Notice must be in writing, or in open court, and a minute made of it. Idem.

See State v. Bank of Nevada, 4 Nev. 358.

New trial—Notice—Trial without jury—Decision of court distinct from findings. Time within which notice must be given begins to run from the announcement of judgment. Robinson v. Benson, 19 Nev. 331 (10 P. 441); Elder v. Frevert, 18 Nev. 278 (3 P. 237); Stanton-Thompson Co. v. Craine, 25 Nev. 114 (58 P. 53); Duffy v. Moran, 12 Nev. 98.

Notice of motion for new trial, without specifying grounds, insufficient. A notice of motion for new trial, which fails to designate the grounds upon which the motion will be made, is insufficient. Street v. Lemon M. & M. Co., 9 Nev. 251.

Defective notice for new trial not helped by statement. The language of section 197 of the old practice act, requiring a notice of motion for new trial to "designate generally the grounds upon which the motion will be made," is clear, plain and explicit; and a disregard of it is not helped out by designating the grounds in the statement. Idem.

New trial statement need not designate general grounds. A statement on motion for new trial need not designate the general grounds of error relied on, but only specify the particulars wherein the error lies—the practice act requiring the notice to designate the general grounds, and the statement to contain the specifications. Worthing v. Cutts, 8 Nev. 118.

Hoopes v. Meyer, 1 Nev. 443, and Gillig v. Lake Bigler Road Company, 2 Nev. 214, on the point that a statement is not required to specifically state the errors relied on, disapproved. Corbett v. Job, 5 Nev. 210; Roberts v. Webster, 25 Nev. 94 (57 P. 180).

Evidence, when not reviewed. The supreme court will not review the evidence in the absence of a regular statement on motion for a new trial. State v. Sadler, 21 Nev. 13 (23 P. 799).

Statement must be authenticated. A statement on motion for a new trial will not be considered on appeal unless it is authenticated in the mode prescribed by statute. Jones v. Adams, 18 Nev. 60 (8 P. 798); White v. White, 6 Nev. 20; Solomon v. Fuller, 13 Nev. 276.

Authentication of statement. A certificate of the clerk, to the effect that no amendments to the statement have been filed, is such an authentication as is required by old section 197. Borden v. Bender, 16 Nev. 49; Tull v. Anderson, 15 Nev. 426.

Naming a paper does not endorse its correctness as such. White v. White, 6 Nev. 20.

Identification of affidavits used on motion for new trial. To entitle affidavits, used on motion for new trial, to be considered on appeal in the supreme court, they must be identified by indorsement of the judge or clerk, made "at the time" of use; and a certificate made after appeal taken, will not avail. Dean v. Pritchard, 9 Nev. 232; Albion M. Co. v. Richmond M. Co., 19 Nev. 225 (8 P. 480).

Certificate of judge to statement for new trial. Where a district judge certified at the end of a statement "that the foregoing is the settled and engrossed statement on motion for new trial of the above entitled cause": Held, that though not a literal compliance with the statute, such certificate was a substantial compliance and sufficient. Overman M. Co. v. Am. M. Co., 7 Nev. 312.

Presumptions in favor of judge's certificate. Idem.

Identification of documents—When sufficient. Martens v. Gilson, 13 Nev. 489; Marshall v. G. F. M. Co., 16 Nev. 156; Bliss v. Grayson, 24 Nev. 422 (56 P. 231).

Defects in clerk's certificate and notice on motion for new trial waived, when. Idem.

Waiver of right to object to proposed amendments—Statement on motion for new trial, when. Hoppin v. Cheney, 24 Nev. 222 (52 P. 12).

Power of court to make statement conform to truth. Idem.

Statement—Objections to, when waived. When counsel appear and orally argue a case upon its merits, and afterwards, by leave of the court, file a brief and therein rely upon objections to the statement: Held, that the oral argument upon the merits amounted to a waiver of the objections to the statement. Truckee Lodge v. Wood, 14 Nev. 293; Sweeney v. Hjul, 23 Nev. 409 (48 P. 1036).

Facts must be embodied in statement. State v. C. P. R. Co., 17 Nev. 259 (30 P. 887).

Statement on motion for new trial—Settled in trial court—Appellate court on motion cannot correct, alter, or amend. The statement having been settled and certified by the district judge, according to the statute, this court has no power to alter or amend it. Gardner v. Brown, 22 Nev. 156 (37 P. 240).

Admission by respondent's attorney that a statement on motion for new trial is correct, does not admit such statement to contain all the evidence offered in the case, where the statement itself does not purport to contain it all. It can only be held to be an admission that so far as the evidence is stated, it is stated correctly. It does not negative the idea of other evidence having been given. Howard v. Winters, 3 Nev. 539.

Statement should be complete. Map referred to should be included. Hamburg M. Co. v. Stephenson, 17 Nev. 449 (30 P. 1088).

Amendments should be liberally allowed. Courts should be liberal in allowing amendments to defective statements on motion for a new trial, etc., and should themselves suggest them whenever a defect or deficiency is apparent. Caldwell v. Greely, 5 Nev. 258.

Statement on motion for new trial cannot be certified to after appeal is taken—Effect of order prematurely made. Thomas v. Sullivan, 11 Nev. 280; Caples v. C. P. R. R. Co., 6 Nev. 266.

New trial—Premature ruling upon. A

motion for new trial, when made upon a statement, should not be ruled upon until the statement has been settled and authenticated. If done, the ruling is irregular and premature, and should be vacated upon motion. Crosby v. N. B. S. M. Co., 23 Nev. 70 (42 P. 583).

Motion for, submitted, how vacated. Where a motion for new trial has been regularly submitted upon a sufficient statement, a ruling thereon cannot be subsequently vacated on motion, but the only remedy is by appeal. Idem.

Statement for new trial—Specification of error. In a statement on motion for a new trial, which contains the charge of the judge as an entirety, a specification of error "that the court erred in giving to the jury the instructions as set forth in this statement," is sufficient. Ellis v. C. P. R. R. Co., 5 Nev. 255.

Statement. When a party in assigning errors, or stating the grounds on which he will move for a new trial, says that the court erred in doing a certain thing, this is no evidence that the court did as charged. To establish that fact, it must appear in the statement of facts. The assignment of errors, and the statement of the facts or evidence to sustain these alleged errors, are separate and distinct things The party moving for a new trial may state the errors complained of in his own language. Neither the court nor the opposite party can correct that. The court can only correct the statement of facts or evidence. Fleeson v. Savage M. Co., 3 Nev. 157; McGurn v. McInnis, 24 Nev. 370 (55 P. 304).

Statement on motion for new trial—Settlement of by judge or referee—Practice. In a case tried before a referee, where all the proceedings are reported to the court, the statement on motion for a new trial may be settled by the judge. Marshall v. G. F. M. Co., 16 Nev. 156.

Statement, when considered "used" in the court below. If prepared, settled and on file in the clerk's office. State v. C. P. R. Co., 17 Nev. 259 (30 P. 887).

Facts must be embodied in statement, to be considered on appeal. Idem.

Order overruling motion for new trial need not be excepted to. Idem.

New trial—Statement—When must be filed—Waiver. A failure to file a statement within five days after giving notice of intention to move for a new trial, nothing having been done in the meantime to retain jurisdiction, operates as a waiver of the right to move for a new trial, and no power exists in the district court to reinstate this right. Elder v. Frevert, 18 Nev. 278 (3 P. 237); Hoppin v. Cheney, 24 Nev. 222 (52 P. 12).

Motion for new trial—Waiver of notice of decision. If he proceed in the case upon actual knowledge of such decision, he waives his right to written notice. Corbett v. Swift, 6 Nev. 194.

Time to move for new trial. Idem.

Waiver of error to be shown by party claiming waiver. McWilliams v. Herschman, 5 Nev. 263; White v. White, 6 Nev. 20.

Extending time to file statement on motion for new trial. An order signed by the judge extending the time fixed by statute for filing a statement on motion for a new trial, must not only be signed, but must be filed with the papers in the case, or entered of record in the minutes of the court, within the time prescribed by statute. Clark v. Strouse, 11 Nev. 76.

In an equity case, this court may order the proper decree to be entered in the court below without the formality of a new trial. Feusier v. Sneath, 3 Nev. 120.

New trial, when to be granted by nisi prius court. A judge who tries a cause should not hesitate to set aside the verdict, where there is a clear preponderance of evidence against it. Phillpotts v. Blasdel, 8 Nev. 61.

A verdict will not be set aside merely because it is against the weight of evidence. Bryant v. Carson L. Co., 3 Nev. 313.

New trial of portion of the issues in action for divorce may be granted. Lake v. Bender, 18 Nev. 361 (4 P. 711).

Order granting new trial—When it will be sustained. Where, on appeal from an order granting a new trial, the record shows that the motion was made upon two grounds, without showing upon which of them the action was based, the order will be affirmed, if the action of the court can be sustained upon either ground. McLeod v. Lee, 14 Nev. 398.

New trial — Improperly granted. When judgment and verdict are in accordance with evidence, no substantial conflict in it upon material issue and no error, court has no right to grant new trial. Lawrence v. Burnham, 4 Nev. 361; Scott v. Haines, 4 Nev. 426.

New trial—When should not be granted. A new trial ought not to be granted on a motion to set aside a verdict, merely because the court had erred in finding a fact in some preliminary proceeding in the case. Solomon v. Fuller, 14 Nev. 63.

Distinction as to weight of evidence on new trial and on appeal. State v. Y. J., 5 Nev. 415.

Cited, Van Valkenburg v. Huff, 1 Nev. 143.

See Gray v. Harrison, under sec. 377 of this act.

When there is a statement on appeal from the judgment, and subsequently a statement on appeal from an order overruling the motion for a new trial, each statement must be considered separately, and portions of one cannot be taken to aid the other. Whitmore v. Shiverick, 3 Nev. 302.

It would be error to grant a new trial where there is no affidavit and no statement in support of the motion for that object. Idem.

A statement on appeal must be made twenty days after judgment, and if a sufficient statement be not made within that time it cannot subsequently be made. Idem.

The exercise of the right in a district court to grant a new trial will be presumed to be

correct and proper until affirmatively shown to be erroneous. State v. Stanley, 4 Nev. 71, 75.

When an appeal is taken only from the judgment the statement that it had been prepared and used as a statement on motion for a new trial cannot be considered as a statement on appeal. (Beatty, J., dissenting). Williams v. Rice, 13 Nev. 237–341.

Cited, Greeley v. Holland, 14 Nev. 323; Iowa M. Co. v. Bonanza M. Co., 16 Nev. 69.

Specification of error held sufficient. Brown v. Warren, 16 Nev. 231.

A statement on appeal must contain a specific statement of the errors or grounds relied on. Corbett v. Job, 5 Nev. 201, 204.

The word "order" in sec. 232, Stats. 1869, 196, does not refer to the ordinary order on motion for a new trial. Johnson v. Wells, Fargo & Co., 6 Nev. 224, 228.

Where there is no assignment or specification of errors, they cannot be reviewed by the appellate court. Meadow Valley M. Co. v Dodds, 6 Nev. 261, 264.

Where there is no statement on appeal, no proper assignment of errors, and no judgment roll, the appeal must be dismissed. Irwin v. Samson, 10 Nev. 282, 283.

In taking an appeal from orders based upon affidavits, no statement on appeal is required. It is only necessary to annex the affidavits to the orders and have them properly certified. Weinrich v. Porteous, 12 Nev. 103, 104.

Where it is not shown that the statement on appeal was filed with the clerk or that a copy of it was served, or that it was agreed to, or settled by the judge, it does not comply with the requirements of the statute, and cannot be considered. Baum v. Meyer, 16 Nev. 91, 92.

Cited, Marshall v. Golden Fleece M. Co., 16 Nev. 168.

When appellant does not rely upon the insufficiency of the evidence to sustain the findings of the court, it is only necessary to insert so much of the evidence in the statement on appeal as is necessary to explain the particular errors relied upon. Rose v. Richmond M. Co., 17 Nev. 25, 50, 51 (37 P. 1105, 114 U. S. 576).

Cited, James v. Leport, 19 Nev. 174, 176 (8 P. 47).

A statement of a case on appeal must be settled and authenticated by the judge or referee hearing the case, or by agreement of the parties; and unless so authenticated thirty days prior to the commencement of a term of the supreme court the appellant is not in default for failure to file a transcript by the first day of the term, though the statement may have been on file with the clerk of the trial court for a longer time, and no amendments proposed thereto. Hayes v. Davis, 23 Nev. 233 (45 P. 466).

An alleged error, in refusing to allow plaintiff to rebut, by his own testimony, the testimony of other witnesses, will not be considered, where such action of the court was not assigned as error. Schwartz v. Stock, 26 Nev. 128, 150 (65 P. 351).

Orders denying motions to strike out and amend a judgment may be presented by statement on appeal instead of by bill of exceptions. State ex rel. Equitable M. Co. v. Murphy, 29 Nev. 248, 256 (88 P. 335).

Where the transcript on appeal from judgment of dismissal contains the original papers filed in the case and "an affidavit on motion for a new trial and on appeal," a motion will be granted to strike out all the papers except the complaint, demurrer, summons, and judgment. Hart v. Spencer, 29 Nev. 286, 287 (89 P. 289).

On counsel failing to agree on the statement and certifying to such fact, the same could be submitted by either party to the trial judge for settlement. Young v. Updike, 29 Nev. 303, 305 (89 P. 457).

This section construed. Smith v. Wells Estate Co., 29 Nev. 411, 417 (91 P. 315); Quinn v. Quinn, 27 Nev. 156 (74 P. 5).

For other cases construing sec. 197, Stats. 1869, 196, see Johnson v. Wells, Fargo & Co., 6 Nev. 229; Neil v. Wynecoop, 9 Nev. 47, 48; Lamburth v. Dalton, 9 Nev. 66; Sherman v. Shaw, 9 Nev. 152; Warren v. Quill, 9 Nev. 266; Rhodes v. Williams, 12 Nev. 26; Thorne v. Sweeney, 13 Nev. 416; Hunter v. Truckee Lodge, 14 Nev. 24; Burns v. Rodefer, 15 Nev. 62; Iowa M. Co. v. Bonanza M. Co., 16 Nev. 69, 70; Gould v. Wise, 18 Nev. 283, 284 (3 P. 30); Boyd v. Anderson, 18 Nev. 350, 351, 352 (4 P. 497); State ex rel. Keane v. Murphy, 19 Nev. 89, 91 (6 P. 840); Earles v. Gilham, 20 Nev. 46–49 (14 P. 586); Poujade v. Ryan, 21 Nev. 450, 451 (33 P. 659); Roberts v. Webster, 25 Nev. 94, 95 (57 P. 180); Powell v. N. C. O. R. R., 28 Nev. 342 (82 P. 96); Hayes v. Davis, 23 Nev. 234 (45 P. 466); Bliss v. Grayson, 25 Nev. 329, 344, 345; Hoppin v. First Nat. Bank, 25 Nev. 90; State ex rel. Cohn v. Mack, 26 Nev. 85 (63 P. 1125); Schwartz v. Stock, 26 Nev. 150 (65 P. 351); Lewis v. Hyams, 26 Nev. 85 (99 A. S. 677, 63 P. 126); Yori v. Cohn, 26 Nev. 206, 228 (65 P. 945); Walsh v. Wallace, 26 Nev. 299, 321 (99 A. S. 692, 67 P. 914); Candler v. W. L. R. Co., 28 Nev. 151, 163 (80 P. 751); Twaddle v. Winters, 29 Nev. 88, 97, 98 (85 P. 280); State ex rel. Equitable G. M. Co. v. Murphy, 29 Nev. 247, 252 (88 P. 335; Central T. Co. v. Holmes M. Co., 30 Nev. 440 (97 P. 390); Finnegan v. Ulmer, 31 Nev. 524 (104 P. 17).

5332. Appeal from judgment and order denying new trial, one statement for both—Statement, what to contain.

SEC. 390. When the appeal is taken both from the judgment and from an order denying a motion for a new trial, there shall be but one statement for both such appeals, which shall embody all errors relied on upon the

appeal both from the judgment and from such order, and the time for filing and serving the proposed statement for both such appeals, and also the time for filing and serving the proposed statement on appeal from an order granting a motion for a new trial, shall be the same as the time provided for filing and serving the proposed statement on appeal from the order. The statement on appeal from an order granting or denying a motion for a new trial may contain so much of the evidence admitted or offered, exceptions taken, or proceedings had upon the trial or before or after the trial, as may be necessary to explain the particular errors specified and which were considered or presented upon the hearing of the motion for a new trial.

5333. Idem—Testimony to be reduced to narrative form—When complete transcript may be furnished.

SEC. 391. In all cases where the appeal is not taken on the ground that the evidence does not support the verdict or decision, or that the trial court erred in denying a motion for a new trial applied for on that ground, where it is necessary to embody the testimony, or any part thereof, in the statement, any such testimony exceeding fifty pages in the proposed statement or exceeding fifty pages in the amendments proposed to the statement, and any such testimony exceeding one hundred pages in the statement as settled, shall be reduced to narrative form, without undue repetition, except as otherwise provided in this section. Where it is necessary in order to properly present an exception to a ruling upon the admissibility of testimony, only such portion of the testimony as is necessary to intelligently present the exceptions need be set out by question and answer. If a party shall include in the statement any more of the testimony and proceedings than is pertinent and necessary to fairly present the exceptions taken, he shall not be allowed costs for the typewriting or printing of such surplusage. In the event a party fails to embody in the proposed statement a fair and substantial portion of the testimony or of the effect thereof essential to a proper presentation of the exceptions relied upon, he shall not be allowed costs therefor, but the opposite party shall be entitled to such costs as he may incur in order that a proper statement may be settled. The effect of the testimony or the ultimate facts testified to may be stated preferably, instead of the full testimony by question and answer.

In cases other than the ones in which the appeal is taken on the ground that the evidence does not support the verdict or decision, or that the district court erred in denying a motion for a new trial applied for on that ground, it will be presumed that the evidence does support the verdict and decision, and shall not be necessary to include in the statement any testimony for the purpose of showing that the evidence supports the verdict or decision. When one of the grounds upon which the appeal is taken is that the evidence does not support the verdict or decision, or that the trial court improperly refused a motion for a new trial applied for on that ground, either party may have all or any part of the testimony by question and answer inserted in the statement, as he may deem appropriate or desire; but when the appellant specifies as one of the grounds for the appeal that the evidence does not support the verdict or decision, or that the court or judge erred in denying a motion for a new trial applied for on that ground, and the appellant does not prevail in the supreme court on one of these grounds, he shall not recover his costs for the typewriting or printing or for the obtaining and insertion in the statement of the testimony and the respondent shall be entitled to recover his costs for the obtaining, typewriting and printing of any testimony which he had inserted in the statement, regardless of whether the appellant may prevail on other alleged errors or grounds.

In cases in which the appeal is not taken on the ground that the evidence does not support the verdict or decision, or that the trial court erred in denying a motion for a new trial applied for on that ground, either party may have all the testimony by question and answer inserted in the record at his own expense, but he shall not recover costs for printing, typewriting or inserting of any testimony in excess of one hundred pages, unless such excess be set out in the statement in narrative form. If the statement contains more than one hundred pages of testimony by question and answer, each party shall prepare and file with the clerk, at least two days before the argument in the supreme court, an abstract of the particular testimony upon which he relies. If the judge, referee or judicial officer in any case refuses to settle the statement in accordance with the facts, the party desiring to have the statement settled may apply by petition to the supreme court for leave to prove the same. The application and proof shall be made in the mode and manner and under such regulations as the court may prescribe; and the statement when proven must be certified by the chief justice, or in his absence or inability to act by one of the associate justices, to be correct, and filed with the clerk of the court in which the action was tried, and when so filed it shall have the same force and effect as if settled by the judge who tried the cause.

5334. Idem—Bill may be settled by referee; judge or other judicial officer may settle after term expires; refusal or death of judge, how settled then.

SEC. 392. When the decision excepted to was made by a referee or any judicial officer other than a judge, the statement shall be presented to such referee or judicial officer, and be settled and signed by him in the same manner as it is required to be presented to, settled, and signed by a court or judge. A judge, referee, or judicial officer may settle and sign a statement after as well as before he ceases to be such judge, referee, or judicial officer. If such judge, referee or judicial officer, before the statement is settled, dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the statement, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may, by its order or rules, direct.

5335. If statement not made within time limited, same waived—Judge may correct misstatement of rulings appearing in statement.

SEC. 393. If the party shall omit to make a statement within the time limited, he shall be deemed to have waived his right thereto; and when a statement is made and the parties shall omit within the several times above limited, the one party to propose amendments, the other to give the notice that he declines to admit the amendments, they shall respectively be deemed, the former to have agreed to the statement as prepared, and the latter to have agreed to the amendments as proposed; but the judge or referee who tried or heard the case shall, notwithstanding such omission or implied agreement, have power to correct any misstatement of his rulings which such statement may contain.

A failure to make a statement on appeal within twenty days after the entry of judgment is equivalent to a waiver of such statement; but such waiver may itself be waived; and a stipulation that the statement on new trial shall also be the statement on appeal, though made more than twenty days after judgment, is such a waiver. Johnson v. W. F. & Co., 6 Nev. 225, 229.

When an appeal is only taken from a judgment, a statement that had been prepared and used as a statement on motion for a new trial, cannot be considered as a statement on appeal. Williams v. Rice, 13 Nev. 234, 236, 241.

See Hayes v. Davis, under sec. 389 of this act.

Cited, Iowa M. Co. v. Bonanza M. Co., 16 Nev. 69, 70.

5336. Idem—Further time may be given by judge.

SEC. 394. The several periods of time above limited may be enlarged, upon good cause shown, by the court, judge or referee before whom the cause was tried.

5337. Statement to be signed by judge, when; by parties or their attorneys, when—To be filed with the clerk.

SEC. 395. The statement, when settled by the judge or referee, shall be signed by him, with his certificate that the same has been allowed and is correct. When the statement is agreed upon by the parties, they or their attorneys shall sign the same, with their certificate that it has been agreed upon by them and is correct. In either case, when settled or agreed upon, it shall be filed with the clerk.

It was held under sec. 335, Stats. 1869, 196, that said section does not contemplate that the judge shall certify that a statement on appeal contains all the evidence, but simply that it has been allowed by him and is correct. Caples v. C. P. R. R. Co., 6 Nev. 265, 272.

A judge's certificate to a statement on motion for new trial and appeal, that the record contains all the evidence, will not be allowed to be added after the appeal has been perfected and the transcript becomes a record of the appellate court. Idem.

Cited, Williams v. Rice, 13 Nev. 236.

Where the statement fails to show that it contains all the evidence, the appellate court will presume that there was sufficient evidence at the trial to sustain the findings of the court. Terry v. Berry, 13 Nev. 514, 523.

Cited, Hayes v. Davis, 23 Nev. 233 (45 P. 466).

This section construed. Smith v. Wells Estate Co., 29 Nev. 411, 418 (91 P. 315).

5338. Idem—When copy of statement to be attached to judgment roll or order—Appeal may be upon judgment roll alone—What errors considered.

SEC. 396. A copy of the statement on appeal, if there be one, shall be annexed to a copy of the judgment roll, if the appeal be from the judgment; if the appeal be from an order, to a copy of such order. A party may appeal upon the judgment roll alone, in which case only errors can be considered which appear upon the face of such judgment roll.

Where there is no statement and the appeal is simply from the judgment, nothing is brought to the appellate court but the judgment roll. Howard v. Richards, 2 Nev. 133.

Where the appeal is taken from the judgment, the statement on appeal must be annexed to the judgment roll. Irwin v. Samson, 10 Nev. 282, 283.

Cited, Williams v. Rice, 13 Nev. 236; Bliss v. Grayson, 24 Nev. 460 (56 P. 231).

Where the record contains duly certified copies of all papers required to constitute the judgment roll except the summons, and it does not disclose whether one was issued or not, but shows that the defendant appeared and answered, it was not defective. Strosnider v. Turner, 29 Nev. 347, 349 (90 P. 581).

Cited, Kirman v. Johnson, 30 Nev. 146, 152 (93 P. 500).

5339. Idem—Appeals made from order based on affidavit must have copy of order annexed.

SEC. 397. The provisions of the last preceding section shall not apply to appeals taken from an order made upon affidavit filed, but a certified copy of such affidavit and counter affidavit, if any, shall be annexed to the order, in the place of the statement on appeal mentioned in that section.

See Gray v. Harrison, under sec. 377 of this act.

In taking an appeal from orders based upon affidavits, no statement on appeal is required. It is only necessary to annex the affidavits to the orders, and have them properly certified. Weinrich v. Porteous, 12 Nev. 102, 104.

The fact that the orders are embodied in a bill of exceptions allowed by the judge, is not sufficient to prevent a dismissal of the appeal, unless the affidavits are annexed to the orders. Idem.

This section dispenses with a statement where an appeal is taken from an order upon affidavits alone. Thompson v. Lake, 19 Nev. 294 (9 P. 883).

Cited, Quinn v. Quinn, 27 Nev. 174(74 P. 5).

This section construed. Smith v. Wells Estate Co., 29 Nev. 411, 417 (91 P. 315).

5340. Court may review on appeal—Intermediate orders affecting judgment.

SEC. 398. Upon an appeal from a judgment the court may review any intermediate order involving the merits and necessarily affecting the judgment which comes within the specifications of error and statement or is embraced in affidavits.

Upon appeal from a final judgment, the appellate court will review an order of a district court dismissing an attachment, if the appeal is also taken from such order. Williams v. Glasgow, 1 Nev. 533, 537.

Cited, Reinhart v. Company D, 23 Nev. 369 (47 P. 979).

5341. Appeal from agreed statement of facts, how taken.

SEC. 399. Where the case has been determined upon an agreed statement of facts, and the appeal is upon the ground that the judgment is contrary thereto, the appeal may be taken upon a certified copy of the statement of facts and the judgment roll, without other statement.

5342. Findings contrary to judgment or order—Record on appeal.

SEC. 400. When a party desires to appeal on the ground that the decision, judgment, or order is contrary to the findings, the appeal may be taken upon a certified copy of the judgment roll which includes the findings, if the appeal is from a judgment, or upon a certified copy of the findings attached to a certified copy of the order, if the appeal is from an order.

5343. Bill of exceptions may be taken and settled at time of decision, order or ruling.

SEC. 401. At the time a decision, order or ruling is made, and during the progress of the cause, before or after judgment, if the opposing party or his attorney be present, a party may take his bill of exceptions to the decision, order, admission or exclusion of testimony or evidence, or other ruling of the court or judge on points of law, and it shall not be necessary to embody in such bill anything more than sufficient facts to show the point or pertinency of the exceptions taken. The presiding judge shall sign the same as the truth of the case may be, and such bill shall then become a part of the record, and any party aggrieved may appeal from the judgment or any appealable order without further statement or motion; and on such appeal it shall only be necessary to bring to the supreme court a transcript of the pleadings, the judgment, and the bill or bills of exception so taken.

5344. Exhibits when not included in the record—Originals.

SEC. 402. Where it is not practicable to embody an exhibit in the record on appeal, a copy thereof, if it be in the nature of a map or drawing, may be certified up separately, and in case the exhibit be of such a character that a copy or duplicate of the same cannot conveniently or accurately be made, then the original exhibit duly certified to by the clerk, may be sent to the supreme court together with the record, but in no other case may original papers, records or documents be sent to the supreme court, except upon the order of the supreme court.

This section is similar in part to the act of 1895, 58, which has had the following citations: Where, instead of a regular transcript, the original papers are sent up on appeal, they must be certified to be such originals and to constitute, in whole or in part, the record on appeal. Where there is no certificate to that effect the appeal will, on motion, be dismissed. Holmes v. Iowa M. Co., 23 Nev. 24 (41 P. 762); Becker v. Becker, 24 Nev. 476, 477 (56 P. 243).

Papers not properly in the record on appeal will be stricken out on motion. The above statute has not changed the method of presenting questions in the supreme court. Streeter v. Johnson, 23 Nev. 194, 199 (44 P. 819).

Under said act, a volume of the original engrossed statement on motion for new trial may be considered, although not filed until after the other volumes in the record have been filed. Bliss v. Grayson, 24 Nev. 422, 437.

A motion to dismiss an appeal because

of the insufficiency of the clerk's certificate attached to the record will be denied where the appellant asks leave to have the defective certificate corrected. State v. Bouton, 26 Nev. 34, 39 (62 P. 595).

Cited, Christensen v. Floriston P. Co., 29 Nev. 552, 558, 567 (92 P. 210); Kirman v. Johnson, 30 Nev. 146, 151 (93 P. 500).

Matters or questions that could be properly presented to the supreme court on appeal before this act only by a statement of the case on a motion for a new trial, or by a statement of the case on appeal, or by bill of exceptions, can now be presented alone in the same manner, with the sole exception that maps and exhibits, under the conditions named in the act, may be sent separately. Peers v. Reed, 23 Nev. 404, 406 (48 P. 897).

Where the record of an appealed case is in two volumes, only one of which is certified "to be a true and correct transcript of the appeal herein," the supreme court can only consider the volume so certified. State v. Hill, 32 Nev. 185 (105 P. 1026).

The record on appeal from an order denying a new trial, should contain only such papers as were used or referred to on the hearing of the motion. Botsford v. Van Riper, 32 Nev. 214 (106 P. 441).

5345. Judgment when reversed for want or insufficiency of finding.

SEC. 403. In cases tried by the court, without a jury, no judgment shall be reversed for want of a finding, or for a defective finding of the facts, unless exceptions be made in the court below to the finding, or to the want of a finding; and in case of a defective finding, the particular defects shall be specifically and particularly designated; and upon failure of the court below to remedy the alleged error, the party moving shall be entitled to his exceptions, and the same shall be settled by the judge as in other cases; *provided*, that such exceptions to the finding, or want of finding, shall be filed in the court within five days after the making of the finding or decision to which exception is made, if the party filing the exception or his attorney was present at the time the finding or decision was made, or if neither he nor his attorney was present, within five days after he receives written notice of the making of the finding or decision.

A motion for new trial on the ground that the evidence is insufficient to justify the findings, based upon the alleged existence of a proven fact not noticed in the findings, cannot be sustained unless it appear that the complaining party requested a finding upon the subject. Warren v. Quill, 9 Nev. 263.

Where certain facts have been found which are warranted by the evidence, but there is an omission defined on an issue of fact essential to the determination of the rights of the losing party, such party should except to the findings as defective, and point out the issue upon which he desires a finding; if he fails to do so the judgment will not be reviewed. Idem.

5346. Undertaking on appeal—Deposit—State and municipalities excepted.

SEC. 404. To render an appeal effectual for any purpose, in any case, a written undertaking shall be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars; or that sum shall be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking shall be filed, or such deposit made with the clerk, within five days after the notice of appeal is filed; *provided, however*, that nothing in this section shall apply when the State of Nevada, or any county, city or town of the State of Nevada or officer thereof in his official capacity, is the appellant; nor shall such undertaking, as provided for in this section, be necessary to perfect such appeal, when the action or proceeding is brought for and in the name of this state, or for and in the name of any county in the state.

Cited, Cal. S. T. Co. v. Patterson, 1 Nev. 160.

The filing and serving of a written notice of appeal must be followed by the filing of a proper undertaking, or the deposit in lieu thereof, within five days, or the notice becomes inoperative and a nullity. Lambert v. Moore, 1 Nev. 345, 347.

See Peran v. Monroe, 1 Nev. 486, under sec. 387 of this act.

The act of 1887, 86, as amended 1903, 63, authorizing the giving of bonds by a surety company as surety, is a general law, and does not repeal the provisions of this section, but only provides an additional method of furnishing such undertaking at

the option of appellant. Botsford v. Van Riper, 32 Nev. 214 (106 P. 440, 443).

A bond to stay execution pending appeal may be given any time before the execution has been executed. Silver Peak Mines v. District Court, 33 Nev.—(110 P. 504).

Cited, Arrington v. Wittenberg, 11 Nev. 285.

In order to take and perfect an appeal, appellant should first file his notice of appeal, next serve, and, within five days after the filing of the notice, file an undertaking on appeal. Reese M. Co. v. Rye Patch M. Co., 15 Nev. 341–343; Spafford v. White River V. L. & L. S. Co., 24 Nev. 184, 185 (51 P. 115).

Upon a review of the facts it was held that appellant was not excused for failure to follow the rule above prescribed. Idem.

An undertaking on appeal is not executed until it is delivered to the clerk for filing. State v. Alta S. M. Co., 24 Nev. 230, 235 (51 P. 982).

It is not necessary that the residence or occupation of sureties be given in an undertaking on appeal. Idem.

Cited, Marx v. Lewis, 24 Nev. 307 (53 P. 600); Johnson v. Badger M. & M. Co., 12 Nev. 262.

An undertaking on appeal executed on Sunday is valid. The execution of such a bond is not "transacting judicial business," and is not prohibited by the statute. State v. Cal. M. Co., 13 Nev. 203, 210–212.

What held to be a sufficient undertaking. Idem.

The presentation and acceptance by the clerk of a certificate of deposit is a sufficient compliance with this section if the transaction is made in good faith. Alt v. Cal. F. S. Co., 18 Nev. 423, 424 (4 P. 743).

An appeal from an order rejecting a claim against a decedent's estate from an order dismissing the suit of appellant against the estate as represented by his attorneys ad litem and the sole heir and from an order dismissing his suit against the administrator of the estate with only one undertaking for $300, will be dismissed for misjoinder of appeals. Griswold v. Bender, 27 Nev. 369, 377 (75 P. 161).

An undertaking on appeal is not essential where the attorney for respondent entered into a written stipulation waiving an undertaking, such stipulation being filed with the clerk. (Marx v. Lewis, 24 Nev. 306 reversed); Hoffman v. Owens, 31 Nev. 481, 483.

One undertaking is sufficient for an appeal taken both from the judgment and from an order denying a new trial. Robinson v. Kind, 25 Nev. 261, 277 (59 P. 863).

A mistake in date held not ground for dismissing appeal, where the undertaking otherwise clearly identified the order appealed from and the mistake was simply a clerical error.* Paul v. Cragnaz, 25 Nev. 311 (47 L. R. A. 540, 59 P. 857).

The fact that an undertaking was prepared and completed, ready for filing, before the notice of appeal was filed, does not render it insufficient when it was not actually filed until the proper time after the notice of appeal was filed. Idem.

5347. Undertaking for appeal from judgment or order directing payment of money, or dissolving attachment, form of.

SEC. 405. If the appeal be from a judgment or order directing the payment of money, or from an order dissolving or refusing to dissolve an attachment, it shall not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant by two or more sureties, stating their places of residence and occupation, to the effect that they are bound in double the amount named in the judgment or order, or double the sum of the value of the property attached, as the case may be, that if the judgment or order appealed from, or any part thereof, be affirmed, the appellant shall pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal. When the judgment or order appealed from is made payable in a specified kind of money or currency, the undertaking required by this section shall be drawn and made payable in the same kind of money or currency specified in such judgment or order, and in case of any appeal from an order dissolving or refusing to dissolve an attachment, such undertaking shall be conditioned, that if the order appealed from or any part thereof be affirmed, the appellant shall pay to the opposing party on such appeal, all damages and costs caused by him by reason of said appeal and the stay of execution thereon.

Kerr, C. C. P., 942.

Appellants, in order to procure a stay of execution on a judgment for $778, pending motion for a new trial, gave an undertaking conditioned, among other things, that if the new trial was denied, the principal should give a good and sufficient undertaking on appeal: Held, that an undertaking on appeal, given by the principal, in

the sum of $300, was not a "good and sufficient undertaking within the contemplation of the provisions of the previous undertaking." Frevert v. Swift, 19 Nev. 401 (13 P. 6).

An undertaking which complies with this section for the stay of execution with the exception of binding the sureties to pay in gold coin, is sufficient. State v. Cal. M. Co., 13 Nev. 203–211.

Such an undertaking executed on Sunday is valid. Idem.

Cited, State v. Alta S. M. C., 24 Nev. 235 (51 P. 982).

On an appeal from a money judgment in a district court, where the only undertaking on appeal is for costs, there is no such vacation or suspension of the judgment as to prevent its being sued on in a foreign state during pendency of such appeal. Rogers v. Hatch, 8 Nev. 39, 41.

An appeal from a judgment does not operate to vacate or suspend such judgment. Brooks v. Nickel Syndicate, 24 Nev. 311, 321 (53 P. 507).

5348. One undertaking only required for appeal from judgment or order denying new trial.

SEC. 406. An appeal may be taken from an order granting or denying a motion for a new trial and from the judgment at the same time by giving only one bond, in the sum of three hundred dollars, for the costs on appeal; and in the notice of such double appeal it may be stated that the appeal is from both the judgment and the order granting or denying the motion for a new trial, and upon the taking of such double appeal the one undertaking to stay execution in the ordinary form, and in the amount required to stay execution on appeal from the judgment, is sufficient to stay the execution.

5349. Bond on appeal from order or judgment directing delivery of documents or personal property.

SEC. 407. If the judgment or order appealed from direct the assignment or delivery of documents, or personal property, the execution of the judgment or order shall not be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint; or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court or the judge thereof may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

Kerr, C. C. P., 943.

5349 A. 13, 301

5350. Appeal from judgment or order directing execution of conveyance stays act.

SEC. 408. If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order shall not be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court.

Kerr, C. C. P., 944.

5351. Appeal from judgment or order directing sale of property does not stay execution unless undertaking given—Mortgaged premises.

SEC. 409. If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant he will not commit nor suffer to be committed, any waste thereon, and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment for a deficiency arising upon the sale, the undertaking

shall also provide for the payment of such deficiency. In all other cases, not hereinbefore mentioned, the amount of the undertaking to stay the execution of the judgment or order shall be fixed by the court or the judge thereof.

Kerr, C. C. P., 945.

See Brooks v. Nickel Syndicate, under sec. 405 of this act.

At the time the motion to redeliver property was made no notice of appeal had been given, and at the time the court denied the motion for redelivery of possession the appeal had not been perfected. It was held that the order of the court denying the motion was correct. Reese M. Co. v. Rye Patch M. Co., 15 Nev. 143, 145.

In construing sec. 345, Stats. 1869, 196, it was held that there is nothing in said section that requires an undertaking, in an action to foreclose a mechanic's lien, to secure the money part of the judgment in order to stay the order directing the sale of the property. Arrington v. Wittenberg, 11 Nev. 285–287.

The only provision for a covenant in the undertaking to pay any deficiency arising upon the sale applies solely to cases in which the judgment is for the sale of mortgaged premises. Idem.

The stay of execution in contested election cases, not being specifically provided for, comes under the last clause of this section. Sweeney v. Karsky, 25 Nev. 197, 201 (58 P. 813).

What held sufficient bond under said last clause. Idem.

When application was first made to fix a stay bond pending appeal, the court authorized a temporary stay on the giving of bond for $300, reserving the right thereafter to establish the amount of a permanent bond pending appeal. The court thereafter fixed $150,000 as the amount of the bond to stay execution pending motion for new trial. Defendants failed to introduce any proof regarding value of ore they were removing from the property and as to plaintiff's damage from waste by their continued possession. It was held that the court had jurisdiction to fix the amount of such stay bond. Silver Peak Mines v. District Court, 33 Nev.—(110 P. 504).

5352. Appeal stays further proceedings—In appeal by executor, trustee or administrator, court may dispense with or limit undertaking.

SEC. 410. Whenever an appeal is perfected, as provided by the preceding sections in this chapter, it shall stay all further proceedings in the court below, upon the judgment or order appealed from, or upon matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment or order appealed from. And the court below may, in its discretion, dispense with or limit the security required by said sections, when an appellant is an executor, administrator, trustee, or other person acting in another's right.

Kerr, C. C. P., 946.

See Silver Peak Mines v. District Court, under sec. 409 of this act.

This section does not give jurisdiction to the district court to matter affecting the appellate court. It refers solely to matters incident to the district court. Lake v. Lake, 17 Nev. 230, 242, 244 (30 P. 878).

5353. Undertakings may be in one instrument in certain cases.

SEC. 411. The undertaking prescribed by sections 404, 405, 406 and 407, may be in one instrument or several, at the option of the appellant.

Kerr, C. C. P., 947.

Cited, State v. Cal. M. Co., 13 Nev. 212; Sweeney v. Karsky, 25 Nev. 201 (58 P. 813).

5354. Affidavit of sureties—Undertaking on appeal, waiver of—Deposit in lieu of undertaking.

SEC. 412. An undertaking on appeal shall be of no effect unless it be accompanied by the affidavit of the sureties that they are each worth the amount specified therein, over and above their just debts and liabilities, exclusive of the property exempt from execution; except where the judgment exceeds three thousand dollars and the undertaking on appeal is executed by more than two sureties, they may state on their affidavit, that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties. The adverse party may, however, except to the sufficiency of the sureties

within five days after the filing of the undertaking, and, unless they or other sureties justify before the judge of the court below, or clerk, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal shall be regarded as if no such undertaking had been given; and in all cases where an undertaking is required on appeal by the provisions of this chapter, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking, and in all cases the undertaking or deposit may be waived by the written consent of the respondent.

Kerr, C. C. P., 948.

See Botsford v. Van Riper, under sec. 404 of this act.

Cited, Johnson v. Badger M. & M. Co., 12 Nev. 262.

An undertaking on appeal is not essential where waived by respondent. Hoffman v. Owens, 31 Nev. 481, 486 (103 P. 414).

5355. Appeal stays proceedings except on order directing sale of perishable property.

SEC. 413. In cases not provided for in sections 404, 405, 408 and 409, the perfecting of an appeal by giving the undertaking, and the justification of the sureties thereon, if required, or making the deposit mentioned in section 404, shall stay proceedings in the court below upon the judgment or order appealed from, except that where it directs the sale of perishable property the court below may order the property to be sold, and the proceeds thereof to be deposited to abide the judgment of the appellate court.

Kerr, C. C. P., 949.

See Silver Peak Mines v. District Court, under sec. 409 of this act.

5356. Appeal from final judgment or order—Transcript of, what to consist.

SEC. 414. On an appeal from a final judgment, the appellant shall furnish the court with a transcript of the notice of appeal, and the statement, if there be one, certified by the respective attorneys of the parties to the appeal, or by the clerk of the court. On an appeal from an order, the appellant shall furnish the court with a copy of the notice of appeal, the order appealed from, and a copy of the papers used on the hearing in the court below, and a statement if there be one, such copies to be certified in like manner to be correct. If any written opinion be placed on file in rendering judgment or making the order in the court below, a copy shall be furnished, certified in like manner. If the appellant fails to furnish the requisite papers, the appeal may be dismissed.

Cited, Marshall v. Golden Fleece M. Co., 16 Nev. 172.

The formal decision required to be filed after trial of an issue of fact by the court, under sec. 285 of this act, is different from the written opinion mentioned in this section. Reno W. L. & L. Co. v. Osburn, 25 Nev. 53 (56 P. 945).

The "written opinion" does not refer to findings. Corbett v. Job, 5 Nev. 201, 205.

Cited, Irwin v. Samson, 10 Nev. 282, 283; Gaudette v. Glissan, 11 Nev. 185; Weinrich v. Porteous, 12 Nev. 102, 104.

In the authentication of papers to be used upon appeal, the policy of the statute is to restrict the authority of the clerk to the record of the case. Thompson v. Reno S. Bank, 19 Nev. 293, 294 (9 P. 883).

When the motion upon which an order was passed was one that could be made or opposed on other evidence than the records of the case, the fact cannot be established by the certificate of the clerk, and it must be presumed, in the absence of an affirmative showing to the contrary, that evidence necessary to support the order was introduced at the hearing. Idem.

Cited, Reinhart v. Company D, 23 Nev. 372 (47 P. 979); Bliss v. Grayson, 24 Nev. 436, 437 (56 P. 231); Smith v. Wells Estate Co., 29 Nev. 411, 418 (91 P. 315).

The written opinion and findings of the lower court do not constitute any part of the "judgment roll," but are only intended to aid the appellate court in the determination of an appeal. Werner v. Babcock, 33 Nev. — (116 P. 357).

As an appeal, in the absence of statement or bill of exceptions, carries up the judgment roll alone, findings made by the trial court cannot be considered, in the absence of a statement or bill of exceptions. Idem.

Where a judgment is supported by the pleadings, and nothing save the record proper is before the appellate court, it must be affirmed. Idem.

In appeals from orders granting or refusing a new trial, a statement on appeal is not necessary. Gregory v. Frothingham, 1 Nev. 253, 259.

This section directs that certain papers shall be brought up on appeal; it does not in express terms prohibit other papers from being brought up. Howard v. Richards, 2 Nev. 129, 137, 138.

The legislature never intended to deprive the appellate court of the power to examine bills of exception and other parts of the record which are not mentioned in this section. Idem.

We must look to the record to see if there is any foundation for a judgment appealed from. As the filing of a cost bill is the only thing that gives jurisdiction to enter up a judgment for costs, we must look to the record to see if any such bill was ever filed and if an examination of the cost bill shows error in the judgment for costs, that error must be corrected. Idem.

Appeal — Transcript — Original papers. Where, instead of a regular transcript, the original papers are sent up on appeal, they must be certified to be such originals, and to constitute, in whole or in part, the record on appeal. Where there is no certificate to that effect, the appeal will, upon motion, be dismissed. Holmes v. Iowa M. Co., 23 Nev. 23 (41 P. 762); Peers v. Reed, 23 Nev. 404 (48 P. 897).

Appeal—Statutory regulations—Questions to be considered. The method of taking appeals, and the questions to be considered thereunder by the appellate court, are matters of purely statutory regulation. Burbank v. Rivers, 20 Nev. 81 (16 P. 430).

Transcript without statement. Where a transcript on appeal contained neither a statement on motion for new trial nor on appeal: Held, that there was nothing in it for review except the judgment roll. McCausland v. Lamb, 7 Nev. 238.

Failure of transcript to show disposition of motion for new trial. Judgment roll only will be looked into; and if no error appears in it, the judgment will be affirmed. Neil v. Daniel, 4 Nev. 436.

Points not covered by transcript not considered. Alleged error in refusing to grant a continuance cannot be considered by the supreme court, if the affidavits are not properly in the transcript, and there is no bill of exceptions, nor statement. State v. Wallin, 6 Nev. 280.

See Bliss v. Grayson, 24 Nev. 436, 437 (56 P. 231).

Transcript must show facts directly. State v. Manhattan S. M. Co., 4 Nev. 318.

Statement on appeal—Papers not part of record. Papers not made a part of the statement on motion for new trial, nor otherwise identified as provided by the statute, cannot be considered upon the appeal. Beck v. Thompson, 22 Nev. 109 (36 P. 562).

5357. Transcript on appeal may be either printed or typewritten—Rule of costs.

SEC. 415. The transcript on appeal may be either printed or typewritten, but in case the transcript is printed, the appellant shall not be entitled to recover as costs a greater amount than he would be entitled to if the transcript were typewritten.

5358. Appeals not to be dismissed except for substantial errors in proceeding.

SEC. 416. No appeal shall be dismissed for insufficiency of the notice of appeal or undertaking thereon; *provided,* that a good and sufficient undertaking approved by the justices of the supreme court or a majority thereof, be filed in the supreme court before the hearing upon motion to dismiss the appeal; *provided,* that the respondent shall not be delayed, but may move when the cause is regularly called, for the disposition of the same, if such undertaking be not given. An appeal shall not be dismissed for any irregularity not affecting the jurisdiction of the court to hear and determine the appeal or affecting the substantial rights of the parties and where any defect or irregularity can be cured by amendment, such amendment shall be allowed on proper application upon such terms as the supreme court shall deem just.

The act of 1889, 22, provides that the statement "when settled or agreed to shall be presumed to contain all the evidence and other matters pertinent to the proper presentation of the question involved, unless the contrary affirmatively appears," and was cited to the following effect: This section does not require that the presumption exist when the contrary appears from the statement itself. Poujade v. Ryan, 21 Nev. 450, 451 (33 P. 659).

Cited, Christensen v. Floriston Paper Co., 29 Nev. 567 (92 P. 210).

5359. Power of appellate court on appeal.

SEC. 417. Upon an appeal from a judgment or order, the appellate

court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned, in the notice of appeal, and as to any or all of the parties; and may set aside, or affirm, or modify, any or all of the proceedings subsequent to or dependent upon such judgment or order, and may, if necessary or proper, order a new trial, or that further action or proceedings be had in the lower court without a new trial, and may remand the case for such further action or proceedings only. When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by erroneous judgment or order, and when it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just.

See sec. 4835.

Probate appeals, sec. 6113.

Under this section, providing that the supreme court may reverse, affirm, or modify the judgment or order appealed from, and may, if necessary, order a new trial, etc., the court on reversing an order denying a new trial demanded for insufficiency of evidence to support the verdict may remand the case, with directions to the trial court to consider and pass on such grounds anew. Goldfield-Mohawk M. Co. v. Frances-Mohawk M. Co., 33 Nev. — (112 P. 43).

Under the statute making insufficiency of the evidence to justify the verdict ground for a new trial, the refusal of the trial judge to pass on such ground in support of a motion for new trial is error. Idem.

Damages for appealing for delay are properly assessed on dismissal for failure to appeal in time, where appellant waited until what he supposed to be the last day for appeal, brought no record up, and did not resist the motion to dismiss. Paroni v. Simonsen, 33 Nev. — (115 P. 415).

Where an appeal, devoid of merit, appears to have been made for delay, damages in addition to costs will be imposed. Kercheval v. McKenney, 4 Nev. 294; Escere v. Torre, 14 Nev. 51; Allen v. Mayberry, 14 Nev. 115; Gammans v. Roussell, 14 Nev. 171.

Whilst the mere reversal of a judgment will not invalidate a sale regularly made, there is no doubt that courts may, under proper circumstances (when the rights of innocent parties are not thereby injuriously affected) set aside such sales. Hastings v. B. M. G. & S. Co., 2 Nev. 100, 104.

Sales under erroneous judgments will be set aside so far as can be done without injury to third parties. Idem.

When a judgment is reversed the parties should as near as possible be restored to the condition they were in before error was committed. Idem.

A party purchasing at a judicial sale and paying his money ought, as a matter of policy, to be protected. Idem.

Cited, Lake v. Lake, 17 Nev. 237 (30 P. 878); Lake v. Bender, 18 Nev. 372, 373, 379 (4 P. 711).

It is only in cases where the judgment is reversed, or so far modified as to make it inequitable to allow the sale to stand that a court would be authorized to set aside an execution sale. Martin v. Victor M. & M. Co., 19 Nev. 197, 198 (9 P. 336).

Cited, State v. C. P. R. R. Co., 21 Nev. 175 (26 P. 225); State v. Shaw, 21 Nev. 224 (29 P. 321).

Where a judgment was excessive through misadvertence of the trial judge, the supreme court, in the event of a denial of a new trial without requiring remission of the excess, on its attention being called to the error, would modify the judgment, and affirm the order denying the motion for a new trial. Costello v. Scott, 30 Nev. 45, 85 (93 P. 1).

5360. Judgment on appeal, how certified and entered.

SEC. 418. When judgment is rendered upon the appeal, it shall be certified by the clerk of the supreme court to the clerk with whom the judgment roll is filed or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed shall attach the certificate to the judgment roll and enter a minute of the judgment of the supreme court on the docket against the original entry. In cases of appeal from an order, the clerk shall enter at length, in the records of the court, the certificate received, and minute against the entry of the order appealed from a reference to the certificate, with a brief statement that the order has been affirmed, reversed, or modified, as the case may be, by the supreme court on appeal.

5361. Execution for costs to be issued when remittitur filed.

SEC. 419. Whenever costs are awarded to a party by an appellate court, such party may have an execution for the same on filing a remittitur with the clerk of the court below, and it shall be the duty of such clerk,

whenever the remittitur is filed, to issue the execution upon application therefor, and whenever costs are awarded to a party by an order of any court, such party may have an execution therefor in like manner as upon a judgment.

Kerr, C. C. P., 1034.

CHAPTER 47

MOTIONS AND ORDERS

5362. Order and motion defined.
5363. Motions and orders, where made.
5364. Notice of motion, at what time to be given.
5365. When judge unable to hear motion or order, another judge may hear.
5366. Order for payment of money, how enforced.

5362. Order and motion defined.

SEC. 420. Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

Kerr, C. C. P., 1003.

The statute clearly points out the distinction between the word "judgment" and the word "order." Sparrow v. Strong, 2 Nev. 368.

Title 15 of the act of 1861, 392, was taken from and very nearly conforms to chapter 11 of the New York code of 1848. Curtis v. McCullough, 3 Nev. 213.

Cited, Iowa M. Co. v. Bonanza M. Co., 16 Nev. 71.

5363. Motions and orders, where made.

SEC. 421. Motions and orders which may be made at chambers may be made in any part of the state.

Kerr, C. C. P., 1004.

5364. Notice of motion, at what time to be given.

SEC. 422. When a written notice of a motion is necessary, it must be given, if the court be held in the same county, where both parties reside, five days before the time appointed for the hearing; otherwise, ten days. When the notice is served by mail, the number of days before the hearing must be increased one day for every twenty-five miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all twenty days; but in all cases the court or a judge thereof may prescribe a shorter time.

Kerr, C. C. P., 1005.

Where a copy of notice of appeal was served on the attorneys for defendant at a certain time and place by "exhibiting to them personally the said copy and by leaving the same in a conspicuous place in their office," it was held a substantial compliance with the statute. Clark v. Strouse, 11 Nev. 76, 77.

Service of a notice of appeal is completed on its deposit in the postoffice, since the extension of time provided does not apply to a notice of appeal for which no such time to enable action to be taken thereon is necessary. Simon v. Matson, 25 Nev. 405, 409 (61 P. 478).

When a statute says an order may be made on due notice to the opposite side, it means the statutory written notice of five days, and it would not be proper to hear a motion and make the order until such notice had been given and the full five days expired. Wilde v. Wilde, 2 Nev. 306, 307.

5365. When judge unable to hear motion or order, another judge may hear.

SEC. 423. When a notice of a motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or, on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge before whom it might originally have been brought.

Kerr, C. C. P., 1006.

See sec. 4922.

5366. Order for payment of money, how enforced.

SEC. 424. Whenever an order for the payment of a sum of money is

made by a court, it may be enforced by execution in the same manner as if it were a judgment.

Kerr, C. C. P., 1007.

CHAPTER 48

NOTICES—FILING AND SERVING OF PAPERS

5367. Notices and papers, how served.
5368. Title does not apply to original or final process.
5369. Service, when and how made.
5370. Service by mail, when.
5371. Service of writ or papers sent by telegraph—Original filed with court.
5372. Idem—Description of seal not necessary.
5373. Service by mail, how made.
5374. Appearance—Notice after appearance.
5375. Service on nonresidents—When service to be on attorney.

5367. Notices and papers, how served.

SEC. 425. Written notices and other papers, when required to be served on the party or an attorney, shall be served in the manner prescribed in the next three sections, when not otherwise provided.

Kerr, C. C. P., 1010.

Power of attorney to bind client, secs. 507-509.

5368. Title does not apply to original or final process.

SEC. 426. Nothing in this title shall be applicable to original or final process, or any proceedings to bring a party into contempt.

5369. Service, when and how made.

SEC. 427. The service may be personal, by delivery to the party or his attorney, on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open, so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope, postage thereon prepaid, into the postoffice, directed to such attorney.

2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion, and if his residence be not known, by putting the same, inclosed in an envelope, postage thereon prepaid, into the postoffice, directed to such party; *provided, however,* that in all cases where the party on whom the service is to be made has no office, or does not reside at the county-seat where the action or proceeding is pending, the service may be made by filing the papers or notice to be served in the county clerk's office and the service shall be deemed complete at the expiration of ten days from the date of such filing.

Kerr, C. C. P., 1011.

See Clark v. Strouse, under sec. 422 of this act.

If the affidavit does not show that an attempt was made to serve notice on the attorney at his residence, it is insufficient. Reese M. Co. v. Rye Patch M. Co., 15 Nev. 341, 344.

5370. Service by mail, when.

SEC. 428. Service by mail may be made, when the person making the service and the person on whom it is to be made reside at different places, between which there is a regular communication by mail.

Kerr, C. C. P., 1012.

See Clark v. Strouse, and Simon v. Matson, under sec. 422 of this act.

5371. Service of writ or papers sent by telegraph—Original to be filed with court.

SEC. 429. Any writ or order in any civil suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place; and the telegraphic copy of such writ, or order or paper, so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and with the same force and effect, in all respects, as the original thereof might be, if delivered to him; and the officer or person serving or executing the same shall have the same authority, and be subject to the same liabilities, as if the said copy were the original. The original, when a writ, or order, shall also be filed in the court from which it was issued, and a certified copy thereof shall be preserved in the telegraph office from which it was sent. In sending it either the original or certified copy may be used by the operator for that purpose.

5372. Idem—Description of seal not necessary.

SEC. 430. Whenever any document to be sent by telegraph bears a seal, either private or official, it shall not be necessary for the operator, in sending the same, to telegraph a description of the seal or any words or device thereon; but the same may be expressed in the telegraphic copy by the letters "L. S.," or by the word "seal"; and wherever any such document bears a revenue stamp, it shall be sufficient to express the same in the telegraphic copy by the word "stamp," without any other or further description thereof.

5373. Service by mail, how made.

SEC. 431. In case of service by mail, the notice or other paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of the deposit, but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day for every twenty-five miles of distance between the place of deposit and the place of address. Such extension, however, not to exceed forty days in all.

Kerr, C. C. P., 1013.

5374. Appearance—Notice after appearance.

SEC. 432. A defendant shall be deemed to appear in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant, or his attorney, shall be entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him, unless he be imprisoned for want of bail.

Kerr, C. C. P., 1014.

The statute, having prescribed what shall be an appearance for certain purposes, does not preclude an appearance in a different manner for other purposes. Curtis v. McCullough, 3 Nev. 202, 212, 213.

A general appearance not only waives defect in a writ or summons, but gives jurisdiction over the person in cases where the writ was void. Idem.

Cited, In re Schnitzer, 33 Nev. — (112 P. 849).

Where it is necessary on the application to determine several questions of fact, such motion should not be entertained except on notice to the opposite party, and a refusal to vacate an order obtained without notice, is error. Pratt v. Rice, 7 Nev. 123, 126.

Cited, State v. Pritchard, 15 Nev. 84.

The object of a summons is to put the defendant upon notice of a demand against him, and to bring him into court at the time therein specified. If the defendant makes

a general appearance by filing a demurrer or answer, the court could thereafter proceed and grant any relief to which the plaintiff is entitled, regardless of the error in form of the notice inserted in the summons. Sweeney v. Schultes, 19 Nev. 53, 57 (6 P. 44).

By answering to the merits the defendant waived any question of service and could not, at the same time, answer and reserve a question of jurisdiction based on a matter of service of process. Golden v. Murphy, 31 Nev. 395, 419 (103 P. 394).

In an action for divorce, the notice of application for the allowance of counsel fees must be served upon the attorney (if there be one) instead of the party. Lake v. Lake, 16 Nev. 363, 366.

5375. Service on nonresidents—When service to be on attorney.

SEC. 433. When a plaintiff or a defendant who has appeared resides out of the state and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, shall be upon the attorney instead of the party, except subpenas, or writs, and other process issued in the suit, and of papers to bring him into contempt.

Kerr, C. C. P., 1015.

CHAPTER 49

COSTS

5376. Attorney fees, agreement and lien for—Costs to prevailing party.
5377. Costs, when allowed.
5378. Several action—Costs allowed for one only.
5379. Defendant's costs must be allowed in certain cases.
5380. Costs, when in the discretion of the court.
5381. Costs on appeal, when allowed.
5382. Referees, fees of.
5383. Continuance, costs may be imposed as condition of.
5384. Action for the recovery of money, tender, costs.
5385. Costs in action by or against administrator or trustee.
5386. Costs in review other than by appeal.
5387. Filing and service of verified cost bill, retaxing.
5388. Interest and costs must be included by clerk in judgment.
5389. When plaintiff nonresident or foreign corporation, defendant may require security for costs.
5390. Idem—Sureties must make affidavit.
5391. Idem—If security not given, action may be dismissed.
5392. Costs, when state is a party.
5393. Costs, when county is a party.

5376. Attorney fees, agreement and lien for—Costs to prevailing party.

SEC. 434. The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof in whosesoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment. There shall be allowed to the prevailing party in any action, or special proceeding in the nature of an action, in the supreme and district courts, his costs and necessary disbursements, in the action or special proceeding.

Kerr, C. C. P., 1021.

Premium on surety bond recovered as costs, sec. 699.

Section 311 of the act of 1861, 237, relating to estates, does not conflict with this section, for it only provides for the allowance of costs in cases not otherwise provided for by law. Estate of Millenovich, 5 Nev. 163, 188.

This section applies to contempt proceedings to enforce a judgment. Ahlers v. Thomas, 24 Nev. 407, 410 (77 A. S. 820, 56 P. 93).

5377. Costs, when allowed.

SEC. 435. Costs shall be allowed of course to the plaintiff upon a judgment in his favor, in the following cases:

1. In an action for the recovery of real property.

2. In an action to recover the possession of personal property, where the value of the property amounts to three hundred dollars or over; such

value shall be determined by the jury, court or referee by whom the action is tried.

3. In an action for the recovery of money or damages, where plaintiff recovers three hundred dollars or over.

4. In a special proceeding.

5. In an action which involves the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, including the costs accrued in such action if originally commenced in a justice court.

Kerr, C. C. P., 1022.

In an election contest involving a state office, where the supreme court appoints a court commissioner to assist in the preliminary stages of the contest in segregating the disputed ballots from those not in dispute and report the same to the court for its consideration, the compensation allowed the commissioner and the costs attendant on the trial are to be awarded against the losing party. State ex rel. Springmeyer v. Baker, 34 Nev. —; State ex rel. Legate v. Josephs, 34 Nev. —.

See sec. 5231.

5378. Several actions—Costs allowed for one only.

SEC. 436. When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs shall be allowed to the plaintiff in more than one of such actions, which may be at his election, if the party proceeded against in the other actions were at the commencement of the previous action openly within this state; but the disbursements of the plaintiff shall be allowed to him in each action.

Kerr, C. C. P., 1023.

5379. Defendant's costs must be allowed in certain cases.

SEC. 437. Costs shall be allowed of course to the defendant upon a judgment in his favor in the actions mentioned in section 435, and in a special proceeding in the nature of an action.

Kerr, C. C. P., 1024.

5380. Costs, when in the discretion of the court.

SEC. 438. In other actions than those mentioned in section 435, costs may be allowed or not, and if allowed, may be apportioned between the parties, or on the same or adverse sides in the discretion of the court, but no costs shall be allowed in any action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars, nor in any action to recover the possession of personal property, when the value of the property is less than three hundred dollars; *provided*, that if, in the judgment of the court, the plaintiff believes he was justified in bringing the action in the district court, and he recovers at least one hundred and fifty dollars in money or damages, or personal property of that value, the court may, in its discretion, allow the plaintiff part, or all of his costs. When there are several defendants in the actions mentioned in section 435, not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court shall award costs to such of the defendants as have judgment in their favor.

Kerr, C. C. P., 1025.

The provision of this section, that no costs shall be allowed when less than three hundred dollars is recovered, is obviously confined to cases in the district courts, and was evidently adopted to prevent the bringing of actions in those courts which should or might be instituted in justices' courts. Klein v. Allenbach, 6 Nev. 159, 161.

In construing sec. 478, Stats. 1869, 196, it was held that the allowance or disallowance of costs in actions to settle copartnership accounts, is within the discretion of the court. Young v. Clute, 16 Nev. 32, 37.

Under the same section, in an injunction suit, it was held that the court erred in rendering judgment for costs. Thorne v. Sweeney, 13 Nev. 415, 417.

See Randall v. Lyon Co., 20 Nev. 35 (14

P. 583), under sec. 1523, ante, allowing costs where the recovery is less than $300.

Costs on motions. Caples v. C. P. R. R., 6 Nev. 265.

Costs in equity. Welland v. Huber, 8 Nev. 203.

Costs in correcting errors in judgment roll. Flannery v. Anderson, 4 Nev. 438.

5381. Costs on appeal, when allowed.

SEC. 439. In the following cases the costs of an appeal to the supreme court shall be in the discretion of the court:

1. Where a new trial is ordered.

2. When a judgment is modified. In the event no order is made by the court relative to the costs in the two instances mentioned in this section, the party obtaining any relief shall have his costs.

Kerr, C. C. P., 1027.

5382. Referees, fees of.

SEC. 440. The fees of referees shall be ten dollars to each, for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation, and thereupon such rate shall be allowed.

Kerr, C. C. P., 1028.

State ex rel. Springmeyer v. Baker, 34 Nev. —; State ex rel. Legate v. Josephs, 34 Nev. —.

5383. Continuance, costs may be imposed as condition of.

SEC. 441. When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

Kerr, C. C. P., 1029.

5384. Action for the recovery of money, tender, costs.

SEC. 442. When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for the plaintiff, the amount so tendered, and the allegations be found to be true, the plaintiff shall not recover costs, but shall pay costs to the defendant.

Kerr, C. C. P., 1030.

5385. Costs in action by or against administrator or trustee.

SEC. 443. In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorized by statute, costs may be recovered as in an action by and against a person prosecuting and defending in his own right; but such costs shall, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense.

Kerr, C. C. P., 1031.

5386. Costs in review other than by appeal.

SEC. 444. When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs shall be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case.

Kerr, C. C. P., 1032.

5387. Filing and service of verified cost bill, retaxing.

SEC. 445. The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve a copy upon the

adverse party, within five days after the verdict or notice of the decision of the court or referee, or such further time as the court or judge may grant, a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. He shall be entitled to recover the witness fees, although at the time he may not have actually paid them. It shall not be necessary to embody in the memorandum the fees of the clerk, but the clerk shall add the same according to his fees fixed by statute. Within three days after service of a copy of the memorandum, the adverse party may move the court, upon two days' notice, to retax and settle the costs, a copy of which motion shall be filed and served on the prevailing party claiming costs. Upon the hearing of the motion the court or judge in chambers shall settle the costs.

Kerr, C. C. P., 1033.

Where a judgment was rendered on Saturday, the time within which the successful party could file his cost bill expired on Monday. McCafferty v. Flinn, 32 Nev. 269 (107 P. 225).

The date of the "decision of the court" means when the finding of facts was filed. Sholes v. Stead, 2 Nev. 107, 108.

The cost bill is no part of the judgment roll and where there is no statement or bill of exceptions, the court cannot pass upon its correctness. Howard v. Richards, 2 Nev. 134 (89 A. D. 520).

An appellant, to whom costs have been awarded on appeal, must comply with the statute and rules of the court governing the taxation of costs in order to make the decision effectual. Candler v. Ditch Co., 28 Nev. 422, 424 (82 P. 458).

The method of taxing costs in the supreme court is governed by supreme court rule 6, and not by this section, which is applicable to district courts only. Idem.

An order striking out a cost bill is an order made after final judgment, and if appealed from should be taken up in a statement on appeal containing only so much of the record as is necessary to present the facts, no statement on motion for a new trial being necessary. Linville v. Scheeline, 30 Nev. 106, 110 (93 P. 225).

If a party fails to file a cost bill within the time prescribed, he waives his rights to costs. Idem.

The "decision of the court" is the announcement by it of its judgment, and is distinct from the findings. Idem.

Prevailing party, who is. Lapham v. Osborne, 20 Nev. 168 (18 P. 881).

Where the record fails to show that plaintiff filed cost bill, including his trial costs, such trial costs are waived, and it will not be presumed against the correctness of the judgment that such cost bill was filed. Idem.

5388. Interest and costs must be included by clerk in judgment.

SEC. 446. The clerk shall include in the judgment entered up by him any interest on the verdict or decision of the court or referee, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he shall, within two days after the same shall be taxed or ascertained, if not included in the judgment, insert the same in a blank to be left in the judgment for that purpose, and shall make a similar insertion of the costs in the copies and docket of the judgment.

Kerr, C. C. P., 1035.

5389. When plaintiff nonresident or foreign corporation, defendant may require security for costs.

SEC. 447. When a plaintiff in an action resides out of the state, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action shall be stayed until an undertaking, executed by two or more persons, be filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of three hundred dollars; or in lieu of said undertaking, the plaintiff may deposit three hundred dollars, lawful money, with the clerk of the

court, subject to the same conditions as required for the undertaking. A new or an additional undertaking may be ordered by the court or judge upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking be executed and filed.

Kerr, C. C. P., 1036.

5390. Idem—Sureties must make affidavit.

SEC. 448. Each of the sureties on the undertaking mentioned in the last section shall annex to the same an affidavit that he is a resident and householder, or freeholder, within the county and is worth double the amount specified in the undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

5391. Idem—If security not given, action may be dismissed.

SEC. 449. After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action to be dismissed.

Kerr, C. C. P., 1037.

5392. Costs when state is a party.

SEC. 450. When the state is a party, and costs are awarded against it, they must be paid out of the state treasury.

Kerr, C. C. P., 1038.

5393. Costs when county is a party.

SEC. 451. When a county is a party, and costs are awarded against it, they must be paid out of the county treasury.

Kerr, C. C. P., 1039.
City delinquent tax suit, sec. 999.

CHAPTER 50

CONTEMPT

5394. What deemed contempt.
5395. Entry after eviction by lawful process, contempt—Restoration.
5396. Contempt, when punishable summarily, when not.
5397. Attachment for contempt, when to issue—Notice to show cause.
5398. Bail may be given by person arrested under such warrant.
5399. Sheriff must detain person until discharged.
5400. Bail bond, form and condition of.
5401. Return of warrant and undertaking by officer.
5402. Idem—Hearing.
5403. Penalty for contempt—Maximum.
5404. Omission of act as contempt, imprisonment.
5405. Indictment for contemptuous conduct.
5406. When defendant does not appear—Proceedings.
5407. Illness sufficient cause for nonappearance of party arrested—Confinement.

5394. What deemed contempt.

SEC. 452. The following acts or omissions shall be deemed contempts:

1. Disorderly, contemptuous, or insolent behavior towards the judge while he is holding court, or engaged in his judicial duties at chambers, or towards referees or arbitrators, while sitting on a reference or arbitration, or other judicial proceeding.

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

3. Disobedience or resistance to any lawful writ, order, rule, or process issued by the court or judge at chambers.

4. Disobedience of a subpena duly served, or refusing to be sworn or answer as a witness.

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court or judge at chambers.

6. Disobedience of the order or direction of the court made pending the trial of an action, in speaking to or in the presence of a juror concerning an action in which the juror has been impaneled to determine, or in any manner approaching or interfering with such juror with the intent to influence his verdict.

7. Every person who shall have been, or shall be hereafter, dispossessed or rejected from out of any piece, parcel, lot, or tract of land, by the judgment, decree, or process of any court of competent jurisdiction, and who, not having any legal right so to do, shall reenter into, or upon, or take possession of any such land, or any part thereof, or induce or procure any person not having a legal right so to do, or who shall aid or abet therein, shall be deemed guilty of contempt of the court by which said judgment or decree was rendered, or from which such process issued, and shall be tried and punished therefor, in the same manner and form as provided in case of contempt not committed in the presence of the court or justice of the peace. Upon conviction for such contempt, the court or justice of the peace shall immediately issue an alias process, directed to the proper officer, and requiring him to restore the party entitled to the possession of such property under the original judgment, decree, or process, to such possession, of which he shall have been dispossessed by the wrongful conduct or act herein declared to be a contempt.

Kerr, C. C. P., 1209, 1210.

See secs. 754, 4882.

The statute relating to contempts and punishments must be strictly construed, and no interpretation should be given beyond its obvious meaning. Ex Parte Sweeney, 18 Nev. 74; Maxwell v. Rives, 11 Nev. 213, 214, 220.

A contempt for the disobedience of a decree and violation of an injunction is in the nature of a criminal offense, and the proceeding for its punishment is in the nature of a criminal proceeding. Idem.

If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed till he complies with the order. The order in such case is not punitive, but coercive. Phillips v. Welch, 11 Nev. 187.

If the contempt consists in the doing of a forbidden act, injurious to the opposite party, the process is criminal, and conviction is followed by a penalty of fine or imprisonment, or both, which is purely punitive. Idem.

The supreme court has no appellate jurisdiction in cases of contempt, where the proceeding is purely criminal. Idem.

Jurisdiction as applied to any particular claim or controversy is the power to hear and determine that controversy, and where a person is charged with violating the decree of a court, no other court, except the one rendering the decree, can hear or determine the controversy, or punish such person if found guilty of a contempt. Phillips v. Welch, 12 Nev. 159, 168, 171–179.

Judgment of conviction final and conclusive. Idem.

Habeas corpus does not lie when conviction for contempt properly had. Idem.

It is not a contempt of court to fail to comply with an order which the court had no jurisdiction to make, and a party imprisoned for a contempt committed under such circumstances will be discharged upon habeas corpus. Ex Parte Gardner, 22 Nev. 281 (39 P. 570).

Though a grand jury is an adjunct of the court, it is not such part thereof as permits the judge to summarily punish offenders for any act before the grand jury, without proceeding on affidavit and citing the offender to show cause why he should not be punished. Ex Parte Hedden, 29 Nev. 353, 371 (90 P. 737).

A court-martial is given power and authority to punish for contempt. State ex rel. Huffaker v. Crosby, 24 Nev. 115, 123 (77 A. S. 786, 50 P. 127).

If a witness refuses to answer questions when the court decides he should answer, it is a contempt and punishable as such. Maxwell v. Rives, 11 Nev. 214.

5395. Entry after eviction by lawful process, contempt—Restoration.

SEC. 453. Every person dispossessed of or ejected from out of any real property, by the judgment or process of any court of competent jurisdiction, and who, not having a right so to do, reenters into or upon, or takes possession of, any such real property, or induces or procures any person not having a right so to do, or aids or abets him therein, is guilty of a contempt of the court by which such judgment was rendered, or from

which such process issued, and shall be tried and punished therefor in the same manner and form as provided by law in cases of contempt not committed in the presence of the court or justice of the peace.

Kerr, C. C. P., 1210; Utah, 3359.

5396. Contempt, when punishable summarily, when not.

SEC. 454. When a contempt is committed in the immediate view and presence of the court or judge at chambers, it may be punished summarily, for which an order shall be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators.

5396 A 13 117

Kerr, C. C. P., 1211.

See Phillips v. Welch and Ex Parte Hedden, under sec. 452 of this act.

Punishments for contempt being quasi criminal, the petition or affidavit must show contempt before the court has jurisdiction to punish, and where the court attempts to punish for violation of a void order by referees, prohibition will issue, and the party is not required to review by appeal. Cline v. Langan, 31 Nev. 239, 245 (101 P. 553).

See, also, citations under sec. 511, ante.

5397. Attachment for contempt, when to issue—Notice to show cause.

SEC. 455. When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or without a previous arrest a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment shall be issued without such previous attachment to answer, or such notice or order to show cause.

Kerr, C. C. P., 1212.

The affidavit for contempt need not show upon its face that the party verifying the same is beneficially interested in the proceedings. Strait v. Williams, 18 Nev. 430 (4 P. 1083).

In case of an alleged contempt for the violation of a decree an affidavit is sufficient if it substantially states the fact of the rendition of judgment restraining the party from doing certain acts, that the judgment is in full force and effect, and that the party enjoined has disobeyed the decree, and threatens to continue the violation thereof. Idem.

Cited, Ex Parte Hedden, 29 Nev. 372 (90 P. 737).

5398. Bail may be given by person arrested under such warrant.

SEC. 456. Whenever a warrant of attachment is issued pursuant to this chapter, the court or judge shall direct, by an endorsement on such warrant, that the person charged may be let to bail for his appearance, in an amount to be specified in such endorsement.

Kerr, C. C. P., 1213.

5399. Sheriff must detain person until discharged.

SEC. 457. Upon executing the warrant of attachment, the sheriff shall keep the person in custody, bring him before the court or judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section.

Kerr, C. C. P., 1214.

5400. Bail bond, form and conditions of.

SEC. 458. When a direction to let the person arrested to bail is contained in the warrant of attachment, or indorsed thereon, he shall be discharged from the arrest upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the

return of the warrant and abide the order of the court or judge thereupon; or they will pay as may be directed the sum specified in the warrant.

Kerr, C. C. P., 1215.

5401. Return of warrant and undertaking by officer.

SEC. 459. The officer shall return the warrant of arrest and the undertaking, if any, received by him from the person arrested, by the return day specified therein.

Kerr, C. C. P., 1216.

5402. Idem—Hearing.

SEC. 460. When the person arrested has been brought up or appeared, the court or judge shall proceed to investigate the charge, and shall hear any answer which the person arrested shall make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

Kerr, C. C. P., 1217.

The district court is bound to hear the witness for the defense (per Beatty, J., dissenting). Phillips v. Welch, 12 Nev. 185.

5403. Penalty for contempt—Maximum.

SEC. 461. Upon the answer and evidence taken, the court or judge shall determine whether the person proceeded against is guilty of the contempt charged; and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding twenty-five days, or both, but no imprisonment shall exceed twenty-five days except as provided in the next section.

5403 A '13 117

Kerr, C. C. P., 1218.

The fine imposed in such cases is punitive, inflicted for the public good; that imprisonment for nonpayment of the fine is but a mode, provided by statute, for the enforcement of the fine, incident to the power given to the court to impose the fine, and that it cannot be regarded in the light of punishment. Ex Parte Sweeney, 18 Nev. 74.

Section 440, Stats. 1861, 381, cited, Ex Parte Sweeney, 18 Nev. 75 (1 P. 379).

The statute concerning contempts is a penal statute and must be strictly construed in favor of those accused of violating its prohibitions. Maxwell v. Rives, 11 Nev. 214, 221.

Petitioner was asked a number of questions, all being addressed to the same point, which he refused to answer. The court found him guilty of a separate contempt for every such question. It was held that in refusing to answer, petitioner was guilty of but one contempt, and that the court had jurisdiction to impose but one sentence. Idem.

5404. Omission of act as contempt, imprisonment.

SEC. 462. When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act shall be specified in the warrant of commitment.

Kerr, C. C. P., 1219.

A finding on application for alimony that defendant had property, real and personal, and for more than thirty years last past had been in the main employed and had earned a monthly competence more than sufficient to support himself and family, and was then so employed, did not constitute a finding that defendant had present ability to comply with an order requiring him to pay alimony and suit money, and was therefore insufficient to sustain an order committing him to jail until he made the payments required. Lutz v. District Court, 29 Nev. 152, 153 (86 P. 445).

Where an affidavit for an order committing defendant for contempt for failure to comply with an order as above recited failed to allege petitioner's ability to make the payments required of him, or facts from which such ability might properly be inferred, it was fatally defective. Idem.

5405. Indictment for contemptuous conduct.

SEC. 463. Persons proceeded against according to the provisions of this chapter shall also be liable to indictment for the same misconduct, if it be an indictable offense, but the court before which a conviction is had on

an indictment, in passing sentence shall take into consideration the punishment before inflicted.

5406. When defendant does not appear—Proceedings.

SEC. 464. When the warrant of arrest has been returned served, if the person arrested do not appear on the return day, the court or judge may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action shall be the extent of the loss or injury sustained by the aggrieved party by reason of the misconduct for which the warrant was issued, and the costs of the proceeding.

Kerr, C. C. P., 1220.

5407. Illness sufficient cause for nonappearance of party arrested—Confinement.

SEC. 465. Whenever, by the provisions of this chapter, an officer is required to keep a person arrested on a warrant of attachment in custody, and to bring him before a court or judge, the inability, from illness or otherwise, of the person to attend, shall be a sufficient excuse for not bringing him up; and the officer shall not confine a person arrested upon the warrant in a prison, or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

Kerr, C. C. P., 1221.

CHAPTER 51

PUBLIC WRITINGS

5408. Judicial records proved by production of original or certified copy.
5409. Record in custody of public officer, when may be read in evidence.
5410. Records of courts of other states, how proved.
5411. Judicial record of foreign country, how proved.
5412. When copy of foreign record admissible.
5413. Printed statutes presumed to be correct.

5408. Judicial records proved by production of original or certified copy.

SEC. 466. A judicial record of this state, or the United States, may be proved by the production of the original, or a copy thereof, certified by the clerk, or other person having the legal custody thereof, under the seal of the court, to be a true copy of such record.

Kerr, C. C. P., 1905.

5409. Record in custody of public officer, when may be read in evidence.

SEC. 467. The original or a copy of any record, other than a judicial record, document, or paper in the custody of a public officer of this state, or of the United States, certified under the official seal, or verified by the oath of such officer to be the original or to be a true, full and correct copy of the original in his custody, may be read in evidence in any action or proceeding in the courts of this state, in like manner and with the like effect as the original could be if produced. A public record or document in the custody of a public officer of this state, in a public office, may be proved and admitted in evidence in any court by the certificate of the legal keeper or custodian thereof that it is genuine and authentic, and by his seal, if there be one annexed.

Kerr, C. C. P., 1919.

The affidavits and declaratory statements of entrymen applying to preempt public lands, filed in the proper land office, or copies thereof certified by the register of the land office wherein the originals are filed, are admissible as evidence of the facts therein stated. Peers v. Deluchi, 21 Nev. 164, 169 (26 P. 228).

5410. Records of courts of other states, how proved.

SEC. 468. The records and judicial proceedings of the courts of any

other state of the United States, or of any territory, may be proved or admitted in the courts of this state, by the attestation of the clerk, and seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form.

Kerr, C. C. P., 1905.

5411. Judicial record of foreign country, how proved.

SEC. 469. A judicial record of a foreign country may be proved by the production of a copy thereof, certified by the clerk, with the seal of the court annexed, if there be a clerk and seal, or by the legal keeper of the record, with the seal of his office annexed, if there be a seal, to be a true copy of such record, together with a certificate of a judge of the court, that the person making the certificate is the clerk of the court, or the legal keeper of the record, and in either case that the signature is genuine, and the certificate in due form; and, also, together with the certificate of the minister or embassador of the United States or of a consul of the United States, in such foreign country, that there is such a court, specifying generally the nature of its jurisdiction, and verifying the signature of the judge and clerk, or other legal keeper of the record.

Kerr, C. C. P., 1906.

5412. When copy of foreign record admissible.

SEC. 470. A copy of the judicial record of a foreign country shall also be admissible in evidence upon proof:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it.

2. That such original was in the custody of the clerk of the court or other legal keeper of the same; and,

3. That the copy is duly attested by a seal, which is proved to be the seal of the court where the record remains, if it be the record of a court, or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

Kerr, C. C. P., 1907.

5413. Printed statutes presumed to be correct.

SEC. 471. Printed copies in volumes of statutes, code or other written law, enacted by any other state, or territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the courts and judicial tribunals of such state, territory, or government, shall be admitted by the courts and officers of this state on all occasions as presumptive evidence of such laws.

Kerr, C. C. P., 1900.

CHAPTER 52

PRIVATE WRITINGS

5414. Instrument affecting real property used as evidence.

SEC. 472. Every instrument conveying or affecting real property, acknowledged or proved and certified, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof.

Kerr, C. C. P., 1951.

See secs. 1043–1046.

5415. Certified copies of United States and state land patents admitted in evidence—When original recorded.

SEC. 473. All patents which have been heretofore, or which may be hereafter issued by either the State of Nevada or by the United States, for lands situate in the State of Nevada, may be recorded as they are issued in the office of the county recorder of the county in the State of Nevada where said lands are situated; and when so recorded, the record or copies thereof, certified as required by the laws of the State of Nevada, may be used in evidence in any court of the State of Nevada in the same manner and under the same circumstances, and with the same force and effect as certified copies of the records of conveyances of real estate, acknowledged or proven, and certified and recorded in the manner prescribed by the laws of the State of Nevada, may now be used.

See secs. 1053–1054.

The record of a patent from the United States is admissible in evidence. Reno B. Co. v. Packard, 31 Nev. 433, 441 (103 P. 415).

CHAPTER 53

ADMISSION OR INSPECTION OF WRITINGS

5416. Party may demand inspection of book or paper—Court may exclude.

SEC. 474. Any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other within a specified time an inspection and copy, or permission to take a copy of any book, document, or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the book, document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing for a contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness.

Kerr, C. C. P., 1000.

5417. Contents of writing, how proved.

SEC. 475. There shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. When the original has been lost or destroyed; in which case proof of the loss or destruction shall first be made.
2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.
3. When the original is a record or other document in the custody of a public officer, or officer of a corporation.
4. When the original has been recorded and a certified copy of the record is made evidence by statute.
5. When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole. In the cases mentioned in subdivisions 3 and 4, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions 1 and 2 either a copy or oral evidence of the contents.

Kerr, C. C. P., 1855.

On an issue as to the earning capacity of a railroad, it was error to permit expert accountants, who had examined the corporation books, to give parol evidence of their opinion as to what the railroad's net earnings should have been by such witnesses making an arbitrary classification and exclusion of debits and credits. State v. N. C. R. R. Co., 28 Nev. 186, 214 (113 A. S. 834, 81 P. 99).

Upon the notice to defendant who was in possession of note sued on to produce the same, and failure on his part, plaintiff may prove contents. McClusky v. Gerhauser, 2 Nev. 47, 50.

It is competent under this section, as well as under the law independent of it, for an expert, who had made full investigation of the accounts of an office, to state orally the result of his examination. State v. Rhoades, 6 Nev. 353, 376.

5418. Writing altered, who to explain.

SEC. 476. The party producing a writing as genuine, which has been altered, or appears to have been altered after its execution, in a part material to the question in dispute, and such alteration is not noted on the writing, shall account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made. If he do that, he may give the writing in evidence, but not otherwise.

Kerr, C. C. P., 1982.

No one can be deprived of the benefit of a deed, instrument, contract, or written evidence on account of an alteration or erasure, provided it appear that such erasure or alteration was made without the knowledge or consent of the party wishing to use the same, and it can be ascertained by any legal method of arriving at the knowledge of that fact how the instrument originally read. State v. Manhattan S. M. Co., 4 Nev. 318, 336.

CHAPTER 54

WITNESSES—COMPETENCY

5419. Who may be witnesses—When witnesses incompetent.
5420. Idem—Religious belief or conviction of felony does not disqualify.
5421. Refusal to testify or give deposition, penalty—Contempt.
5422. Insane husband or wife as witness.
5423. Persons excluded as witnesses.
5424. Husband and wife, when one cannot be witness against the other.
5425. Attorney and client, attorney's secretary, as witnesses.
5426. Clergymen as witnesses.
5427. Physician as witness.
5428. Public officer as witness.
5429. Judge or juror may be called as witness.
5430. When an interpreter may be sworn.
5431. Subpena may require witness to bring books — Not required to attend unless mileage paid, when.
5432. Subpena, how issued.
5433. Subpena, how served.
5434. Idem—How served if witness be concealed.
5435. Persons present compelled to testify.
5436. Duty of witness.
5437. What questions witness must answer—What he may refuse.
5438. Disobedience, punishment for.
5439. Penalty for disobedience.
5440. Warrant may issue to bring witness, when.
5441. Contents of warrant.
5442. Prisoner as witness, how brought—Disposition of.
5443. Idem—On whose motion.
5444. Idem—How examined.
5445. Witnesses exempt from arrest, when.
5446. Idem—Arrest void and arresting officer liable.
5447. Witness, not Christian, how sworn.
5448. Witness may take affirmation instead of oath.
5449. Exclusion of witnesses during trial.

5419. Who may be witnesses—When witnesses incompetent.

SEC. 477. All persons, without exception, otherwise than as specified in this chapter, who, having organs of sense, can perceive, and perceiving can make known their perceptions to others, may be witnesses in any action or proceeding in any court of the state. Facts which, by the common law, would cause the exclusion of witnesses, may still be shown for the purpose of affecting their credibility. No person shall be allowed to testify:

1. When the other party to the transaction is dead.

2. When the opposite party to the action, or the person for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person, when the facts to be proven transpired before the death of such deceased person; *provided*, that when

such deceased person was represented in the transaction in question by an agent who is living, and who testifies as a witness in favor of the representative of such deceased person, or, when persons other than the parties to the transaction, claiming to have been present when the transaction took place, testify as witnesses in favor of the representative of such deceased person, in such case the other party may also testify in relation to such transaction.

Nothing contained in this section shall affect the laws in relation to the attestation of any instrument required to be attested.

Kerr, C. C. P., 1878–1879.

The object of this section was to make even the parties to actions competent witnesses in all cases, except where an undue advantage might be gained thereby. By the phrase "adverse party" was meant the actual party to the transaction; he who could himself testify as to it. Roney v. Buckland, 4 Nev. 45, 55, 57.

When a surviving partner is sued for a loan for the use of the fund made to a deceased partner, and of the particulars of which the deceased partner only was cognizant, the plaintiff is not a competent witness in his own behalf. Idem.

An executor is not within the exception of this section. In re Millenovich, 5 Nev. 163, 188.

The statute making parties competent witnesses does not abrogate the rule of evidence requiring the subscribing witness to a written instrument to be called, or his absence accounted for. Kalmes v. Gerrish, 7 Nev. 31.

Where a person was employed by another to work at a quartz mill for an association, to whom such latter person had assigned a lease thereof, and, after the death of the assignor, the employee sued the association for work and labor, it was held that none of the association was sued as the representative of deceased, and there was nothing in this section to prevent plaintiff from testifying as to the conversation and employment by deceased. Fulton v. Day, 8 Nev. 80, 83.

Where a person is disqualified under this section, he is a competent witness to testify to incidental and preliminary matters addressed solely to the judge, but cannot testify to any of the issues raised by the pleadings. Higgs v. Hansen, 13 Nev. 356, 357.

Where the administrator of a deceased person is plaintiff, and testifies to a contract made by deceased in his presence, it was held that defendant could not testify in his own behalf. Vesey v. Benton, 13 Nev. 284, 285.

The surviving partners are not the "representatives of a deceased person." Crane v. Gloster, 13 Nev. 279, 280, 282.

A defendant, in a suit by a surviving partner to foreclose a mortgage, will not be allowed to testify that the deceased partner accepted property under a verbal agreement in satisfaction of a mortgage. Gage v. Phillips, 21 Nev. 150, 154 (37 A. S. 494, 26 P. 60).

This section does not prohibit witnesses, who are not parties to the action and have no interest in the result thereof, from testifying concerning conversations had with the deceased person, who was the opposite party to the transaction in controversy, and concerning such transaction. Burgess v. Helm, 24 Nev. 242, 249, 250 (51 P. 1025).

In an action to recover alleged partnership property after the decease of an alleged partner, plaintiff's testimony authenticating the books containing the alleged partnership transactions, and also plaintiff's individual business accounts, was properly excluded as relating to transactions with a deceased person. Schwartz v. Stock, 26 Nev. 128, 146, 149 (65 P. 351).

5420. Idem—Religious belief or conviction of felony does not disqualify.

SEC. 478. No person shall be disqualified as a witness in any action or proceeding on account of his opinions on matters of religious belief, or by reason of his conviction of felony, but such conviction may be shown for the purpose of affecting his credibility, and the jury is to be the exclusive judges of his credibility, or by reason of his interest in the event of the action or proceeding as a party thereto, or otherwise, but the party or parties thereto, and the person in whose behalf such action or proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and be compellable to give evidence, either orally or by deposition or upon a commission, in the same manner and be subject to the same rules of examination as other witnesses on behalf of himself, or either or any of the parties to the action or proceeding.

Kerr, C. C. P., 1879.

See Crane v. Gloster, under sec. 477 of this act.

Under sec. 380, Stats. 1869, 196, it was held that a person convicted of an infamous crime in the courts of another state is rendered incompetent to testify as a witness in

a criminal proceeding in this state. State v. Foley, 15 Nev. 64, 73 (37 A. R. 458).

The same section was cited in State v. McKenney, 18 Nev. 201 (2 P. 171).

See Schwartz v. Stock, under sec. 477 of this act.

Cited, State v. Roberts, 28 Nev. 351, 379 (82 P. 100).

The interest which will render one incompetent as a witness, must be a direct interest in the judgment; he must either gain or lose by the direct legal operation or effect of the judgment, or the record of it must be such as would make it legal evidence for or against him in some other action. Geller v. Huffaker, 1 Nev. 22, 24.

5421. Refusal to testify or give deposition, penalty—Contempt.

SEC. 479. If a party refuse to attend and testify at the trial, or to give his deposition before trial, or upon a commission when required, his complaint, answer or reply may be stricken out and judgment be taken against him and he may be also, in the discretion of the court, proceeded against as in other cases for a contempt.

5422. Insane husband or wife as witness.

SEC. 480. When a husband or wife is insane, and has been so declared by a commission of lunacy, or in due form of law, the other shall be a competent witness to testify as to any fact which transpired before or during such insanity, but the privilege of so testifying shall cease on the restoration to soundness of mind of the insane husband or wife, unless upon the consent of both, in which case they shall be competent witnesses.

Cited, Gage v. Phillips, 21 Nev. 155, 156 (37 A. S. 494, 26 P. 60).

5423. Persons excluded as witnesses.

SEC. 481. The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination.

2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person.

Kerr, C. C. P., 1880.

5424. Husband and wife, when one cannot be witness against the other.

SEC. 482. A husband cannot be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

Kerr, C. C. P., 1881.

Where two parties are jointly indicted, but tried separately, the wife of one may be a witness for or against the other, if her husband cannot be benefited or injured by her testimony. State v. Waterman, 1 Nev. 543, 549.

Where the wife of an accomplice is called, her testimony is entitled at least to the same weight and effect as that of an accomplice. Idem.

5425. Attorney and client, attorney's secretary, as witnesses.

SEC. 483. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the

consent of his employer, concerning any fact, the knowledge of which has been acquired in such capacity.

Kerr, C. C. P., 1881, subd. 2.

An attorney or counselor cannot, without the consent of his client, and has no right to, disclose any fact which may have been communicated to him by his client, solely for the purpose of obtaining his professional assistance or advice; but this rule is not to be carried to the extent of depriving the attorney of means of obtaining or defending his own rights. Mitchell v. Bromberger, 2 Nev. 345, 348.

Whenever, in a suit between attorney and client, the disclosure of a privileged communication becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. Idem.

5426. Clergymen as witnesses.

SEC. 484. A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character.

Kerr, C. C. P., 1881.

5427. Physician as witness.

SEC. 485. A licensed physician or surgeon shall not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; *provided, however,* in any suit or prosecution against a physician or surgeon for malpractice, if the patient or party suing or prosecuting shall require or give such consent, and any such witness shall give testimony, then such physician or surgeon, defendant may call any other physicians or surgeons as witnesses on behalf of defendant, without the consent of such patient or party suing or prosecuting.

Kerr, C. C. P., 1881.

Such consent may be either express or implied. When the parents of a child institute criminal proceedings charging a defendant with committing rape upon the child and are principal witnesses against him, testifying to the nature of the injury and ailment for which the physician prescribed, a waiver of the protection which the law gives to the confidential information acquired by the physician will be upheld. State v. Dopoister, 21 Nev. 107, 117, 123 (25 P. 1000).

5428. Public officer as witness.

SEC. 486. A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

Kerr, C. C. P., 1881.

5429. Judge or juror may be called as witness.

SEC. 487. The judge himself, or any juror, may be called as a witness by either party; but in such case it shall be in the discretion of the court or judge to order the trial to be postponed, or suspended, and to take place before another judge or jury.

Kerr, C. C. P., 1883.

Where no foundation is laid for the impeachment of a witness by asking him if he has not made certain contradictory statements, and calling his attention to the place where, the time when, and the persons to whom or in whose presence he made such statements, it is not error for the judge, by whose testimony it is sought to prove such contradictory statements, to refuse to testify. (Fitzgerald, J., dissenting.) Reno M. & L. Co. v. Westerfield, 26 Nev. 332, 341 (67 P. 961).

5430. When an interpreter may be sworn.

SEC. 488. When a witness does not understand and speak the English language, an interpreter shall be sworn to interpret for him. Any person resident of the county may be summoned by any judge or court to appear

before judge or court to act as interpreter in any action or proceeding. The summons shall be served and returned in like manner as a subpena. Any person so summoned shall, for a failure to attend at the time and place named in the summons, be deemed guilty of contempt, and punished accordingly.

Kerr, C. C. P., 1884.

5431. Subpena may require witness to bring books—Not required to attend unless mileage paid, when.

SEC. 489. A subpena may require not only the attendance of the person to whom it is directed, at a particular time and place, to testify as a witness, but may also require him to bring with him any books, documents, or other things under his control, to be used as evidence. No person shall be required to attend as a witness before any court, judge, justice, referee, or other officer, out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the county of trial; *provided,* that such witness shall have the right to demand payment in advance of his fees for one day's attendance, and his mileage to and from the place specified in the subpena.

Kerr, C. C. P., 1985, 1989.

Fees for mileage or attendance of the opposite parties' witnesses cannot be taxed, and a judgment therefor entered against the losing party when such witnesses have not been subpenaed in the case according to law, or sworn or examined, although present in court at the request of the successful party. (Hawley, C. J., dissenting). Meagher v. Van Zandt, 18 Nev. 230, 234 (2 P. 57). (See this case, under sec. 2000, ante.)

5432. Subpena, how issued.

SEC. 490. The subpena shall be issued as follows:

1. To require attendance before a court, it shall be issued in the name and under the seal of the court before which the attendance is required.

2. To require attendance out of court, before a judge, referee, justice or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it shall be issued by the judge, referee, justice, or other officer before whom the attendance is required.

3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state, or of a territory of the United States, or any district judge or justice of the peace of this state, it may be issued by a judge or justice of the peace in places within their respective jurisdictions, with like power to enforce attendance and to punish contempt of such subpena as such judge or justice could exercise if the subpena directed the attendance of the witness before his own court, in a matter pending therein.

Kerr, C. C. P., 1986.

See Meagher v. Van Zandt, under sec. 489 of this act.

5433. Subpena, how served.

SEC. 491. The service of a subpena shall be made by showing the original, and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. Such service may be made by any person.

Kerr, C. C. P., 1987.

5434. Idem—How served if witness be concealed.

SEC. 492. If a witness be concealed in a building, vessel, or elsewhere, so as to prevent the service of a subpena upon him, any court or judge, or any officer issuing the subpena, may, upon proof by affidavit of the con-

cealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpena, and the sheriff shall serve it accordingly, and for that purpose may break into the building, vessel, or other place where the witness is concealed.

Kerr, C. C. P., 1988.

5435. Persons present compelled to testify.

SEC. 493. A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpena issued by such court or officer.

Kerr, C. C. P., 1990.
Cited, Maxwell v. Rives, 11 Nev. 219.

5436. Duty of witness.

SEC. 494. It shall be the duty of a witness, duly served with a subpena, to attend at the time appointed, with any papers under his control required by the subpena, to answer all pertinent and legal questions, and, unless sooner discharged, to remain till the testimony is closed.

5437. What questions witness must answer, what he may refuse.

SEC. 495. A witness shall answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony, nor need give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact at issue would be presumed. But a witness shall answer as to the fact of his previous conviction for felony.

The witness might have put himself upon his privilege not to criminate or degrade himself, but having expressly disclaimed this excuse, he was bound to answer the questions. Maxwell v. Rives, 11 Nev. 220, 221.

5438. Disobedience, punishment for.

SEC. 496. Disobedience to a subpena, or a refusal to be sworn or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpena or requiring the witness to be sworn; and if the witness be a party, his complaint may be dismissed or his answer stricken out.

Kerr, C. C. P., 1991.

5439. Penalty for disobedience.

SEC. 497. A witness disobeying a subpena, shall also forfeit to the party aggrieved the sum of one hundred dollars and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

Kerr, C. C. P., 1992.

5440. Warrant may issue to bring witness, when.

SEC. 498. In case of failure of a witness to attend, the court or officer issuing the subpena, upon proof of the service thereof and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

Kerr, C. C. P., 1993.

5441. Contents of warrant.

SEC. 499. Every warrant of commitment, issued by a court or officer pursuant to this chapter, must specify therein the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness,

pursuant to this chapter, must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process issued by the district court.

Kerr, C. C. P., 1994.

5442. Prisoner as witness, how brought—Deposition of.

SEC. 500. If the witness be a prisoner confined in a jail or prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer for the purpose of being orally examined, may be made as follows:

1. By the court itself in which the action or special proceeding is pending, unless it be a justice court.

2. By a justice of the supreme court or district court where the action or proceeding is pending, if pending before a justice's court, or before a judge or other person out of court.

Kerr, C. C. P., 1995.

See Maxwell v. Rives, under sec. 501 of this act.

5443. Idem—On whose motion.

SEC. 501. Such order can only be made on motion of a party upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

Kerr, C. C. P., 1996.

The law requiring an affidavit to be made of certain facts before the court should make an order to have the party in jail produced in court, was never designed for the protection of the prisoner, but only to prevent improper and unnecessary interference with the custody of prisoners. Maxwell v. Rives, 11 Nev. 213, 214, 218.

If the order for the prisoner's attendance in court was improvidently granted, it is no concern of the prisoner; being before the court he was bound to answer any question that he would have been required to answer if the process for bringing him there had been strictly pursued. Idem.

5444. Idem—How examined.

SEC. 502. If the witness be imprisoned in the county where the action or proceeding is pending, his production may, in the discretion of the court or judge, be required; in all other cases his examination, when allowed, shall be taken upon deposition.

Kerr, C. C. P., 1997.

See Maxwell v. Rives, under sec. 501 of this act.

5445. Witnesses exempt from arrest, when.

SEC. 503. Every person who has been in good faith served with a subpena to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, shall be exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there, and returning therefrom.

Kerr, C. C. P., 2067.

5446. Idem—Arrest void and arresting officer liable.

SEC. 504. The arrest of a witness contrary to the last section shall be void; but an officer shall not be liable to the party for making the arrest in ignorance of the facts creating the exoneration, but shall be liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit, stating:

1. That he has been served with a subpena to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance and the action or proceeding in which the subpena was issued; and,

2. That he has not been thus served by his own procurement, with the intention of avoiding an arrest.

Kerr, C. C. P., 2068.

5447. Witness, not Christian, how sworn.

SEC. 505. When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.

Kerr, C. C. P., 2096.

5448. Witness may take affirmation instead of oath.

SEC. 506. Any witness who desires it, may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting when addressed in the following terms: "You do solemnly affirm that the evidence you shall give in this issue (or matter), pending between..... and....., shall be the truth, the whole truth, and nothing but the truth." Assent to this affirmation shall be made by the answer, "I do." A false affirmation or declaration shall be deemed perjury equally with a false oath.

Kerr, C. C. P., 2094.

5449. Exclusion of witnesses during trial.

SEC. 507. If either party require it, the judge may exclude from the court room any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses.

CHAPTER 55

AFFIDAVITS

5450. Affidavits to be used in state, before whom taken.
5451. Affidavit out of state, how taken.
5452. Idem—If taken in foreign country, before whom taken.
5453. Certificate of clerk, when taken out of state before a judge.

5450. Affidavits to be used in state, before whom taken.

SEC. 508. An affidavit to be used before any court, judge, or officer of this state may be taken before any justice, judge or clerk of any court, or any justice of the peace or notary public in this state.

Kerr, C. C. P., 2012.

5451. Affidavit out of state, how taken.

SEC. 509. An affidavit taken in another state, or in a territory of the United States, to be used in this state, shall be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state or territory, or before any notary public or judge of a court of record having a seal.

Kerr, C. C. P., 2013.

5452. Idem—If taken in foreign country, before whom taken.

SEC. 510. An affidavit taken in a foreign country to be used in this state shall be taken before an embassador, minister or consul of the United States, or before any judge of a court of record having a seal in such foreign country.

Kerr, C. C. P., 2014.

5453. Certificate of clerk, when taken out of state before a judge.

SEC. 511. When an affidavit is taken before a judge of a court in another state, or in a territory of the United States, or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that such judge is a member thereof, shall be certified by the clerk of the court, under the seal thereof.

Kerr, C. C. P., 2015.

CHAPTER 56

DEPOSITIONS TAKEN WITHIN THE STATE

5454. Testimony of witness in state taken by deposition.
5455. Depositions may be taken before judge, clerk, justice of peace, or notary public.
5456. Manner of taking depositions, may be used by either party on trial.
5457. Deposition once taken may be read at any time.

5454. Testimony of witness in state taken by deposition.

SEC. 512. The testimony of a witness in this state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases:

1. When the witness is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.

2. When the witness is the president, vice-president, secretary, treasurer, or general manager of a corporation for whose benefit the action is prosecuted or defended.

3. When the witness resides out of the county in which his testimony is to be used.

4. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required.

5. When the witness, otherwise liable to attend the trial is nevertheless too infirm to attend, or resides within the county, but more than fifty miles from the place of trial.

Kerr, C. C. P., 2021.

The affidavit required to be made to authorize the taking of a deposition of a witness within the state, has to show that the case is one of those mentioned in this section; but need not show that summons has been served. Lambert v. McFarland, 7 Nev. 159, 163.

5455. Depositions may be taken before judge, clerk, justice of peace, or notary public.

SEC. 513. Either party may have the deposition of a witness in this state taken before any judge or clerk of a court, or any justice of the peace or notary public in this state, on serving upon the adverse party previous notice of the time and place of examination, together with a copy of an affidavit showing that the case is one mentioned in the last section. At any time during the forty days immediately after the service of summons by publication has been completed, and at any time thereafter, when the defendant has not appeared, and his residence is unknown to the plaintiff, the notice required by this section may be served upon the clerk of the court where the action is pending. Such notice shall be at least five days, and, in addition, one day for every twenty-five miles of the distance of the place of examination from the residence of the person upon whom the notice is served, unless, for a cause shown, a judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order shall be served with the notice.

Kerr, C. C. P., 2031.

5456. Manner of taking depositions—May be used by either party on trial.

SEC. 514. Either party may attend such examination and put such questions, direct and cross, as may be proper. The deposition, when completed, shall be carefully read to the witness and corrected by him in any particular, if desired; it shall then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelope or wrapper, sealed and directed to the clerk of the court in which the action

is pending, or to such person as the parties, in writing, may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken by reason of the absence or intended absence from the county of the witness, or because he is too infirm to attend, proof by affidavit or oral testimony shall be made at the trial that the witness continues absent or infirm, to the best of the deponent's knowledge or belief. The deposition thus taken may be also read in case of the death of the witness.

Kerr, C. C. P., 2032.

5457. Deposition once taken may be read at any time.

SEC. 515. When a deposition has been once taken, it may be read in any stage of the same action or proceeding by either party, and shall then be deemed the evidence of the party reading it.

Kerr, C. C. P., 2034.

CHAPTER 57

DEPOSITIONS TAKEN OUT OF THE STATE

5458. Testimony taken out of state.
5459. Idem—How taken—By whom taken.
5460. Interrogatories may be prepared or waived.
5461. Idem—Commission, what to authorize.
5462. Trial, when postponed for reason of nonreturn of commission.
5463. Deposition, by whom used.

5458. Testimony taken out of state.

SEC. 516. The testimony of a witness out of the state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding, at any time after a question of fact has arisen therein.

Kerr, C. C. P., 2020.

5459. Idem—How taken—By whom taken.

SEC. 517. The deposition of a witness out of this state shall be taken upon commission issued from the court, under the seal of the court, upon an order of the judge or court, on the application of either party, upon five days' previous notice to the other. It shall be issued to a person agreed upon by the parties, or, if they do not agree, to any judge, justice of the peace or notary public selected by the officer granting the commission, or to a commissioner appointed by the governor of this state to take affidavits and depositions in other states or territories.

Kerr, C. C. P., 2024.

A commission to take a deposition, authenticated by the certificate of the clerk under the seal of the court, and issued in pursuance of a former order of the court, is sufficient authority for taking the testimony of a witness. Smith v. North American Co., 1 Nev. 423.

When two cases are pending in the same court, between the same parties, a deposition may be taken upon one notice, affidavit and commission, to be read in both cases. Scott v. Bullion M. Co., 2 Nev. 81, 83, 84.

A deposition taken in one case may be used between the same parties in another; so a deposition entitled in two cases between the same parties may be used in either. Idem.

Where the parties to a suit agree that a deposition may be taken at a certain place, before T., a notary public in another state, a deposition certified by T., made under his official seal as a notary, may be read by either party without other proof that T. was a notary when the deposition was taken. The seal was prima facie evidence of his official character. Sargent v. Collins, 3 Nev. 260, 268, 279.

Where it was objected to a deposition taken out of the state that the statement that the deposition was read over to the witness before signing was interlined in the certificate, it was held that the interlineation was not material, as the statute did not prescribe any form of certificate

nor require any matter to be specifically set forth, except that the commissioner had administered an oath and taken the deposition in answer to the interrogatories, or when the examination was without interrogatories in respect to the question in dispute. Blackie v. Cooney, 8 Nev. 42, 47.

As the statute provides no method of identification of the official character of the person appointed to take the deposition, such person, whether judge, justice of the peace, or commissioner, becomes for the purpose the officer of the court issuing a commission, and his certificate of his own character must be deemed to show prima facie that he is the person designated. Idem.

A stipulation that certain depositions "may be taken before F., a justice of the peace at W., in the county of C., in the province of N. B.," is a concession that there was such person occupying such official position at the place mentioned and was an agreement upon that person to take the deposition. Idem.

Depositions will not be rejected for informality in the certificate of the officer before whom they are taken, when it appears that both parties were present and the witnesses were cross-examined. Lockhart v. Mackie, 2 Nev. 294.

A stipulation of the parties to a suit may dispense with any certificate by the officer taking depositions. Idem.

It is too late to raise the objection in the supreme court for the first time that there was no proof of the absence of the witnesses whose depositions were read. Idem.

5460. Interrogatories may be prepared or waived.

SEC. 518. Such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled, if the parties disagree as to their form, by the judge or officer granting the order for the commission, at a day fixed in the order, or at the time of granting the order for commission, may be annexed to the commission, or when the parties agree to that mode, the examination may be without written interrogatories.

Kerr, C. C. P., 2025.
See Sargent v. Collins, under sec. 517 of this act.

5461. Idem—Commission, what to authorize.

SEC. 519. The commission shall authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to the interrogatories, or when the examination is to be without interrogatories in respect to the question in dispute, and to certify the deposition to the court, in a sealed envelope directed to the clerk or other person designated or agreed upon, and forwarded to him by mail or other usual channel of conveyance.

Kerr, C. C. P., 2026.
See citations under sec. 517 of this act.

5462. Trial, when postponed for reason of nonreturn of commission.

SEC. 520. A trial or other proceeding shall not be postponed by reason of a commission not returned, except upon evidence satisfactory to the court that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

Kerr, C. C. P., 2027.

5463. Deposition, by whom used.

SEC. 521. The deposition mentioned in this chapter may be used by either party on the trial or other proceeding, against any other party giving or receiving the notice subject to all just exceptions.

Kerr, C. C. P., 2028.

CHAPTER 58

PERPETUATING TESTIMONY

5464. Evidence may be perpetuated.
5465. Manner of application for order.
5466. Judge to designate officer to take testimony—Return.
5467. Testimony to be taken before judge.
5468. Manner of taking deposition.
5469. Affidavit prima facie proof.
5470. Idem—When the evidence may be produced.
5471. Effect of deposition.
5472. When testimony officially reported used on subsequent trial.
5473. When clerk to take down testimony.

5464. Evidence may be perpetuated.

SEC. 522. The testimony of a witness may be taken and perpetuated as provided in this chapter.

Kerr, C. C. P., 2083.

5465. Manner of application for order.

SEC. 523. The applicant shall present to a district judge a petition verified by the oath of the applicant, stating:

1. That the applicant expects to be a party to an action in a court in this state, and, in such case, the name or names of the person or persons whom he expects will be adverse parties; or,

2. That the proof of some fact or facts is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which it may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

3. The name of the witness to be examined and his place of residence, and a general outline of the facts expected to be proved.

Kerr, C. C. P., 2084.

5466. Judge to designate officer to take testimony—Return.

SEC. 524. The judge to whom such petition is presented shall make an order allowing the examination before any judge of a court of record, and prescribing the notice to be given, which notice, if the parties are known and reside in this state, shall be personally served on them, and if unknown, or nonresidents, such notice shall be served on the clerk of the county where the property to be affected by such testimony is situated, and a copy thereof published in some newspaper, to be designated by the judge making the order.

Kerr, C. C. P., 2084.

5467. Testimony to be taken before judge.

SEC. 525. Upon proof of the service of the notice as provided in the last section, it shall be the duty of the judge before whom the testimony is ordered to be taken to proceed to take the testimony of the witnesses named in said petition, upon the facts therein set forth, and the taking of the same may be continued from time to time, in the discretion of the judge.

5468. Manner of taking deposition.

SEC. 526. The examination shall be by question and answer, unless the parties otherwise agree. The testimony, when completed, shall be carefully read to and subscribed by the witness, then certified by the judge, and immediately thereafter filed in the office of the clerk of the district court of the county where it was taken, together with the order for the examination of the witness, the petition on which the same was granted, and the proof of service of the notice.

Kerr, C. C. P., 2086.

5469. Affidavit prima facie proof.

SEC. 527. The affidavits or other proof filed with the testimony, or certified copies thereof, shall be prima facie evidence of the facts stated therein.

Kerr, C. C. P., 2087.

5470. Idem—When the evidence may be produced.

SEC. 528. If the trial be had between the persons named in the petition as parties expectant, or their successors in interest, or between any parties

wherein it may be material to establish the facts which such testimony proves or tends to prove, upon proof of the death or insanity of the witness, or of his inability to attend the trial by reason of age, sickness, or settled infirmity, the testimony, or certified copies thereof, may be used by either party, subject to all legal objections. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial unless the same was stated at the examination.

Kerr, C. C. P., 2088.

5471. Effect of the deposition.

SEC. 529. The deposition so taken and read in evidence has the same effect as the oral testimony of the witness, and no other, and every objection to the witness, or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial.

Kerr, C. C. P., 2089.

5472. When testimony officially reported used on subsequent trial.

SEC. 530. Whenever in any court of record the testimony of any witness in any case shall be stenographically reported by an official court stenographer, and thereafter said witness shall die, or be beyond the jurisdiction of the court in which the cause is pending, either party to the record may read in evidence the testimony of said witness, when duly certified by the stenographer to be correct, in any subsequent trial of, or proceeding had, in the same cause, subject only to the same objection that might be made if said witness were upon the stand and testifying in open court.

5473. When clerk to take down testimony.

SEC. 531. On the trial of an action in a court of record, if there is no court stenographer in attendance, the court may require the clerk to take down the testimony in writing.

CHAPTER 59

COMMON LAW—DEFINITIONS—DEFECTIVE TITLES TO PAPERS—SUCCESSIVE AND CONSOLIDATED ACTIONS—ACTION BETWEEN SURETIES—CLERK'S REGISTER—SEAL—COMPUTATION OF TIME—OATH—GENERAL PROVISIONS RELATING TO UNDERTAKINGS AND SURETIES—MAJORITY OF REFEREES AND ARBITRATORS—ACTS OF JUDGE AFTER HIS TERM—LIEN ON BULLION—DEFERRED CLAIM FOR WAGES—ELISORS—LIEN ON ANIMALS.

5474. Common law, extent of, application of.

SEC. 532. The common law of England, so far as it is not repugnant to, or in conflict with the constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state.

The common law of England, as modified by English statutes, adopted prior to the time of the declaration of American independence, is presumed to be the law of this state, so far as it is applicable to our conditions. Hamilton v. Kneeland, 1 Nev. 40, 55; Clark v. Clark, 17 Nev. 124 (28 P. 238); State ex rel. Donnelley v. Hamilton, 33 Nev.—(111 P. 1026).

The common-law rule, that a condition cannot be reserved to any but the grantor or his heirs, has not been recognized as the law in this country. Hamilton v. Kneeland, 1 Nev. 40, 55.

Courts are subject to the mandates and provisions of the common law, both as regards their authority and the manner of proceedings, except where that law has been modified or changed by legislation. Burling v. Goodman, 1 Nev. 318.

Whatever is a crime at common law is punishable under our statute. State v. Sales, 2 Nev. 268.

The common law forbade the transfer of any disputed title or right, whether relating to real or personal property, and made all such transfers utterly void. Stonecifer v. Y. J. S. M. Co., 3 Nev. 47.

The provisional remedies under our code are in derogation of the common law, and the statute must be strictly followed. O'Neil v. N. Y. & S. P. M. Co., 3 Nev. 142.

At common law a grand juror was not precluded from finding an indictment because he was either a witness or prosecutor. State v. Millain, 3 Nev. 409.

The territorial statute adopting the common law was adopted by the state constitution (ante, 386). Van Sickle v. Haines, 7 Nev. 251, 285.

English statutes in force at the date of the declaration of American independence and applicable to our situation are a part of the common law. Evans v. Cook, 11 Nev. 69, 75.

The law of marriage and divorce, as administered by the ecclesiastical courts, is a part of the common law of this country, except as it has been altered by statute. Wuest v. Wuest, 17 Nev. 217 (30 P. 886).

Under the common law an information in the nature of quo warranto will lie only for usurping a public office, and is never exercised in the case of a mere agency or employment determinable at the will of the employer. State ex rel. Ryan v. Cronan, 23 Nev. 237 (49 P. 41).

The English statute declaring lotteries to be public nuisances constitutes a part of the common law of the United States, and was so understood by the framers of our constitution. Ex Parte Blanchard, 9 Nev. 101.

The term "common law of England" was employed in the sense it is generally understood, and the intention of the legislature was to adopt only so much of it as was applicable to our condition. Reno S. M. & R. Works v. Stevenson, 20 Nev. 269, 276 (19 A. S. 364, 4 L. R. A. 60, 21 P. 317).

The common-law doctrine of riparian rights is unsuited to the condition of this state. Idem.

It was a principle of the common law that a right of action could not be transferred by him who had the right. Gruber v. Baker, 20 Nev. 468 (9 L. R. A. 302, 23 P. 858).

Forcible entry is a misdemeanor under the common law. Ex Parte Webb, 24 Nev. 238 (51 P. 1027).

Under the common law, in all cases where a juror is discharged during the progress of the trial from any cause of necessity, the balance of the jurors must be discharged, or rather, the discharge of the one by the court operates to the discharge of all the balance, but the balance may be immediately recalled into the jury box and their examination be entered into as originally upon their voir dire, if either party so desires, and the respective parties may have their challenges over. State v. Vaughan, 23 Nev. 112 (43 P. 193).

A common-law marriage by contract per verba de præsenti is valid. State v. Zichfeld, 23 Nev. 308 (62 A. S. 800, 34 L. R. A. 784, 46 P. 802).

The affidavits of jurors to impeach their verdict were inadmissible under the common law. So. Nev. M. Co. v. Holmes M. Co., 27 Nev. 151 (103 A. S. 759, 73 P. 759).

The rule of the common law requiring that an indictment be found in the county where the crime was committed prevails in this state, and while the crime of larceny is an exception to the rule, in the absence of statute the venue of the crime of receiving stolen goods is in the county where they are received, and not in the county where they are stolen, nor the one to which they are subsequently taken. State v. Pray, 30 Nev. 207, 221 (94 P. 218).

Under the common law as to gaming obligations, as modified by St. 9 Anne, c. 14, as found in 4 Bac. Abr. 456, making all bills securities, etc., given for money advanced during gaming or playing cards, etc., to any person playing, void, a transfer of a certificate of deposit, indorsed during a game of chance, to enable the indorser to secure funds to continue the game, was void, so that the transferee acquired no title, and could not recover thereon as against the indorser. Burke v. Buck, 31 Nev. 74, 79, 22 L. R. A. (N. S.) 627, 99 P. 1078.

Under the common-law rule allowing a nonresident to act as administrator and under this section, letters of administration may be granted to a nonresident. In re Bailey's Etsate, 31 Nev. 377 (103 P. 232, 234).

At common law, a citizen could be required to perform the duties of an officer. State ex rel. Donnelley v. Hamilton, 33 Nev. —(111 P. 1026).

5475. Words and terms defined.

SEC. 533. Words used in this act in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word "person" includes a company, partnership, association or corporation as well as a natural person; writing includes printing and typewriting; oath includes affirmation or declaration; and every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose"; signature or subscription includes mark, when the person cannot write, his name being written near it by a person who writes his own name as a witness; *provided*, that when a signature is by mark it must, in order that the same may be acknowledged or may serve as the signature to any sworn statement, be witnessed by two persons who must subscribe their

own names as witnesses thereto. The following words have in this act the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "property" includes both real and personal property.
2. The words "real property" are coextensive with lands, tenements, and hereditaments.
3. The words "personal property" include money, goods, chattels, things in action, and evidences of debt.
4. The word "month" means a calendar month, unless otherwise expressed.
5. The word "will" includes codicil.
6. The word "writ" signifies an order or precept in writing, issued in the name of the state, or of a court or judicial officer; and the word "process" a writ or summons issued in the course of judicial proceedings.
7. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories; and the words "United States" may include the District of Columbia and territories or insular possessions.
8. The word "section" whenever hereinafter employed, refers to a section of this act, unless some other act or statute is expressly mentioned.
9. The word "affinity" when applied to the marriage relation, signifies the connection existing in consequence of marriage, between each of the married persons and the blood relatives of the other.

Kerr, C. C. P., 17.

5476. Papers without title or with defective title, when valid.

SEC. 534. An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, shall be as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.

Kerr, C. C. P., 1046.

The affidavits used on motions to set aside a default were simply entitled "State of Nevada, Storey County." It was held that, inasmuch as the affidavits intelligibly referred to the respective actions, the fact that they were not properly entitled therein, was immaterial. State v. Con. Va. M. Co., 13 Nev. 195, 202.

Cited, Mayberry v. Bowker, 14 Nev. 336, 341; State ex rel. Office S. M. Co. v. Curler, 26 Nev. 353 (67 P. 1075).

5477. Successive actions on same contract.

SEC. 535. Successive actions may be maintained upon the same contract or transaction, whenever after the former action, a new cause of action arises therefrom.

Kerr, C. C. P., 1047.

5478. Actions may be consolidated.

SEC. 536. Whenever two or more actions are pending at one time between the same parties, and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.

Kerr, C. C. P., 1048.

5479. Actions to determine adverse claims and by sureties.

SEC. 537. An action may be brought by one or more persons against any other person or persons for the purpose of determining an adverse claim which the latter makes against the former, for money or property, upon an alleged obligation or liability of any nature or kind, or upon any claim for an accounting, or for any other legal or equitable relief, and also against any two or more persons for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as surety or

otherwise. The word "person" in this section shall be deemed to include artificial as well as natural persons.

Kerr, C. C. P., 1050.

5480. Register of actions to be kept by clerk.

SEC. 538. The clerk shall keep among the records of the court a register of actions. He shall enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein.

Kerr, C. C. P., 1052.

5481. Seal, how affixed.

SEC. 539. A seal of a court or public office, when required to any writ or process, or proceeding, or to authenticate a copy of any record or document, may be impressed with wax, wafer, or any other substance, and then attached to the writ, process or proceeding, or to the copy of the record or document, or it may be impressed on the paper alone.

Kerr, C. C. P., 1931.

5482. Time, how computed.

SEC. 540. The time in which any act is to be done, as provided in this act, shall be computed by excluding the first day and including the last. If the last day be Sunday, or other nonjudicial day, it shall be excluded. If the last day be a nonjudicial day and be directly followed by one or more nonjudicial days, they also shall be excluded.

Kerr, C. C. P., 12.

Where a judgment was rendered on Saturday, the time within which the successful party could file his cost bill, expired on Monday. McCafferty v. Flinn, 32 Nev. 269 (107 P. 225).

5483. Who may administer oath.

SEC. 541. Every court of this state, every justice, judge or clerk of any court, every justice of the peace, and every notary public, and every officer authorized to take testimony, or to decide upon the evidence in any proceeding, shall have power to administer oaths or affirmations.

Kerr, C. C. P., 2093.

Cited, Gillig v. Ind. G. & S. M. Co., 1 Nev. 250.

5484. Undertaking of sureties generally, what affidavit required.

SEC. 542. In all cases where an undertaking with sureties is required by the provisions of this act, the judge, justice, or clerk, or other officer taking the same, shall, unless it is otherwise provided in this act, require the sureties to accompany the same with an affidavit that they are each worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; *provided*, that when the amount specified in an undertaking exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties.

Kerr, C. C. P., 1057.

5485. Justification of sureties, generally.

SEC. 543. In all cases not otherwise provided for in this act, where sureties are required to justify, they shall appear before the officer or person authorized to take the justification, and may be examined under oath by such officer or person and the adverse party, touching their qualifications as sureties, which examination shall be reduced to writing and subscribed by the sureties if required. If, upon such examination, it shall appear to such officer or person that said sureties, or either of them, have

the necessary qualifications of such, he shall so indorse upon the statement, and cause the same to be filed, and thereupon the justification shall be complete.

5486. Surety, bonding company or cash may be accepted in place of personal sureties.

SEC. 544. In all cases where a bond or undertaking is required by the provisions of this act, the party required to give such bond or undertaking may furnish such bond or undertaking with a surety or bonding company, authorized to do business under the laws of this state and to furnish such bonds or undertakings, to be approved by the court or judge, in lieu of personal sureties. A party may, also, in lieu of a bond or undertaking required by this act, deposit with the court or clerk thereof, cash in the amount of the bond or undertaking required.

Regarding bonds and undertakings by surety companies, see secs. 695–701.
Surety company, secs. 698–699.

5487. Actions by or against state, county, city, town or officer thereof in official capacity, undertaking not required.

SEC. 545. In any action or proceeding before any court or other tribunal in this state, wherein the State of Nevada or any county, city or town of this state, or any officer thereof in his official capacity, is a party plaintiff or defendant, no bond, undertaking or security shall be required of the state, county, city or town, or such officer in his official capacity, but on complying with the other provisions of law the state, county, city or town, or officer thereof, acting as aforesaid, shall have the same rights, remedies and benefits as though such bond, undertaking or security were given and approved as required by law; *provided, however*, that the provisions of this section shall only apply where such action or proceeding is prosecuted or defended in the name of the state, county, city, town or officer thereof for the public benefit, and shall not be applicable where such action or proceeding is so prosecuted or defended for the benefit of a private individual or for the enforcement or protection of a private right.

5488. Two of three referees or arbitrators may act.

SEC. 546. When there are three referees, or three arbitrators, all shall meet, but two of them may do any act which might be done by all.

Kerr, C. C. P., 1053.

5489. Judge may perform certain acts after term expires.

SEC. 547. It shall be lawful for any district judge of this state at any time within twelve months after the expiration of his term of office, or within twelve months after he shall, from any cause, have ceased to exercise the duties of such office, to sign any records of his court that he may have left unsigned at the time of going out of office; also to sign and settle bills of exception, subject to the same regulations and restrictions that now are or hereafter may be prescribed by law. All judges about to retire from office by reason of resignation or the expiration of their term shall before such retirement, decide all cases and matters submitted to them and remaining undetermined, and such decision or decisions shall be entered in the minutes of the court, and thereafter at any time within sixty days such judge may sign the findings and decree in all cases so decided and such findings and decree so made, signed and filed shall be valid for all purposes as if made, signed and filed prior to the retirement from office of the judge making the same.

5490. Idem—Legal effect of such acts.

SEC. 548. Said records, when thus signed, and such bills of exceptions,

when thus settled, shall have the same legal force and effect that they would be entitled to had they been signed or settled by the judge while in the exercise of his office.

5491. Idem—Power outgoing judge not to abridge rights of successor.

SEC. 549. The foregoing section shall not be deemed to take from the successors of any district judge the power to sign any record, or to sign and settle any bill of exceptions, as heretofore authorized by law.

5492. Parties selling ore to reduction works have preferred lien.

SEC. 550. Where ore is delivered to a custom mill or reduction works, and either sold to said mill or reduction works, or worked at a percentage, the party or parties so furnishing ore to mill or reduction works shall have a preferred lien upon the bullion product, and upon the ore not reduced as against attachment and other creditors.

5493. Wages preferred claim, when.

SEC. 551. That in all assignments of property, whether real or personal, which shall hereafter be made by any person or chartered company or corporation, or by any person or persons, owning or leasing real or personal property, to trustees or assignees on account of inability at the time of the assignment to pay his, her, or their debts, the wages of the miners, mechanics, salesmen, servants, clerks, or laborers, employed by such person or persons, or chartered company or corporation, shall be held and deemed preferred claims, and paid by such trustees or assignees, before any other creditor or creditors of the assignor; *provided*, that the claims of each miner, mechanic, salesman, servant, clerk, or laborer thus preferred, shall not exceed in value two hundred dollars of gold coin of the United States, and the services shall have been rendered or labor performed within ninety days next preceding said assignment.

Kerr, C. C. P., 1204.

Regarding wages as preferred claims against estates of deceased persons, see sec. 6145.

Notice of the laborer's claim must be given to the debtor and creditor as well as to the sheriff. (Hawley, J., dissenting.) Coscia v. Kyle, 15 Nev. 394–397.

Cited, Luigi v. Luchesi, 12 Nev. 308.

5494. Idem—In cases of attachments—Notice—If claim disputed—Action thereon—Claims preferred.

SEC. 552. In all cases of execution, attachments and writs of a similar nature against the property of any person or persons, or chartered company or corporation, it shall be lawful for such miner, mechanic, salesman, servant, clerk and laborer to give notice of their claim or claims, and the amount thereof, duly certified and sworn to by the creditor or creditors making the claim to the officer executing either of such writs, at any time before the actual sale of property levied upon; the creditor or creditors making the claim shall at the same time give notice in writing to the creditor or creditors at whose instance the property has been levied upon, or his or their attorney, of their said claim or claims, and the amount thereof duly certified and sworn to by such claimant or claimants; a copy of said notice shall also be served upon the debtor, if he be found within the county where the property levied upon is situated; *provided*, that if the debtor cannot be found within the county where the property levied upon is situated, then said notice may be served upon the officer executing either of such writs in lieu of said debtor. Upon the filing in the court where the action or actions against the debtor is, or are pending, of an affidavit of the claimant or claimants, showing his or their compliance with the foregoing provisions of this section, the officer executing either of said writs shall pay to such miners, mechanics, salesmen, servants, clerks or laborers, out of the proceeds of the sale, the amount each is justly

and legally entitled to receive for services rendered, within ninety days next preceding the levy of the writ of execution, attachment, or other writ, not exceeding two hundred dollars in gold coin of the United States; *provided*, that either the creditor or debtor may dispute the claim of any person seeking and claiming preference under this section, and in such case the party or parties disputing such claim shall serve a written notice that they dispute such claim upon the claimant or claimants, and upon the officer executing such writs, within five days from the time of service upon such creditor or debtor of the notice of the claim by the claimant seeking preference, as hereinbefore provided for. Within ten days from the time of the service last provided for, the claimant or claimants shall commence an action in any court of competent jurisdiction against the debtor, and the person or persons disputing his or their claim, or claims, for the recovery thereof, and shall prosecute such action with due diligence, or be forever barred from any claim of priority payment thereof; but in case action is rendered necessary by the act as aforesaid, by either debtor or creditor, and judgment shall be had for said claim, or any part thereof, carrying costs, the costs attending the prosecution of said action, and legally taxable therein, shall likewise be a preferred claim with the same rank as the original claim; *and, provided further*, if the amount of assets, after deducting costs of levy and sale, shall not be adequate to the payment of all the preferred claims of this class, they shall be paid pro rata out of the money hereby made applicable thereto; *and, provided further*, that nothing in this act contained shall be construed to affect any homestead claims, mortgage, or lien of any description, created and existing before the claim of such laborer accrued.

Kerr, C. C. P., 1206.

The action upon the claim, if disputed, must be commenced within ten days after presentation of the claim to the officer who levied the writ. Coscia v. Kyle, 15 Nev. 396–400.

This statute is constitutional and does not deprive a person of his property without due process of law. Alexander v. Archer, 21 Nev. 22, 27 (24 P. 373).

When the claimant complies with the law, and his claim has not been disputed within five days, it becomes the duty of the officer selling the property and receiving the money to pay the claim, and he is liable to the claimant for the amount without an additional action to recover the same. Idem.

Service of notices and the filing of a preferred claim is in the nature of a petition in intervention, and, if either the debtor or the creditor serve written objections thereto, it becomes the duty of the claimant, within ten days, to commence an action in a court of competent jurisdiction to establish his claim. Idem.

If the claim is not disputed within five days and the sheriff fails to pay it, the justice has jurisdiction to enter an order requiring the sheriff to pay the claim. (Belknap, J., dissenting.) Idem.

5495. Elisors, when may be appointed—Must give bond, when.

SEC. 553. Process and orders, in an action or proceeding, may be executed in any county in this state by a person designated by the court, or the judge thereof, of the county in which the action or proceeding is pending, and denominated an elisor, in the following cases:

1. When the sheriff is a party.
2. When there is a vacancy in the office of sheriff.
3. When it shall be made to appear, by affidavit, to the satisfaction of the court in which the suit or proceeding is pending, or the judge thereof, that the sheriff, by reason of any bias, prejudice, or other cause, would not act promptly or impartially; *provided*, said court or judge may require such person so appointed to give a bond, with sufficient security, in such amount and with such condition, to the person to be served, as the court or judge may deem necessary to secure the rights of the party.

5496. Process, how executed by elisor.

SEC. 554. When process is delivered to an elisor, he shall execute it in

the same manner as the sheriff is required to execute similar process in other cases.

5497. Sheriff, when arrested, how confined.

SEC. 555. If the sheriff, on being arrested by an elisor, or if another, on being arrested in an action in which the sheriff is a party, upon an order of arrest, in a civil action, neglect to give bail or make a deposit of money instead thereof, or if he be arrested on execution against his body, or on a warrant of attachment, he shall be confined in a house other than the house of the sheriff or the county jail, in the same manner as the sheriff is required to confine a prisoner in the county jail; the house in which he is thus confined shall thereupon become, for that purpose, the county jail.

5498. Powers and duties of elisors—Fees.

SEC. 556. An elisor, appointed to execute process and orders in the cases mentioned in this act, shall be invested with the powers, duties, and responsibilities of the sheriff, in the execution of such process or orders, and in every matter incidental thereto and shall be entitled to the same fees as a sheriff would be entitled to for like services.

5499. Lien upon animals—Sales—Fees.

SEC. 557. Any ranchman, or other person or persons, keeping corrals, livery or feed stables, or furnishing hay, grain, pasture, or otherwise boarding any horse or horses, mule or mules, ox or oxen, or other animal or animals, shall have a lien upon and retain possession of the same, or a sufficient number thereof, until all reasonable charges are paid; or suit can be brought and judgment obtained for the amount of such charges, and execution issued and levied on said property; *provided*, nothing herein shall be so construed as to include any debt other than for the boarding, keeping, or pasture of such animal or animals, together with costs of suit and sale. Sales of such animal or animals shall be made as other sales of personal property under execution. The officer making such sale shall be entitled to such fees for his services as are allowed by law in cases of other sales of personal property.

Kerr, C. C. P., 1208.

Where a stable keeper boarded a team of horses, but allowed them every day to be driven away to work, and on one occasion after being so driven away they were not returned, it was held that, though he might have retained possession of the horses, and insisted upon his lien, yet having allowed them to be driven away, he relinquished possession and thereby lost his right of lien. Cardinal v. Edwards, 5 Nev. 37.

The fixing of a future time for payment for the keeping or boarding of animals, such as an agreement to pay on the first of each month, destroys the lien contemplated by this section. Idem.

The statutory lien for keeping animals is lost when possession is parted with. Estey v. Cooke, 12 Nev. 276, 280.

5500. Idem—Sale of animals, owner to be paid surplus, when.

SEC. 558. After paying all charges, together with costs of suit and sale, the remainder, if there be any, shall be paid to the owner or owners of such animal or animals, or, in case such owner or owners is or are out of the state, or cannot be found, to the justice of the peace before whom, or the clerk of the court in which, judgment is rendered. If said money is not called for by the owner or owners thereof within six months, said justice or clerk shall pay the same to the county treasurer of his county for school purposes.

Kerr, C. C. P., 1208.

See citations under sec. 557.

CHAPTER 60

FORECLOSURE OF MORTGAGES

5501. Judgment for amount due—Sale ordered—Land in two counties—Execution issued—Judgment for deficiency—Lien.

SEC. 559. There shall be but one action for the recovery of any debt, or for the enforcement of any right secured by mortgage or lien upon real estate, or personal property, which action shall be in accordance with the provisions of this chapter. In such action, the judgment shall be rendered for the amount found due the plaintiff, and the court shall have power, by its decree or judgment, to direct a sale of the encumbered property, or such part thereof as shall be necessary, and apply the proceeds of the sale to the payment of the costs and expenses of the sale, the costs of the suit, and the amount due to the plaintiff. If the land mortgaged consists of a single parcel, or two or more contiguous parcels, situated in two or more counties, the court may, in its judgment, direct the whole thereof to be sold in one of such counties by the sheriff, and upon such proceedings, and with like effect, as if the whole of the property were situated in that county. If it shall appear from the sheriff's return that there is a deficiency of such proceeds and balance still due to the plaintiff, the judgment shall then be docketed for such balance against the defendant or defendants personally liable for the debts, and shall, from the time of such docketing, be a lien upon the real estate of the judgment debtor, and an execution may thereupon be issued by the clerk of the court, in like manner and form as upon other judgments, to collect such balance or deficiency from the property of the judgment debtor.

Kerr, C. C. P., 726.
Complaint to include affidavit of taxes paid, sec. 3756.
Sale of corporate franchise, sec. 1152.

The mortgageor may contract to pay a counsel fee for the expense for enforcing the lien on the property mortgaged in case legal proceedings have to be taken, and such contract will be enforced to the extent of allowing a reasonable counsel fee. The courts will believe that to be reasonable for which the parties themselves contract, unless it be extravagantly large and apparently so made as to hold in terrorem over the mortgageor. Cox v. Smith, 1 Nev. 161, 172.

A court of chancery may allow the mortgagee a percentage for the expense of collecting his mortgage when the instrument provides for such allowance. McLane v. Abrams, 2 Nev. 200.

The allowance for a foreclosure suit should not always be the full amount mentioned in the mortgage, but a reasonable amount not exceeding that provided for. Idem.

The stipulation as to the amount of judgment does not preclude the court from entering the necessary decree to enforce the payment by sale of mortgaged property. Nosler v. Haynes, 2 Nev. 56.

This section confines the mortgagee to the pursuit of one remedy only. The action of ejectment is entirely forbidden. Nor can the action of debt be resorted to unless the mortgage lien be entirely abandoned. The remedy against the property is confined to the remedy of foreclosure and sale. Hyman v. Kelly, 1 Nev. 180, 184–188.

This section does not deprive the mortgagee of any portion of the relief which is usually granted in foreclosure suits where the sale of the property is sought. Idem.

Receivers will be appointed in foreclosure suits where it is necessary to prevent fraud, injustice or loss of security. Idem.

This section does not deprive a mortgagee of personal property of his right to sell without action. Bryant v. Carson R. L. Co., 3 Nev. 313, 318, 319 (93 A. D. 403).

In a suit to foreclose a mortgage there may be a good common-law judgment for the debt which cannot be enforced until the equitable remedy against the mortgaged property is exhausted. Weil v. Howard, 4 Nev. 384, 390–392.

This section limits the lien of a foreclosure judgment or decree, whatever its form, to the mortgaged property until it is exhausted; and there can be no judgment lien upon other property until a deficiency is duly ascertained and docketed. Idem.

A mortgage for purchase money must first be satisfied out of the property before a mechanic's lien. Virgin v. Brubaker, 4 Nev. 31.

A suit to foreclose a mortgage, given to secure the purchase money of land, is not a suit for the enforcement of a vendor's lien. Hopper v. Parkinson, 5 Nev. 233.

Mortgagee for preexistent debt, when regarded as bona fide purchaser for value. Fair v. Howard, 6 Nev. 304.

Cited, Arrington v. Wittenberg, 11 Nev.

287; Adams v. Smith, 19 Nev. 273 (3 A. S. 888, 9 P. 237); Borden v. Clow, 21 Nev. 277 (37 A. S. 511, 30 P. 821).

In a suit to foreclose a mortgage where lien claimants are made parties, the court should determine the relative rights of the plaintiff and the several lien claimants. Johnson v. Badger M. & M. Co., 13 Nev. 351.

In an action to foreclose a mortgage after a conveyance of the mortgaged premises and the death of the mortgageor when no judgment against the estate of the latter is asked for, it is unnecessary for the mortgagee to present the note and mortgage to the administrator of such estate for allowance. Rickards v. Hutchinson, 18 Nev. 215 (2 P. 52).

The mortgagee may maintain an action to foreclose the mortgage against the grantee of the mortgaged premises alone, without serving the administratrix, as she is not, in such cases, a necessary party to the action. Idem.

The exemption contained in the United States homestead act does not render invalid a voluntary incumbrance by mortgage, placed on a homestead prior to the issuance of patent therefor. Orr v. Ulyatt, 23 Nev. 134 (43 P. 916).

5502. Surplus money, how paid and deposited.

SEC. 560. If there be surplus money remaining after payment of the amount due on the mortgage, lien, or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.

Kerr, C. C. P., 727.

5503. Proceedings, when debt secured falls due at different times.

SEC. 561. If the debt for which the mortgage, lien or incumbrance is held be not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease; and afterwards, as often as more becomes due for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

Kerr, C. C. P., 728.

CHAPTER 61

ACTIONS FOR NUISANCE, WASTE, ETC.

5504. Nuisance defined — Abatement of — Actions instituted, by whom.
5505. Action for waste.
5506. Trespass for cutting timber—Action for—Treble damages.
5507. Idem—Measure of damages.
5508. Forcible or unlawful entry—Treble damages.
5509. Manner of working mine—Damages, how assessed.
5510. Lien of judgment and continuation thereof.
5511. Survey may be applied for—Notice of application, and how served—Costs.
5512. Order may be made to allow party to survey and measure property.
5513. Idem—Order, what to contain, how served.

5504. Nuisance defined—Abatement of—Actions instituted, by whom.

SEC. 562. Anything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

Kerr, C. C. P., 731; see, also, secs. 3479 and 3480, Kerr's civil code.
Duty of officers to abate, sec. 1562.

To enable plaintiffs to maintain this action, it must be clearly shown that they have sustained, or will sustain, a special and peculiar injury, irreparable in its nature and different in kind from that sustained by the general public. Fogg v. N. C. O. R. R., 20 Nev. 429, 435 (23 P. 840).

The controlling principle, which gives the right of action to private individuals to abate a public nuisance, is the invasion, impairment, or destruction of a common right which they possess, independent, separate and distinct from the rights enjoyed by the general public. Idem.

If the facts alleged and proven constitute an injury to the health, or are indecent or offensive to the senses, or create an obstruction to the right of enjoyment and use of the property of individuals which is common to them, then the nuisance becomes to them a private nuisance, constituting a special and peculiar injury, distinct from that of the public, for which they can maintain an action. Idem.

The plaintiffs being the owners of separate and distinct town lots, having no common interest, the complaint is demurrable for misjoinder of parties. Idem.

In an action to abate and enjoin a nuisance only those persons should be made parties who would be liable to respond in damages. Bliss v. Grayson, 24 Nev. 422, 454, 455 (56 P. 231).

It is the right of both parties to insist that an easement remain substantially as it was at the time of its acquisition. **Thomas v.** Blaisdell, 25 Nev. 223, 228 (58 P. 903).

5505. Action for waste.

SEC. 563. If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

Kerr, C. C. P., 732.

Waste is a permanent or lasting injury done, or permitted to be done, by the holder of a particular estate to the inheritance, or to the prejudice of any one who has an interest in the inheritance. Price v. Ward, 25 Nev. 203, 209, 214, 215 (46 L. R. A. 459, 58 P. 849).

An administrator, who takes land as assets by special provisions of law, has no such right, title or interest in and to the lands of his intestate in another state as will authorize him to sue to redeem from a mortgage thereon by setting off against the mortgage debt waste permitted by the mortgagee in possession after the death of the intestate, or to recover damages for waste or trespass on such lands. (Bonnifield, C. J. dissenting.) Idem.

5506. Trespass for cutting timber, action for—Treble damages.

SEC. 564. Any person who shall cut down or carry off any wood or underwood, tree or timber, or girdle or otherwise injure any tree or timber on the land of another person, or on the street or highway in front of any person's house, village or city lot, or cultivated grounds or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, shall be liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action in any court having jurisdiction.

Kerr, C. C. P., 733.

See Price v. Ward, under sec. 563 of this act.

5507. Idem—Measure of damages.

SEC. 565. Nothing in the last section shall authorize the recovery of more than the just value of the timber taken from uncultivated wood land for the repair of a public highway or bridge upon the land, or adjoining it.

Kerr, C. C. P., 734.

5508. Forcible or unlawful entry—Treble damages.

SEC. 566. If a person recover damages for a forcible or unlawful entry in or upon, or detention of any building or any uncultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

Kerr, C. C. P., 735.

5509. Manner of working mine—Damages, how assessed.

SEC. 567. Any person or persons, company or corporation, being the owner or owners of, or in possession under any lease or contract for the working of any mine or mines within the State of Nevada, shall have the right to institute and maintain an action for the recovery of any damages that may accrue by reason of the manner in which any mine or mines have been or are being worked and managed by any person or persons, company or corporation, who may be the owner or owners, or in possession of and working such mine or mines under a lease or contract, and to prevent the

continuance of working and managing such mine or mines in such manner as to hinder, injure, or in any wise endanger the safety of any mine or mines adjacent or adjoining thereto. And any such owner of, or [person] in the possession of any mine or mining claim, who shall enter upon or into, in any manner, any mine or mining claim, the property of another, and mine, extract, excavate or carry away any valuable mineral therefrom, shall be liable to the owner or owners of any such mine or mines trespassed upon in the amount of the value of all such mineral mined, extracted, excavated or carried away, and for all other damages, and, in the absence of a showing to the contrary, the value of all such mineral mined, extracted, excavated or carried away shall be presumed to be twice the amount of the gross value of the same ascertained by an average assay of the excavated material or the ledge from which it was taken; *and, provided,* that if such trespass was made in bad faith, such damages may be trebled.

The act of 1861, 410, sec. 561, provided for the admission of proof of customs, usages and regulations established and enforced in the mining district and said section was cited in Smith v. N. Am. M. Co., 1 Nev. 424, 427, to the following effect: "Testimony as to mining customs may be introduced, however recent the date or short the duration of their establishment."

A statute, empowering a court of equity, on a proper showing, to order, in the absence of a pending suit, a survey of the boundaries and underground workings of adjacent mines, is not unconstitutional.

Equity has the inherent power to order, in a pending case, a survey of the boundaries and underground workings of mines constituting the subject-matter of the suit.

The court, in construing an ambiguous statute, may consider the law as it existed prior to the statute.

This section authorizes the owner or owners of any mine to sue for damages for improper mining by one in possession under a lease and for trespass to the mine, and providing for an application for an order for a survey of mines, and declaring that the costs of the order and survey shall be paid by the persons making the application unless they shall subsequently maintain an action and recover damages by reason of a trespass threatened prior to such survey, does not permit a survey of the boundaries and underground workings of adjacent mines unless there is a pending suit involving such mines.

Where a statute is equally susceptible of two constructions, the court will presume that the legislature did not intend a radical change in existing procedure, and will construe the statute in harmony therewith.

The word "maintain" in a statute in reference to actions comprehends the institution as well as the support of the action, though it may be used to express a meaning corresponding to its most restricted definition.

Where the same word is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and, where its meaning in one instance is clear, such meaning will be attached to it elsewhere, unless it clearly appears that it was the intention of the legislature to use it in different senses. National Mines Co. v. District Court, 34 Nev. — (116 P. 996). Talbot J., dissenting.

5510. Lien of judgment and continuation thereof.

SEC. 568. Any judgment obtained for damages under the provisions of this act shall become a lien upon all the property of the judgment debtor or debtors, not exempt from execution, in the State of Nevada, owned by him, her, or them, or which may afterwards be acquired, as is now provided for by law, which lien shall continue two years, unless the judgment be sooner satisfied.

5511. Survey may be applied for—Notice of application, and how served—Costs.

SEC. 569. Any person or persons named in the two preceding sections shall have the right to apply for and obtain from any district court, or the judge thereof, an order of survey in the following manner: An application shall be made by filing the affidavit of the person making the application, which affidavit shall state, as near as can be described, the location of the mine or mines of the parties complained of, and as far as known, the names of such parties; also, the location of the mine or mines of the party making such application, and that he has reason to believe, and does believe, that the said parties complained of, their agent, or employees, are

or have been trespassing upon the mine or mines of the party complaining, or are working their mine in such manner as to damage or endanger the property of the affiant. Upon the filing of the affidavit as aforesaid, the court or judge shall cause a notice to be given to the party complained of, or the agent thereof, which notice shall state the time, place, and before whom the application will be heard, and shall cite the party to appear in not less than five or more than ten days from the date thereof, to show cause why an order of survey should not be granted; and upon good cause shown, the court or judge shall grant such order, directed to some competent surveyor or surveyors, or to some competent mechanics, or miners, or both, as the case may be who shall proceed to make the necessary examination as directed by the court and report the result and conclusions to the court, which report shall be filed with the clerk of said court. The costs of the order and survey shall be paid by the persons making the application, unless such parties shall subsequently maintain an action and recover damages, as provided for in section 567, by reason of a trespass or damage done or threatened prior to such survey or examination having been made, and in that case, such costs shall be taxed against the defendant as other costs in the suit. The parties obtaining such survey shall be liable for any unnecessary injury done to the property in the making of such survey.

See National Mines Co. v. District Court, under sec. 567 of this act.

5512. Order may be made to allow party to survey and measure property.

SEC. 570. The court in which an action is pending for the recovery of real property or for damages for an injury thereto, or a judge thereof, may, on motion, upon notice by either party for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action.

Kerr, C. C. P., 742.
See National Mines Co. v. District Court, under sec. 567 of this act.

5513. Idem—Order, what to contain, how served.

SEC. 571. The order shall describe the property, a copy thereof shall be served on the owner or occupant, and thereupon such party may enter upon the property with necessary surveyors and assistants, and may make such survey and measurements; but if any unnecessary injury be done to the property he shall be liable therefor.

Kerr, C. C. P., 743.
See National Mines Co. v. District Court, under sec. 567 of this act.

CHAPTER 62

ACTIONS TO QUIET TITLE, ETC.

5514. Action to quiet title, by whom brought.
5515. Costs not recoverable, when.
5516. Right terminated during action—What may be recovered—Verdict and judgment.
5517. Improvements allowed as set-off, when.
5518. Mortgage not deemed a conveyance.
5519. Court may enjoin inquiry to property during foreclosure.
5520. Damages may be recovered for injury to possession after sale and before delivery.
5521. Action not to be prejudiced by alienation pending suit.
5522. Action to determine adverse claims to real property, by whom and how brought.
5523. Idem—Summons, what to contain, how served — Unknown persons concluded by judgment.
5524. Idem—Judgment, when rendered, conclusive against whom—Proof or service of summons and filing lis pendens.
5525. Idem—Proceedings, how conducted, remedy cumulative.
5526. Adverse action on mining claim.

5514. Action to quiet title, by whom brought.

SEC. 572. An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim.

Kerr, C. C. P., 738.

The action of ejectment is unknown to our system. Alford v. Dewin, 1 Nev. 207, 211, 212.

Tenants in common may maintain a joint action for possession of real estate. Idem.

This section does not restrict any pre-existing right or remedy, but seems to give, in some cases, a new and more extensive remedy. Low v. Staples, 2 Nev. 209, 213.

Before a court of equity will interfere to remove a cloud, they must be satisfied that the party seeking relief has the legal title. If the possession is held adversely, the court may properly refuse to act until the complainant has established his legal title by an action at law. Idem.

Cited, Four-Twenty M. Co. v. Bullion M. Co., 9 Nev. 248.

Under our practice the different forms of real actions are merged into one action in which both the right of possession and the right of property are tried. Sherman v. Dilley, 3 Nev. 26.

In an action to determine an adverse claim to land, a court cannot decree that defendant has no title or right to land in which plaintiff fails to show a possession or title in himself. Van Vliet v. Olin, 4 Nev. 95, 96 (97 A. D. 513).

The possession of real property is the base upon which an action to quiet title is founded, but it cannot be said that an admission or proof of the mere fact, which gives the right of action, establishes prima facie the cause of action. Blasdel v. Williams, 9 Nev. 161.

Burden of proof—Plaintiff must show adverse claim. Idem.

The statute gives the right of action to any person in possession irrespective of the mode by which possession has been acquired. Scorpion S. M. Co. v. Marsano, 10 Nev. 370, 378, 379.

In such actions it is not necessary for the plaintiff to set out specifically the character of the adverse claim of defendant; the burden of proof is upon the defendant, if he admits plaintiff's possession, or does not disclaim, to plead and prove a good title in himself. (Blasdel v. Williams, 9 Nev. 161, overruled.) Idem.

Where the findings of the court show that both parties were in possession of different portions of the same lode and the character of their possession is particularly defined, the party having the better right to the possession of the lode must prevail, and is entitled to maintain the action. Rose v. Richmond M. Co., 17 Nev. 26, 52, 56 (37 P. 1105, 114 U. S. 576).

Cited, Springer v. Clopath, 26 Nev. 191 (65 P. 804).

That defendant relied on a deed from a third person, who acknowledged the paramount title in plaintiff and that his possession was that of a tenant, and that defendant had no interest other than that obtained from the deed, authorizes a judgment for plaintiff. Reno B. Co. v. Packard, 31 Nev. 433, 442, 443 (103 P. 415).

5515. Costs not recoverable, when.

SEC. 573. If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs.

Kerr, C. C. P., 739.

5516. Right terminated during action—What may be recovered—Verdict and judgment.

SEC. 574. In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact, and the plaintiff may recover damages for withholding the property.

Kerr, C. C. P., 740.

Where parties having a joint right of action bring suit, and pending the litigation sever their interests, the suit will not abate. Alford v. Dewin, 1 Nev. 207, 213.

5517. Improvements allowed as set-off, when.

SEC. 575. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant or those under whom he claims, holding under color of title adversely to the claims of the plaintiff, in good faith, the value of such improvements shall be allowed as a set-off against such damages.

Kerr, C. C. P., 741.

5518. Mortgage not deemed a conveyance.

SEC. 576. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to take possession of the real property without a foreclosure and sale.

Kerr, C. C. P., 744.

See Hyman v. Kelly, under sec. 559 of this act.

This section applies to mortgagees out of possession, and does not prevent the running of the statute of limitations before foreclosure in favor of a mortgagee in adverse possession under claim of title. Borden v. Clow, 21 Nev. 275, 277 (37 A. S. 511, 30 P. 821).

When a deed to real estate, absolute on its face, is given to secure a debt, and there is no agreement when such debt shall become due, the statute of limitations begins to run in favor of the grantee in possession immediately on the delivery of the deed. Idem.

Under the provision of this section a mortgage is not an alienation, but is a mere security for a debt. Orr v. Ulyatt, 23 Nev. 134, 140 (43 P. 916).

Cited, Price v. Ward, 25 Nev. 214 (46 L. R. A. 459, 58 P. 849).

A deed, absolute on its face, if clearly shown to have been given as security for a loan, will be treated as a mortgage in equity and a reconveyance to the debtor upon payment of the debt. Bingham v. Thompson, 4 Nev. 224; Saunders v. Stewart, 7 Nev. 200.

The proof necessary should be clear, satisfactory and convincing. Idem. Also Pierce v. Traver, 13 Nev. 526.

The doctrine upon which parol proof is received to show a conveyance absolute in form to be a mortgage or security for a loan, is that such evidence is received, not to contradict the instrument, but to prove an equity superior to it. Saunders v. Stewart, 7 Nev. 200.

The mere fact that property is conveyed for less than its real value is not, of itself, sufficient to authorize the court to declare a deed absolute upon its face to be a mortgage. Pierce v. Traver, 13 Nev. 526.

Where the circumstances show that a person in possession of real estate under a deed absolute on its face holds it only in fact as security for a debt, he will be compelled to account for the rents and profits. Cookes v. Culbertson, 9 Nev. 199.

Deed absolute upon its face, when a mortgage. Leahigh v. White, 8 Nev. 147.

An absolute deed made by the owner of property for the purpose of securing money due the third persons, with a written acknowledgment by the grantee that he holds it for that purpose, is a mortgage. First Nat. Bank v. Kreig, 21 Nev. 404 (32 P. 641).

5519. Court may enjoin injury to property during foreclosure.

SEC. 577. The court may by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or after a sale on execution, before a conveyance.

Kerr, C. C. P., 745.

5520. Damages may be recovered for injury to possession after sale and before delivery.

SEC. 578. When real property shall have been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession, after sale and before possession is delivered under the conveyance.

Kerr, C. C. P., 746.

5521. Action not to be prejudiced by alienation pending suit.

SEC. 579. An action for the recovery of real property against a person in possession cannot be prejudiced by an alienation made by such person, either before or after the commencement of the action.

Kerr, C. C. P., 747.

5522. Action to determine adverse claims to real property, by whom and how brought.

SEC. 580. An action may be brought to determine the adverse claims to and clouds upon title to real property by a person who, by himself, or by himself and his predecessors in interest, has been in the actual, exclusive and adverse possession of such property continuously for more than fifteen

years prior to the filing of the complaint, claiming to own the same in fee, or by any other freehold estate, against the whole world, and who has by himself or his predecessors in interest, paid all taxes of every kind levied or assessed and due against the property during the period of five years next preceding the filing of the complaint. Said action shall be commenced by the filing of a verified complaint averring the matters above enumerated. The said complaint must include as defendants in such action, in addition to such persons as appear of record to have, all other persons who are known, or by the exercise of reasonable diligence could be known, to plaintiff to have some claim to an estate, interest, right, title, lien or cloud in or on the land described in the complaint adverse to plaintiff's ownership and may also include as defendants, any and all other persons, unknown, claiming any estate, right, title, interest, or lien in such lands, or cloud upon the title of plaintiff thereto, and the plaintiff may describe such unknown defendants in the complaint as follows: "Also all other persons unknown claiming any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto." Within ten days after the filing of the complaint, plaintiff shall file or cause to be filed in the office of the county recorder of the county where the property is situated, a notice of the pendency of the action containing the matters required by section 79 of this act.

See Smith v. N. Am. M. Co., under sec. 567 of this act.

5523. Idem—Summons, what to contain, how served—Unknown persons concluded by judgment.

SEC. 581. Within one year after the filing of the complaint, as required by the preceding section, a summons must be issued, which shall contain in addition to other requirements, a description of the property described in the complaint. In said summons the said unknown defendants shall be designated as in the complaint. Within thirty days after the issuance of the summons, the plaintiff shall post or cause to be posted a copy thereof in a conspicuous place, on each separate parcel of the property described in the complaint, and each parcel of the land upon which a copy of said summons is posted shall be deemed to be in the possession of the court for all the purposes of and pending the determination of the action. All defendants residing in the State of Nevada whose place or places of residence is, or by the exercise of reasonable diligence can be, known to the plaintiff shall be served personally, except as otherwise provided by sections 84 and 85 of this act. After service on all such defendants has been made with the exception last above specified, the plaintiff or his agent or attorney shall make and file an affidavit wherein there shall be stated the names of the defendants who have been served personally, and the names of the defendants who reside out of the state and their places of residence if known to the affiant, and the names of the defendants residing in or out of the state whose places of residence are unknown to the affiant, or who resided within, but have departed from, the state, or cannot, after due diligence, be found within the state, or who conceal themselves to avoid service of summons, and thereupon the court or a judge thereof shall make an order directing the said summons to be served upon the defendants residing out of the state whose places of residence are known to the plaintiff or affiant, and upon the defendants residing in or out of the state whose places of residence are, after the exercise of due diligence unknown to the plaintiff or affiant, or who reside within, but have departed from the state, or cannot, after due diligence, be found within the state, or who conceal themselves to avoid service of summons, and upon all the unknown defendants as stated in the complaint and summons,

by publication in some newspaper of general circulation printed and published in the county where the property is situated, and if there be no such paper in such county, then in some adjoining county, to be designated by the court or a judge thereof, which publication shall be for once a week for a period of six successive weeks. A copy of the summons and complaint, within ten days after the making of said order properly addressed to and with the postage thereon fully prepaid, shall be mailed to each of the defendants who reside out of the state, at their places of residence if known, and also to the defendants residing in or out of the state and whose places of residence or present whereabouts are unknown to plaintiff or affiant, addressed to them at the county-seat of the county where the action is commenced, and at their places of residence, if any, last known to the plaintiff. All such unknown persons so served shall have the same rights as are provided by law in cases of all other defendants named, upon whom service is made by publication or personally, and the action shall proceed against such unknown persons in the same manner as against the defendants who are named, upon whom service is made by publication or personally, and with like effect; and any such unknown person, who has or claims to have any right, title, estate, lien or interest in the said property, or cloud on the title thereto, adverse to plaintiff, at the time of the commencement of the action, who has been duly served as aforesaid, and anyone claiming title under him, shall be concluded by the judgment in such action as effectually as if the action had been brought against the said person by his or her name and personal service of process obtained, notwithstanding any such unknown person may be under legal disability. Service shall be deemed complete upon the completion of the publication.

5524. Idem—Judgment, when rendered, conclusive against whom—Proof of service of summons and filing lis pendens.

SEC. 582. When the summons has been served as provided in the preceding section and the time for answering has expired, the court shall proceed to hear the case as in other cases and shall have jurisdiction to examine into and determine the legality of plaintiff's title and of the title and claim of all the defendants and of all unknown persons, and to that end must not enter any judgment by default, but must in all cases require evidence of plaintiff's title and possession and receive such legal evidence as may be offered respecting the claims and title of any of the defendants and must thereafter direct judgment to be entered in accordance with the evidence and the law. The court, before proceeding to hear the case, must require proof to be made that the summons has been served and posted as hereinbefore directed and that the required notice of pendency of action has been filed. The judgment after it has become final shall be conclusive against all the persons named in the summons and complaint who have been served personally, or by publication, and against all unknown persons as stated in the complaint and summons who have been served by publication, but shall not be conclusive against the State of Nevada or the United States. Said judgment shall have the effect of a judgment in rem except as against the State of Nevada and the United States; *and provided, further,* that the said judgment shall not bind or be conclusive against any person claiming any recorded estate, title, right, possession or lien in or to the property under the plaintiff or his predecessors in interest, which claim, lien, estate, title, right or possession has arisen or been created by the plaintiff or his predecessors in interest within ten years prior to the filing of the complaint.

5525. Idem—Proceedings, how conducted, remedy cumulative.

SEC. 583. The remedy provided in the three preceding sections shall be

construed as cumulative and not exclusive of any other remedy, form or right of action or proceeding now allowed by law.

5526. Adverse action on mining claim.

SEC. 584. In all actions brought to determine the right of possession of a mining claim, or metalliferous vein or lode, where an application has been made to the proper officers of the government of the United States by either of the parties to such action for a patent for said mining claim, vein, or lode, it shall only be necessary to confer jurisdiction on the court to try said action, and render a proper judgment therein, that it appear that an application for a patent for such mining claim, vein, or lode has been made, and that the parties to said action are claiming such mining claim, vein, or lode, or some part thereof, or the right of possession thereof.

See Smith v. N. Am. M. Co., under sec. 567 of this act.

The pendency of a contest in the land office, with respect to a mining claim, gives the district courts jurisdiction to determine the right of possession as between adverse claimants. Golden Fleece G. & S. M. Co. v. Cable Con. G. & S. M. Co., 12 Nev. 312.

Each party must prove his claim to the premises in dispute, and the better claim must prevail. Actual possession makes out a prima facie case for the contestant, and throws upon the defendant the burden of proving a superior right in himself. Idem.

Plaintiff may sustain this action without proving actual possession. A right to the possession is always necessary. Idem.

See, also, Rose v. Richmond, M. Co., 17 Nev. 25, 52, 54, 56 (37 P. 1105, 114 U. S. 576); Steele v. Gold Lead M. Co., 18 Nev. 81, 87 (1 P. 448).

Cited, Nesbitt v. Delamar N. G. M. Co., 24 Nev. 280 (77 A. S. 807, 52 P. 609, 177 U. S. 533).

CHAPTER 63

PARTITION

5527. Who may bring actions for partition—Partial partition.
5528. Interest of all parties must be set forth in complaint.
5529. Lienholders not of record need not be made parties.
5530. Plaintiff must file lis pendens.
5531. Summons must be directed to all parties interested in property.
5532. Unknown parties may be served by publication.
5533. Answer, what to contain.
5534. All rights may be determined in one action.
5535. Plaintiff must produce certificate of recorder showing no liens.
5536. Lienholders must be made parties or referee appointed.
5537. Lienholders must be notified to appear before referee.
5538. Court may order sale or partition.
5539. Partition, how made.
5540. Reports of referees.
5541. Court may set aside or affirm report—Judgment, conclusive, upon whom.
5542. Judgment not to affect tenants for years.
5543. Apportionment of counsel fees and expenses.
5544. Abstract of title in action for partition, cost of, when allowed.
5545. Abstract, how made and verified.
5546. Interest allowed on disbursements, when.
5547. Lien on individual interest, charge on, what.
5548. Estate for life or years, how set off.
5549. Proceeds of sale of incumbered property, how applied.
5550. Lien claimant holding other securities, may be required to first exhaust them.
5551. Proceeds of sale, how distributed.
5552. When paid into court, cause may be continued for determination of claims.
5553. Sales by referees, how made.
5554. Court must direct terms of sale or credit—Investment of purchase money.
5555. Referees may take securities for purchase money.
5556. Tenants, whose estate sold, to receive compensation.
5557. Idem—Court may fix compensation.
5558. Court must protect unknown tenants.
5559. Court must secure value of future interests.
5560. Terms and manner of sale must be made known.
5561. Who may not be purchasers.
5562. Referees must make report to court.
5563. Idem—If confirmed, conveyance may be executed.
5564. Proceeding if lienholder becomes purchaser.
5565. Conveyances must be recorded, are bar against parties.
5566. Proceeds belonging to unknown owners.
5567. Investment must be made in name of clerk.

5568. When interests of parties ascertained, securities to be taken in their names.
5569. Duties of clerk concerning investments.
5570. When unequal partition made, compensation to equalize.
5571. Share of infant paid to guardian.
5572. Share of insane persons to be received by guardian.
5573. Guardian may consent to partition without action and execute releases.
5574. Costs of partition—Lien and shares of parceners.
5575. Court may appoint single referee.
5576. Court may order referees to divide mining claims.
5577. Idem—Court may fix time for division.
5578. Idem—Division, how to be made by referees.
5579. Idem—Parties may unite for purposes of division—Order of court to govern.
5580. Portions sold at auction—Referees to mark off portions sold.
5581. Remainder of bids after first bidder, how marked off—Parties remaining to become owners of what.
5582. Report of referees, what to be returned with.
5583. Expenses of referees apportioned among parties.

5527. Who may bring actions for partition—Partial partition.

SEC. 585. When several persons hold and are in possession of real property, as joint tenants or as tenants in common, in which one or more of them have an estate of inheritance or for life, or lives, or for years, an action may be brought by one or more of such persons for a partial partition thereof according to the respective rights of the persons interested therein, and for a sale of such property or a part of it, if it appear that a partition cannot be made without great prejudice to the owners. Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original cotenants, and thereupon adjudge and cause a partition to be made, as if such original cotenants were the parties, and sole parties, in interest, and the only parties to the action and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire.

Kerr, C. C. P., 752, 760.

It is immaterial when a party in possession files his bill claiming that he is a tenant in common with others, asking for a division of the land, whether he shows that he has a legal title in common with the defendants, or only has an equitable title to the one-half of the land described. In either case he is entitled to substantially the same relief. Crosier v. McLaughlin, 1 Nev. 348.

The court will not only proceed to divide the land, but will, in a proper case, direct an accounting, and do equity in the case by making parties account for rents, etc. Dall v. Confidence Co., 3 Nev. 531.

When a bill is filed for a partition of realty, the court should not decree a sale except in those cases where a partition would manifestly be injurious to the interests of the cotenants. Idem.

A district court can order a partition to be made, but, it cannot itself make the partition except in the indirect mode of confirming the report of the referees appointed for the purpose of carrying out the order of partition. Dondero v. Van Sickle, 11 Nev. 389, 393.

When the court decides in favor of a partition being made, it should appoint referees and direct them to divide and mark out the land, including the improvements into parcels of equal value, instead of making the division into parcels of equal area. Idem.

A severance and removal of improvements, which are a part of the realty, from one parcel of land to another, in order to equalize their values, is not authorized by the statute, and would generally be injurious to the interest of the cotenants. Idem.

If the land cannot be divided into parcels of convenient shape and situation without throwing the valuable improvements into one tract, then, unless the value of the land in the other tract is greater than the one on which the improvements are situated, it should be increased in area until it is equal, quality and quantity considered, to the remaining tract, with the improvements included. Idem.

A person has not the right of a compulsory partition of property unless he has an estate in possession, one by virtue of which he is entitled to enjoy the present rents or the possession of the property as one of the cotenants thereof. Conter v. Herschel, 24 Nev. 152 (50 P. 851).

5528. Interest of all parties must be set forth in complaint.

SEC. 586. The interests of all persons in the property, whether such persons be known or unknown, shall be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint.

Kerr, C. C. P., 753.

5529. Lienholders not of record need not be made parties.

SEC. 587. No persons who have or claim any liens upon the property, by mortgage, judgment, or otherwise, need be made parties to the action, unless such liens be matters of record.

Kerr, C. C. P., 754.

5530. Plaintiff must file lis pendens.

SEC. 588. Immediately after filing the complaint, the plaintiff shall file with the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of the filing it shall be deemed notice to all persons.

Kerr, C. C. P., 755.
Cited, State ex rel. N. T. G. & T. Co. v. Grimes, 29 Nev. 58.

5531. Summons must be directed to all parties interested in property.

SEC. 589. The summons shall be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise upon the property, or upon any particular portion thereof; and generally to all persons unknown who have or claim any interest in the property.

Kerr, C. C. P., 756.

5532. Unknown parties may be served by publication.

SEC. 590. If a party having a share or interest is unknown or any one of the known parties reside out of the state, or cannot be found therein and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons as published shall be accompanied by a brief description of the property which is the subject of the action.

Kerr, C. C. P., 757.

5533. Answer, what to contain.

SEC. 591. The defendants who have been personally served with the summons and a certified copy of the complaint, shall set forth in their answers, fully and particularly, the nature and extent of their interest in the property, and if such defendants claim a lien upon the property by mortgage, judgment, or otherwise, they shall state the amount and date of the same, and the amount remaining due thereon, and whether the amount has been secured in any other way or not; and if secured, the extent and nature of the security; or they shall be deemed to have waived their rights to such lien.

Kerr, C. C. P., 758.

5534. All rights may be determined in one action.

SEC. 592. The rights of the several parties, plaintiffs as well as defendants, may be put to issue, tried, and determined by such action; and when

a sale of the premises is necessary, the title shall be ascertained by proof to the satisfaction of the court, before the judgment of sale shall be made; and where service of the complaint has been made by publication, like proof shall be required of the right of the absent or unknown parties before such judgment is rendered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

Kerr, C. C. P., 759.

5535. Plaintiff must produce certificate of recorder showing no liens.

SEC. 593. The plaintiff shall produce to the court, on the hearing of the case, the certificate of the recorder of the county where the property is situated, showing whether there were or not any liens outstanding of record upon the property, or any part thereof, at the time of the commencement of the action.

5536. Lienholders must be made parties or referee appointed.

SEC. 594. If it shall appear to the court, by the certificate of the county recorder or county clerk, or by the sworn or verified statement of any person who may have examined or searched the records that there are outstanding liens or incumbrances of record upon such real property, or any part thereof, which existed and were of record at the time of the commencement of said action, and the persons holding such liens are not made parties to the action, the court shall either order such persons to be made parties to the action, by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid, or if not paid, what amount remains due thereon, and their order among the liens or incumbrances severally held by the said persons and the parties to said action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security.

Kerr, C. C. P., 761.

5537. Lienholders must be notified to appear before referee.

SEC. 595. The plaintiff shall cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed, as provided in the last section, on each person having outstanding liens of record who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the true amount due or to become due, contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication of notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon shall be made to the court, and shall be confirmed, modified, or set aside and a new reference ordered, as the justice of the case may require.

Kerr, C. C. P., 762.

5538. Court may order sale or partition.

SEC. 596. If it be alleged in the complaint, and be established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof. Otherwise, upon the requisite proofs being made, it shall order a partition according to the respective rights of the parties, as ascertained by the court, and appoint three referees therefor; and shall designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained.

Kerr, C. C. P., 763.

5539. Partition, how made.

SEC. 597. In making the partition, the referee shall divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties, as determined by the court, designating the several portions by proper landmarks; and may employ a surveyor, with the necessary assistants, to aid them therein.

Kerr, C. C. P., 764.

5540. Report of referees.

SEC. 598. The referees shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided and the shares allotted to each party, with a particular description of each share.

Kerr, C. C. P., 765.

5541. Court may set aside or affirm report—Judgment, conclusive upon whom.

SEC. 599. The court may confirm, change, modify or set aside the report, and, if necessary, appoint new referees. Upon the report being confirmed, judgment shall be rendered that such partition be effectual forever, which judgment shall be binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life, or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or of any part thereof, after the determination of a particular estate therein, and who, by any contingency, may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof as tenants for years, or for life.

2. On all persons interested in the property who may be unknown, to whom notice shall have been given of the action for partition by publication; and,

3. On all other persons claiming from such parties or persons, or either of them, and no judgment is invalidated by reason of the death of any party, after filing of the report of the referee and before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent, as if it had been entered before his death.

Kerr, C. C. P., 766.

5542. Judgment not to affect tenants for years.

SEC. 600. But such judgment and partition shall not affect tenants for years less than ten, to the whole of the property which is the subject of the partition.

Kerr, C. C. P., 767.

5543. Apportionment of counsel fees and expenses.

SEC. 601. If it appear that other actions or proceedings have been necessarily prosecuted or defended by any one of the tenants in common, for the protection, confirmation, or perfecting of the title, or setting the boundaries, or making a survey or surveys of the estate partitioned, the court shall allow to the parties to the action, who have paid the expenses of such litigation or other proceedings, all the expenses necessarily incurred therein, except counsel fees, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making the said expenditures, and in the same kind of money expended or paid, and the same must be pleaded and allowed by the court,

and included in the final judgment, and shall be a lien upon the share of each tenant respectively, in proportion to his interest, and shall be enforced in the same manner as taxable costs of partition are taxed and collected.

Kerr, C. C. P., 798.

5544. Abstract of title in action for partition, cost of, when allowed.

SEC. 602. If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the commencement of the action, and any one of the defendants shall have had such abstract afterward made, the cost of the abstract, with interest thereon from the time the same is subject to the inspection of the respective parties to the action, must be allowed and taxed. Whenever such abstract is procured by the plaintiff, before the commencement of the action, he must file with his complaint a notice that an abstract of the title has been made, and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff shall have failed to procure such abstract before commencing the action, and any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action with the clerk of the court, stating who is making the same, and where it will be kept when finished. The court, or the judge thereof, may direct from time to time during the progress of the action, who shall have the custody of the abstract.

Kerr, C. C. P., 799.

5545. Abstract, how made and verified.

SEC. 603. The abstract mentioned in the last preceding section may be made by any competent searcher of records, and need not be certified by the recorder or other officer, but instead thereof it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct; but the same may be corrected from time to time if found incorrect, under the direction of the court.

Kerr, C. C. P., 800.

5546. Interest allowed on disbursements, when.

SEC. 604. Whenever, during the progress of the action for partition, any disbursements shall have been made, under the direction of the court or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making such disbursements.

Kerr, C. C. P., 801.

5547. Lien on individual interest, charge on, what.

SEC. 605. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party, but such share shall be first charged with its just proportion of the costs of the partition, in preference to such lien.

Kerr, C. C. P., 769.

5548. Estate for life or years, how set off.

SEC. 606. When a part of the property only is ordered to be sold, if there be an estate for life or years in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

Kerr, C. C. P., 770.

5549. Proceeds of sale of incumbered property, how applied.

SEC. 607. The proceeds of the sale of the incumbered property shall be applied, under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action.
2. To pay the costs of the reference.
3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment.
4. The residue among the owners of the property sold, according to their respective shares therein.

Kerr, C. C. P., 771.

5550. Lien claimant holding other securities, may be required to first exhaust them.

SEC. 608. Whenever any party to an action who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property on account thereof.

Kerr, C. C. P., 772.

5551. Proceeds of sale, how distributed.

SEC. 609. The proceeds of sale, and the securities taken by the referees, or any part thereof, shall be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given all such proceeds and securities shall be paid into court, or deposited therein, or as directed by the court.

Kerr, C. C. P., 773.

5552. When paid into court, cause may be continued for determination of claims.

SEC. 610. When the proceeds of sales of any shares or parcels belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which shall be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings, as in an original action.

Kerr, C. C. P., 774.

5553. Sales by referees, how made.

SEC. 611. All sales of real property, made by referees under this chapter, shall be made by public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice shall state terms of sale, and if the property or any part of it is to be sold subject to a prior estate, charge, or lien, that shall be stated in the notice.

Kerr, C. C. P., 775.
Cited, Dazet v. Landry, 21 Nev. 294 (30 P. 1064).

5554. Court must direct terms of sale or credit—Investment of purchase money.

SEC. 612. The court shall, in the order for sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which

the purchase money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the state.

Kerr, C. C. P., 776.
Cited, Dazet v. Landry, 21 Nev. 294 (30 P. 1064).

5555. Referees may take securities for purchase money.

SEC. 613. The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase money, of such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age, in the name of such owner, and for the shares of an infant, in the name of the guardian of such infant, and for other shares, in the name of the clerk of the county and his successors in office.

Kerr, C. C. P., 777.

5556. Tenants, whose estate sold, to receive compensation.

SEC. 614. The person entitled to a tenancy for life or years, whose estate shall have been sold, shall be entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk shall enter the same in the minutes of the court.

Kerr, C. C. P., 778.

5557. Idem—Court may fix such compensation.

SEC. 615. If such consent be not given, filed and entered, as provided in the last section, at or before a judgment of sale is rendered, the court shall ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and shall order the same to be paid to such party, or deposited in court for him, as the case may require.

Kerr, C. C. P., 779.

5558. Court must protect unknown tenants.

SEC. 616. If the person entitled to such estate for life or years be unknown, the court shall provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared.

Kerr, C. C. P., 780.

5559. Court must secure value of future interests.

SEC. 617. In all cases of sales, when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court shall ascertain and settle the proportional value of such contingent or vested right or estate, and shall direct such proportion of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties.

Kerr, C. C. P., 781.

5560. Terms and manner of sale must be made known.

SEC. 618. In all cases of sales of property, the terms shall be made known at the time; and if the premises consist of distinct farms or lots, they shall be sold separately.

Kerr, C. C. P., 782.
Cited, Dazet v. Landry, 21 Nev. 295 (30 P. 1064).

5561. Who may not be purchasers.

SEC. 619. Neither of the referees, nor any person for the benefit of either of them, shall be interested in any purchase; nor shall a guardian

of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section shall be void.

Kerr, C. C. P., 783.

5562. Referees must make report to court.

SEC. 620. After completing a sale of the property, or any part thereof ordered to be sold, the referee shall report the same to the court, with a description of the different parcels of land sold to each purchaser, the name of the purchaser, the price paid or secured, the terms and conditions of the sale, and the securities, if any taken. The report shall be filed in the office of the clerk of the county where the property is situated.

Kerr, C. C. P., 784.

5563. Idem—If confirmed, conveyance may be executed.

SEC. 621. If the sale be confirmed by the court, an order shall be entered directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

Kerr, C. C. P., 785.

5564. Proceeding if lienholder becomes purchaser.

SEC. 622. When a party entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

Kerr, C. C. P., 786.

5565. Conveyances must be recorded, are bar against parties.

SEC. 623. The conveyances shall be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action, and against all such parties and persons as were unknown if the summons has been served by publication, and against all persons claiming from them or either of them.

Kerr, C. C. P., 787.
Cited, State ex rel. N. T. G. & T. Co. v. Grimes, 29 Nev. 58.

5566. Proceeds belonging to unknown owners.

SEC. 624. When there are proceeds of a sale belonging to an unknown owner, or to a person without the state, who has no legal representative within it, the same shall be invested in securities or placed at interest for the benefit of the persons entitled thereto.

Kerr, C. C. P., 788.

5567. Investment must be made in name of clerk.

SEC. 625. When the security of the proceeds of the sale is taken, or when an investment of any such proceeds is made, it shall be done, except as herein otherwise provided, in the name of the clerk of the county where the papers are filed, and his successors in office, who shall hold the same for the use and benefit of the parties interested, subject to the order of the court.

Kerr, C. C. P., 789.

5568. When interests of parties ascertained, securities to be taken in their names.

SEC. 626. When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing under their

hands delivered to the referees, agree upon the shares and proportions to which they are respectively entitled; or when shares and proportions have been previously adjudged by the court, such securities shall be taken in the names of, and payable to, the parties respectively entitled thereto, and shall be delivered to such parties upon their receipt therefor. Such agreement and receipt shall be returned and filed with the clerk.

Kerr, C. C. P., 790.

5569. Duties of clerk concerning investments.

SEC. 627. The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, shall receive the interest and principal as it becomes due, and apply and invest the same as the court may direct, and shall file in his office all securities taken, and keep an account in a book provided and kept for that purpose in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

Kerr, C. C. P., 791.

5570. When unequal partition made, compensation to equalize.

SEC. 628. When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interest of some of them, and a partition be ordered by judgment, the court may adjudge compensation to be made by one party to another, on account of the inequality of partition. But such compensation shall not be required to be made to others by owners unknown, nor by infants, unless in case of an infant it appear that he has personal property sufficient for that purpose, and that his interests will be promoted thereby.

Kerr, C. C. P., 792.

5571. Share of infant paid to guardian.

SEC. 629. When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.

Kerr, C. C. P., 793.

5572. Share of insane persons to be received by guardian.

SEC. 630. The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property shall have been sold, may receive, in behalf of such person, his share of the proceeds of such real property, from the referee, on executing with sufficient sureties an undertaking approved by a judge of the court, that he will faithfully discharge the trust imposed in him, and will render a true and just account to the person entitled, or to his legal representatives.

Kerr, C. C. P., 794.

5573. Guardian may consent to partition without action and execute releases.

SEC. 631. The general guardian of an infant and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf to the owners of the shares of the parts to which they may be respectively entitled, upon an order of the court.

Kerr, C. C. P., 795.

5574. Costs of partition—Lien on shares of parceners.

SEC. 632. The costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case there shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, a litigation arises between some of the parties only, the court may require the expenses of such litigation to be paid by the parties thereto, or any of them.

Kerr, C. C. P., 796.

5575. Court may appoint single referee.

SEC. 633. The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this chapter, and the single referee, when thus appointed, shall have all the powers and perform all the duties required of the three referees.

Kerr, C. C. P., 797.

5576. Court may order referees to divide mining claims.

SEC. 634. When the action is for partition of a mining claim among the tenants in common, joint tenants, coparceners or partners thereof, the court, upon good cause shown by any party or parties in interest, may, instead of ordering partition to be made in manner as hereinbefore provided, or a sale of the premises for cash, direct the referees to divide the claim in the manner hereinafter specified.

Cited, Dazet v. Landry, 21 Nev. 295 (30 P. 1064).

If any one or more of the cotenants files an affidavit showing that the sale of an entire mining claim would be injurious to him or them, the court must proceed to divide the claim as prescribed by statute. A sworn answer setting up the same matter is equivalent to the affidavit required. Dall v. Confidence S. M. Co., 3 Nev. 531, 533.

5577. Idem—Court may fix time for division.

SEC. 635. The court shall, in its order, or by a subsequent order made upon motion, fix the time for division of the claim by the referees, which shall not be less than twenty nor more than forty days from the day of making the order, except by consent of all the parties in interest who have appeared in the action.

5578. Idem—Division, how to be made by referees.

SEC. 636. On the day designated in the order, the referees shall go upon the claim to be divided, and proceed to make division of the same as hereinafter provided, and shall continue from day to day until the whole business is completed.

5579. Idem—Parties may unite for purposes of division—Order of court to govern.

SEC. 637. Two or more of the tenants in common, joint tenants, copartners, or parceners, may unite together for the purposes of such division, of which they shall give the referees written notice before they commence the business of division; and all who do not unite as aforesaid or give notice of separate action, shall, for the purposes of division, be deemed and held to have united. The referees in their action shall recognize those named in the order of the court, or their agents and attorneys in fact, duly appointed by instrument in writing, and acknowledged as in cases of conveyance of real estate, the guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person or other person

adjudged incapable of conducting his own affairs, and as to the interest of each, shall be controlled entirely by the order of the court.

5580. Portions sold at auction—Referees to mark off portions sold.

SEC. 638. At the time and place of division, one of the referees to be selected by them shall, in the manner of public auction, offer to the party or parties who will take the least part or portion of said mining claim in proportion to the interest he or they may have therein, the privilege of first selecting the place at which his portion shall be located, and upon closing the bids the referees shall proceed to measure and mark off, by distinct metes and bounds, to the lowest bidder, his or their portion of said mining claim, at the place designated by them or him, according to the terms of his or their bid.

5581. Remainder of bids after first bidder, how marked off—Parties remaining, to become owners of what.

SEC. 639. When the referees have marked off and set apart the interest of the lowest bidder, as provided in the last section, they shall offer to the remaining parties the privilege of selection as in said section mentioned and described, and shall, upon closing the bids, proceed in the same manner to locate and mark off the portion of the lowest bidder, and shall thereafter continue in the same manner to receive bids and mark off the interest of the bidder or bidders until there shall remain but one party in interest, or parties united, forming one interest, as provided in section 637. The party or parties remaining shall become the owner or owners, as the case may be, of the entire claim not marked off and set apart to the other parties as hereinbefore provided, in proportion to their respective interests in the claim.

5582. Report of referees, what to be returned with.

SEC. 640. The referees shall return with their report in this act required to be made by them, the evidences of authority presented to them by persons other than the parties mentioned in the order of the court by which they claim the right to bid, or otherwise act, during the proceedings hereinbefore mentioned.

5583. Expenses of referees apportioned among parties.

SEC. 641. The expenses of the referees, including those of a surveyor and his assistant, when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees, shall be apportioned among the different parties to the action.

Kerr, C. C. P., 768.

CHAPTER 64

TERMINATION OF LIFE ESTATE

5584. Proceedings to determine—Notice—Order.

SEC. 642. If any person has died, or shall hereafter die, who at the time of his death, was the owner of a life estate which terminates by reason of his death, any person interested in the property, or in the title thereto, in which such life estate was held, may file in the district court of the county in which the property is situated, his verified petition, setting forth such facts, and thereupon and after such notice by publication or otherwise, as the court or judge may order, the court or judge shall hear such petition and the evidence offered in support thereof, and if upon such hearing it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, the court or judge shall

make an order to that effect, and thereupon a certified copy of such order may be recorded in the office of the county recorder.

Kerr, C. C. P., 1723; Utah, 3572.

CHAPTER 65

FORCIBLE ENTRY AND DETAINER

5585. Entry to be made only when legal and in peaceable manner.
5586. Forcible entry defined.
5587. Forcible detainer defined.
5588. Unlawful detainer defined.
5589. Tenant of agricultural lands may hold over if not notified.
5590. Tenant has similar remedies against subtenant.
5591. Notice to quit, how served.
5592. Only tenant and subtenant need be made defendants—Exception.
5593. Complaint and summons, what to contain—Service.
5594. Issue of fact tried by jury unless waived.
5595. Proof required of respective parties—What possession a bar.
5596. Amendments to conform to proof—Effect.
5597. Adjournment, when may be made and for how long.
5598. Idem—No adjournment when admission that evidence would be given.
5599. Judgment—Restitution—Rent—Treble damages—Stay of execution.
5600. Pleadings verified.
5601. Appeal within ten days—Undertaking—Stay.
5602. Court not to dismiss or quash proceedings for want of form.
5603. Civil procedure applicable.
5604. Jurisdiction.
5605. Writ of restitution—Form of.

5585. Entry to be made only when legal and in peaceable manner.

SEC. 643. No entry shall be made into any lands, tenements, or other possessions, but in cases where entry is given by law; and in such case, only in a peaceable manner, not with strong hand, nor with multitude of people.

Kerr, C. C. P., 1159.
See sec. 6300.

Forcible entry is a misdemeanor under Stats. 1861, 56, sec. 151, providing that "offenses recognized by the common law and not herein enumerated shall be punished." Ex Parte Webb, 24 Nev. 241 (51 P. 1027).

A demand of possession must be made by the landlord before bringing suit against his tenant for holding over. Such demand is indispensable, and is as necessary to be made before suit as that the relation of landlord and tenant should exist. Paul v. Armstrong, 1 Nev. 82, 94, 99, 100, 137.

Our statute does not require a demand for rent to be made on the premises at a late hour of the day the same falls due in order to produce a forfeiture of the premises rented. The only demand required is the written demand for the money, which must be made after the rent has been three days due. Hoopes v. Meyer, 1 Nev. 433, 437, 440, 442.

When rent is fixed at a certain rate for a definite period, an agreement without consideration to reduce the rent during that period is void. Idem.

Every entry into lands or tenements in the actual possession of another, with strong hand, or with multitude of people, is forcible. Lachman v. Barnett, 18 Nev. 271 (3 P. 38).

A justice of the peace has no jurisdiction of an action for forcible entry and unlawful detainer. Strozzi v. Wines, 24 Nev. 389, 396, 397 (55 P. 828); Peacock v. Leonard, 8 Nev. 84.

5586. Forcible entry defined.

SEC. 644. Every person is guilty of a forcible entry who either:

1. By breaking open doors, windows, or other parts of a house, or by fraud, intimidation, or stealth, or by any kind of violence or circumstance of terror, enters upon or into any real property; or,

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

Kerr, C. C. P., 1159; Utah, 3573.

5587. Forcible detainer defined.

SEC. 645. Every person is guilty of a forcible detainer who either:

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

2. Who in the nighttime, or during the absence of the occupant of any real property, unlawfully enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands.

Kerr, C. C. P., 1160; Utah, 3574.

5588. Unlawful detainer defined.

SEC. 646. A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

1. Where he continues in possession, in person or by subtenant, of the property or any part thereof, after the expiration of the term for which it is let to him. In all cases where real property is leased for a specified term or period, or by express or implied contract, whether written or parol, the tenancy shall be terminated without notice at the expiration of such specified term or period; or,

2. When, having leased real property for an indefinite time, without monthly or other periodic rent reserved, he continues in possession thereof, in person or by subtenant, after the end of any such month or period, in cases where the landlord, fifteen days or more prior to the end of such month or period, shall have served notice requiring him to quit the premises at the expiration of such month or period; or, in cases of tenancy at will where he remains in possession of such premises after the expiration of a notice of not less than five days.

3. When he continues in possession, in person or by subtenant, after default in the payment of any rent and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, shall have remained uncomplied with for the period of three days after service thereof. Such notice may be served at any time after the rent becomes due.

4. When he assigns or sublets the leased premises contrary to the covenants of the lease, or commits or permits waste thereon, or when he sets up or carries on therein or thereon any unlawful business, or when he suffers, permits, or maintains on or about said premises any nuisance, and remains in possession after service upon him of three days' notice to quit.

5. When he continues in possession, in person or by subtenant, after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those hereinbefore mentioned, and after notice, in writing, requiring in the alternative the performance of such condition or covenant, or the surrender of the property, served upon him, and, if there be a subtenant in actual occupation of the premises, also upon such subtenant, shall remain uncomplied with for five days after the service thereof. Within three days after the service, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person, interested in its continuance, may perform such condition or covenant and thereby save the lease from forfeiture; *provided,* that if the covenants and conditions of the lease, violated by the lessee, cannot afterwards be performed, then no notice as last prescribed herein need be given.

Kerr, C. C. P., 1161; Utah, 3575; Wash. (1896), 4776.

See Paul v. Armstrong, 1 Nev. 96, under sec. 643 of this act; Hoopes v. Meyer, 1 Nev. 433, under same section.

A justice court has jurisdiction to render judgment for plaintiff for the restitution of real estate or rent due, and for damages for deprivation of the premises, where defendant in his answer admits the execution of the lease and the payment of rent under it, as such admission establishes the relation

of landlord and tenant. Fitchett v. Henley, 31 Nev. 326, 332 (102 P. 86).

Where a tenant under a lease for a term less than a year holds over with the consent of his landlord, a new tenancy for a like term is created. Fitton v. Hamilton, 6 Nev. 196, 202.

5589. Tenant of agricultural lands may hold over if not notified.

SEC. 647. In all cases of tenancy upon agricultural land where the tenant has held over and retained possession for more than sixty days after the expiration of his term, without any demand of possession or notice to quit by the landlord, or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord or the successor in the estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of the tenant to hold for another year.

Kerr, C. C. P., 1161; Utah, 3576.

5590. Tenant has similar remedies against subtenant.

SEC. 648. A tenant may take proceedings similar to those prescribed in this chapter, to obtain possession of the premises let to any undertenant, in case of his unlawful detention of the premises underlet to him.

Kerr, C. C. P., 1161; Utah, 3577.

5591. Notice to quit, how served.

SEC. 649. The notices required by the preceding sections may be served, either:

1. By delivering a copy to the tenant personally; or,

2. If he is absent from his place of residence, or from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his place of residence or place of business; or,

3. If such place of residence or business cannot be ascertained, or a person of suitable age or discretion cannot be found there, then by fixing a copy in a conspicuous place on the leased property, and also delivering a copy to a person there residing, if such person can be found, and also sending a copy through the mail addressed to the tenant at the place where the leased property is situated. Service upon a subtenant may be made in the same manner.

Kerr, C. C. P., 1162; Utah, 3578.

5592. Only tenant and subtenant need be made defendants—Exception.

SEC. 650. No person other than the tenant of the premises and the subtenant if there be one in actual occupation of the premises when the action is commenced, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited for the nonjoinder of any person who might have been made a party defendant; but when it appears that any of the parties served with process or appearing in the proceeding are guilty of the offense charged, judgment must be rendered against him. In case a person has become subtenant of the premises in controversy after the service of any notice in this chapter provided for, the fact that such notice was not served on such subtenant shall constitute no defense to the action. All persons who enter under the tenant, after the commencement of the action hereunder, shall be bound by the judgment the same as if they had been made parties to the action.

Kerr, C. C. P., 1164; Wash. (1896), 4780; Utah, 3579.

5593. Complaint and summons, what to contain—Service.

SEC. 651. The plaintiff in his complaint, which shall be in writing, must

set forth the facts on which he seeks to recover, and describes the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry, or forcible or unlawful detainer, and claim damages therefor, or compensation for the occupation of the premises or both. In case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. The summons shall be issued and served as in other cases, but the court, judge or justice of the peace may shorten the time within which the defendant shall be required to appear and defend the action, in which case the officer or person serving the summons shall change the prescribed form thereof to conform to the time of service as ordered; *provided,* that where publication is necessary the court shall direct publication for a period of not less than one week.

Kerr, C. C. P., 1166; Wash. (1896), 4781; Utah, 3580.

5594. Issue of fact tried by jury unless waived.

SEC. 652. Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases.

Kerr, C. C. P., 1171; Utah, 3581.

5595. Proof required of respective parties—What possession a bar.

SEC. 653. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings.

Kerr, C. C. P., 1172; Utah, 3582.

See Lachman v. Barnett, under sec. 643 of this act.

The expression that a tenant can only excuse himself from paying rent when evicted by paramount title, means that he can only excuse himself when he is kept out of possession by one who has a legal right to do so, and not a mere trespasser against whom he has his remedy. Hoopes v. Meyer, 1 Nev. 433, 441.

5596. Amendments to conform to proof—Effect.

SEC. 654. When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry or forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs. Such amendment must be without any imposition of terms. No continuance must be permitted upon account of such amendment, unless the defendant, by affidavit filed, shows, to the satisfaction of the court, good cause therefor.

Kerr, C. C. P., 1173; Utah, 3583.

5597. Adjournment, when may be made and for how long.

SEC. 655. The court or justice of the peace may for good cause shown adjourn the trial of any cause under this chapter, not exceeding five days; and when the defendant, his agent or attorney, shall make oath that he cannot safely proceed to trial, for want of some material witness, naming him, stating the evidence that he expects to obtain, showing that he has used due diligence to obtain such witness, and believes that if an adjournment be allowed he will be able to procure the attendance of such witness, or his deposition, in time to produce the same upon the trial; in which case, if such person or persons will give bond, with one or more sufficient

sureties, conditioned to pay the said complainant for all rent that may accrue during the pending of such suit, and all costs and damages consequent upon such adjournment, the court or justice of the peace shall adjourn said cause for such reasonable time as may appear necessary, not exceeding thirty days.

5598. Idem—No adjournment when admission that evidence would be given.

SEC. 656. If the complainant admit that the evidence stated in the affidavit mentioned in the last preceding section would be given by such witness, and agree that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be adjourned.

5599. Judgment—Restitution—Rent—Treble damages—Stay of execution.

SEC. 657. If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court, be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and, if the proceeding be for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement. The jury, or the court if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, and any amount found due the plaintiff by reason of waste of the premises by the defendant during the tenancy, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent; and the judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for the rent and for three times the amount of the damages thus assessed. When the proceeding is for an unlawful detainer after default in the payment of the rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied, and the tenant be restored to his estate; but if payment, as herein provided, be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately.

Kerr, C. C. P., 1174; Utah, 3584.
As to treble damages, see Hoopes v. Meyer, 1 Nev. 441, 448.

5600. Pleadings verified.

SEC. 658. The complaint and answer must be verified.

Kerr, C. C. P., 1175; Utah, 3585.

5601. Appeal within ten days—Undertaking—Stay.

SEC. 659. Either party may, within ten days, appeal from the judgment rendered. But an appeal by the defendant shall not stay the execution of the judgment, unless, within said ten days, he shall execute and file with the court or justice his undertaking to the plaintiff, with two or more sureties, in an amount to be fixed by the court or justice, but which shall not be less than twice the amount of the judgment and costs, to the effect that, if the judgment appealed from be affirmed or the appeal be dismissed, the appellant will pay the judgment and the cost of appeal, the value of the

use and occupation of the property, and damages justly accruing to the plaintiff during the pendency of the appeal. Upon taking the appeal and filing the undertaking, all further proceedings in the case shall be stayed.

Kerr, C. C. P., 978; Utah, 3586.

5602. Court not to dismiss or quash proceedings for want of form.

SEC. 660. In all cases of appeal under this chapter, the appellate court shall not dismiss or quash the proceedings for want of form; *provided,* the proceedings have been conducted substantially according to the provisions of this chapter; and amendments to the complaint, answer, or summons, in matters of form only, may be allowed by the court, at any time before final judgment, upon such terms as may be just; and all matters of excuse, justification, or avoidance of the allegations in the complaint, may be given in evidence under the answer.

5603. Civil procedure applicable.

SEC. 661. The provisions of this act, relative to civil actions, appeals, and new trials, so far as they are not inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

Kerr, C. C. P., 1177; Utah, 3587.

5604. Jurisdiction.

SEC. 662. Any justice of the proper county shall have jurisdiction concurring with the district courts of all actions for the possession of lands and tenements where the relation of landlord and tenant exists, or when such possession has been unlawfully or fraudulently obtained or withheld.

Kerr, C. C. P., 1163.
See Const., sec. 323.

5605. Writ of restitution—Form of.

SEC. 663. The writ of restitution issued by a justice of the peace shall be substantially in the following form: The State of Nevada to the sheriff or constable of the county of....., greeting: Whereas, A. B., of the county of.....at a court of inquiry of an unlawful holding over of lands, tenements, and other possessions, held at my office (stating the place), in the county aforesaid, on the.....day of....., A. D....., before me, a justice of the peace for the county aforesaid, by the consideration of the court, has recovered judgment against C. D., to have restitution of (here describe the premises as in the complaint). You are therefore commanded, that taking with you the force of the county, if necessary, you cause the said C. D. to be immediately removed from the aforesaid premises, and the said A. B. to have peaceable restitution of the same; and you are also commanded that of the goods and chattels of the said C. D., within said county, you cause to be made the sum of.....dollars for the said plaintiff, together with the costs of suit indorsed hereon, and make return hereof within thirty days from this date. Given under my hand, this.....day of....., A. D..... E. F., justice of the peace.

CHAPTER 66

EMINENT DOMAIN

5606. May be exercised in behalf of what uses.
5607. Estates and rights subject to condemnation.
5608. Property subject to condemnation.
5609. Conditions precedent to condemnation.
5610. Right to enter to make survey—Damage.
5611. Jurisdiction in district court—Complaint verified.
5612. Contents of complaint.
5613. All parties in interest may appear.
5614. Power of the court.
5615. Occupancy of premises pending action—Notice—Hearing proof—Bond—Restraining order.
5615. Damages, how assessed.
5617. Damages deemed accrued at date of service.

5618. Action begun anew where defendant's title defective.
5619. Damages to be paid within thirty days —Bond for railroad fence.
5620. Idem—To whom paid—Execution if not paid—Annulling proceedings.
5621. Final order made upon payment—Recording same.
5622. Authorizing occupancy by plaintiff—Deposit—Payment—Effect.
5623. Apportionment of costs.
5624. Procedure applicable.
5625. Rights of cities and towns not affected.
5626. Crossings to be made and kept in repair.
5627. Condemnation by railroad companies.
5628. When two railroad companies may have right over same territory—Change and expense of reconstruction of way or road.
5629. Right may be exercised by foreign corporations.

5606. May be exercised in behalf of what uses.

SEC. 664. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. All public uses authorized by the government of the United States.

2. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature.

3. Public buildings and grounds for the use of any county, incorporated city or town, or school district; reservoirs, water rights, canals, aqueducts, flumes, ditches or pipes for conducting water for the use of the inhabitants of any county, or incorporated city or town, or for draining any county, or incorporated city or town; for raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; for roads, streets, and alleys, and all other public uses for the benefit of any county, incorporated city or town, or the inhabitants thereof.

4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation.

5. Reservoirs, dams, water-gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for supplying persons, mines, mills, smelters, or other works, for the reduction of ores, with water for domestic and other uses, or for irrigating purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable.

6. Roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines, and for all mining purposes; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters or other works for the reduction of ores, or from mines, mill dams, natural gas or oil pipe lines, tanks, or reservoirs; also an occupancy in common by the owners or possessors of different mines, mills, smelters or other places for the reduction of ores, of any place for the flow, deposit or conduct of tailings or refuse matter; also necessary land upon which to erect smelters and to operate the same successfully, including deposition of fine flue dust, fumes and smoke.

7. By-roads leading from highways to residences and farms.

8. Telegraph, telephone, electric light, and electric power lines, and sites for electric light and power plants.

9. Sewerage of any city, or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university.

10. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light or heat.

11. Cemeteries or public parks.

12. Pipe lines for the purpose of conducting any and all liquids connected with the manufacture of beet sugar.

Kerr, C. C. P., 1238; Utah, 3588.

The act of 1875, 111, whereby the mining, smelting or other reduction of ores was declared a public use, and the exercise of the right of eminent domain granted therefor, has had the following citations:

The said act declared constitutional. Dayton G. & S. M. Co. v. Seawell, 11 Nev. 394–399; Overman S. M. Co. v. Corcoran, 15 Nev. 147, 150.

When the legislative power of appropriation of the private property of a citizen is attempted to be exercised, the true test of its validity is whether or not the use for which the property is to be appropriated is a "public use" within the meaning of Const., sec. 237, ante. Idem.

The declaration of a "public use" by the legislature is not conclusive upon the courts. Idem.

Any appropriation of private property under the right of eminent domain for any purpose of great public benefit, interest or advantage to the community, is a taking for a public use. Idem.

The object for which private property is to be taken must not only be of great public benefit and for the paramount interests of the community, but the necessity must exist for the exercise of the right of eminent domain. Idem.

Condemnation of land, what held to be a necessity for. Overman S. M. Co. v. Corcoran, 15 Nev. 147, 150.

In an action of ejectment, condemnation proceedings for the premises in dispute which are still pending is a defense to the action. Byrnes v. Douglass, 23 Nev. 83, 86 (42 P. 798).

The petition for condemnation gave the court jurisdiction to make the order, and, even if erroneous, is not open to collateral attack. Idem.

It is the averments of the petition, and not proof of them, that confers jurisdiction. Idem.

Cited, Ex Parte Boyce, 27 Nev. 331 (65 L. R. A. 47, 75 P. 1).

5607. Estates and rights subject to condemnation.

SEC. 665. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, mill, smelter, or other place for the reduction of ores.

2. An easement, when taken for any other use.

Kerr, C. C. P., 1239; Utah, 3589.

5608. Property subject to condemnation.

SEC. 666. The private property which may be taken under this chapter includes:

1. All real property belonging to any person, company or corporation.

2. Lands belonging to the state, or to any county, or incorporated city or town, not appropriated to some public use.

3. Property appropriated to public use; *provided,* that such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.

4. Franchises for toll roads, toll bridges, ferries, and all other franchises; *provided,* that such franchises shall not be taken unless for free highways, railroads, or other more necessary public use.

5. All rights of way for any and all purposes mentioned in section 664, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed, or intersected by any other right of way or improvement or structure thereon. They shall also be subject to a limited use in common with the owner thereof, when necessary; but such uses of crossings, intersections, and connections shall be made in the manner most compatible with the greatest public benefit and the least private injury.

6. All classes of private property not enumerated may be taken for public use when such taking is authorized by law.

Kerr, C. C. P., 1240; Utah, 3590.

5609. Conditions precedent to condemnation.

SEC. 667. Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by law.

2. That the taking is necessary to such use.
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

Kerr, C. C. P., 1241; Utah, 3591.

5610. Right to enter to make survey—Damage.

SEC. 668. In all cases where land is required for public use, the person or corporation or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of this chapter. The person or corporation or his or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the lands, except for actual damages sustained and all injuries resulting from negligence, wantonness, or malice.

Kerr, C. C. P., 1242; Utah, 3592.

5611. Jurisdiction in district court—Complaint verified.

SEC. 669. All proceedings under this chapter must be brought in the district court for the county in which the property or some part thereof is situated. The complaint in such cases must be verified, and the party instituting any such proceedings shall file with the recorder of each county in which any of the property is situated a notice of the pendency of the action.

Kerr, C. C. P., 1243; Utah, 3593.

5612. Contents of complaint.

SEC. 670. The complaint must contain:

1. The name of the court in which the action is commenced.
2. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff.
3. The names of all owners, occupants and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.
4. A statement of the right of the plaintiff.
5. If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding.
6. A description of each piece of land sought to be taken, and whether the same includes the whole or only part of an entire parcel or tract. All parcels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties; *provided, however,* that each defendant, at his option, may have a separate trial.

Kerr, C. C. P., 1244; Utah, 3594.

5613. All parties in interest may appear.

SEC. 671. All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

Kerr, C. C. P., 1246; Utah, 3595.

5614. Power of the court.

SEC. 672. The court or judge thereof shall have power:

1. To determine the conditions specified in section 667; to determine the

places of making connections, crossings, cattle guards and culverts, and to regulate the manner thereof, and of enjoying the common use mentioned in the fifth subdivision of section 666.

2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor.

3. To determine the respective rights of different parties asking condemnation of the same property.

Kerr, C. C. P., 1247; Utah, 3596.

5615. Occupancy of premises pending action—Notice—Hearing—Proof—Bond—Restraining order.

SEC. 673. The plaintiff may move the court or a judge thereof, at any time after the commencement of suit, on notice for such time as the court or judge may direct to the defendant, if he is a resident of the county, or has appeared in the action, otherwise by serving a notice directed to him on the clerk of the court, for an order permitting the plaintiff to occupy the premises sought to be condemned, pending the action, and to do such work thereon as may be required for the easement sought, according to its nature. The court or a judge thereof shall take proof by affidavit or otherwise, of the value of the premises sought to be condemned and of the damages which will accrue from the condemnation, and of the reasons for requiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damages which may accrue to the parties. If the motion is granted, the court or judge shall require the plaintiff to execute and file in court a bond to the defendant, with sureties, to be approved by the court or judge in a penal sum to be fixed by the court or judge, not less than double the value of the premises sought to be condemned and the damages which will ensue from condemnation and occupation, as the same may appear to the court or judge on the hearing, and conditioned to pay the adjudged value of the premises and all damages, in case the property is condemned, and to pay all damages arising from occupation before judgment in case the premises are not condemned, and all costs adjudged to the defendant in the action. The sureties shall justify before the court or judge, after a reasonable notice to the defendant of the time and place of justification. The amounts fixed shall be for the purpose of the motion only, and shall not be admissible in evidence on final hearing. The court or judge may also, pending the action, restrain the defendant from hindering or interfering with the occupation of the premises and the doing thereon of the work required for the easement.

Utah, 3597.

5616. Damages, how assessed.

SEC. 674. The court, jury, commissioners, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

2. If the property sought to be condemned constitutes only a part of a large parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.

3. If the property, though no part thereof is taken, will be damaged by

the construction of the proposed improvement, the amount of such damages.

4. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed, under subdivision 2 of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value of the portion taken.

5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad between such railroad and other adjoining lands of the defendant; and the cost of cattle guards where fences may cross the line of such railroads.

6. As far as practicable, compensation must be assessed for each source of damages separately.

Kerr, C. C. P., 1248; Utah, 3598.

5617. Damages deemed accrued at date of service.

SEC. 675. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the last section. No improvements put upon the property subsequent to the date of service of summons, shall be included in the assessment of compensation or damages.

Kerr, C. C. P., 1249; Utah, 3599.

5618. Action begun anew where defendant's title defective.

SEC. 676. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same as in this chapter prescribed.

Kerr, C. C. P., 1250; Utah, 3600.

5619. Damages to be paid within thirty days—Bond for railroad fence.

SEC. 677. The plaintiff must, within thirty days after final judgment, pay the sum of money assessed; and, if the plaintiff is a railroad company, it shall also execute to the defendant a bond, with sureties to be determined and approved by the court or judge, conditioned that the plaintiff shall build proper fences through any enclosed field before commencing actual construction. In an action on the bond all damages sustained and the cost of the construction of such fences and cattle guards, with a reasonable attorney fee, to be fixed by the court, may be recovered.

Kerr, C. C. P., 1251; Utah, 3601.

5620. Idem—To whom paid—Execution if not paid—Annulling proceedings.

SEC. 678. Payment may be made to the defendants entitled thereto, or the money may be deposited in court for defendants and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendants, if possession has been taken by the plaintiff.

Kerr, C. C. P., 1252; Utah, 3602.

5621. Final order made upon payment—Recording same.

SEC. 679. When payments have been made (and the bond given, if the plaintiff be required to give one), as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned and the purpose of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the title to the property described therein shall vest in the plaintiff for the purpose therein specified.

Kerr, C. C. P., 1253: Utah, 3603.

5622. Authorizing occupancy by plaintiff—Deposit—Payment—Effect.

SEC. 680. At any time after the entry of judgment, or pending an appeal from the judgment to the supreme court, whenever the plaintiff shall have paid into court for the defendant the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceedings, as well as all damages that may be sustained by the defendant, if for any cause the property shall not be finally taken for public use, the district court in which the proceeding was tried may, upon notice of not less than ten days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court or judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation.

Kerr, C. C. P., 1254; Utah, 3604.

5623. Apportionment of costs.

SEC. 681. Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court.

Kerr, C. C. P., 1255; Utah, 3605.

5624. Procedure applicable.

SEC. 682. Except as otherwise provided in this chapter, the provisions of this act relative to civil actions, new trials, and appeals shall be applicable to and constitute the rules of practice in the proceedings in this chapter.

Kerr, C. C. P., 1256; Utah, 3606.

5625. Rights of cities and towns not affected.

SEC. 683. Nothing in this chapter shall be construed to abrogate or repeal any statute provided for the taking of property in any city, town or county for street or highway purposes.

Kerr, C. C. P., 1263; Utah, 3607.

5626. Crossings to be made and kept in repair.

SEC. 684. A party obtaining a right of way shall, without delay, con-

struct such crossings and culverts as may be required by the court or judge, and shall keep them and the way itself in good repair.

Utah, 3608.

5627. Condemnation by railroad companies.

SEC. 685. Any company incorporated under the laws of this state, or constructing or operating a railway in this state, in addition to other rights conferred, shall have power to enter, by its servants, upon the real property of any person, for the purpose of selecting an advantageous route for its main line or any branch thereof, or for the purpose of relocating its line, subject to responsibility for all damages resulting therefrom; to acquire by purchase, donation, or otherwise, all such real and personal property as may be necessary for, or may be given to aid or encourage the construction and maintenance of its railroad and for its buildings and yards; to condemn, in the manner provided by law, a right of way with such additional lands as may be necessary for depot grounds or for the purpose of constructing necessary embankments, excavations, ditches, drains and culverts; to cross natural or artificial streams or bodies of water, streets, highways, or railroads which its road may intersect, and in such manner as to afford security for life and property and subject to the duty of immediately restoring such course or body of water, street, highway, or railway to its former condition, as nearly as may be; to cross, intersect, join, or unite its railroad with any other railroad, either before or after the construction, at any point upon its route, and upon the grounds of such other railroad corporation, with the necessary turnouts, sidings and switches, and other conveniences in furtherance of the objects of its connections, and every corporation whose railroad is or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant facilities therefor; to construct and operate spurs or branch lines of railroad connecting with the main line or any branch thereof, not to exceed five miles in length each, though such spurs or branch lines be not named or described in the articles of incorporation, and to relocate any section or sections of its lines between the principal termini, with the same powers as in the case of original or first locations.

See Railroads, secs. 3535–3550.

5628. When two railroad companies may have right over same territory—Change and expense of reconstruction of way or road.

SEC. 686. Any railroad company whose right of way, or whose track or roadbed upon such right of way passes through any canon, pass or defile, shall not prevent any other railroad company from the use or occupancy of said canon, pass, or defile for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade; and the location of such right of way through any canon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road, or highway where such road, or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road; *provided,* that such expenses shall be equitably divided between any number of railroad companies occupying and using the same canon, pass or defile.

5629. Right may be exercised by foreign corporations.

SEC. 687. The right of eminent domain is hereby granted to nonresident

or foreign corporations, which are now organized or may be organized under the laws of another state or territory, or under any act of Congress, and upon the same terms and conditions as any resident citizen or domestic corporation; *provided, however,* that before any corporation organized or incorporated otherwise than under the laws of this state shall be entitled to any of the rights granted by this chapter, it must first comply with all laws of this state prescribing the conditions in which such foreign corporation may be authorized to do business within the state or within any county of the state wherein it seeks to exercise the right of eminent domain.

CHAPTER 67

LOST RECORDS AFFECTING REAL PROPERTY, RESTORATION OF

5630. Lost records rerecorded under date of original record — Affidavit — Force of copy.
5631. What deeds considered prima facie evidence, what not.
5632. Records of liens, mortgages or judgments may be restored—Subsequent purchasers or incumbrancers—Limitations.
5633. Records of deeds or instruments affecting title—Wills, action to restore—Parties.
5634. Idem—Complaint, what to allege—Summons—Waiver—Decree.
5635. Character of evidence which may be received.
5636. Action brought in county where property situated.
5637. Idem—Division of county after destruction of records.
5638. Limitations affecting restored records.
5639. Restored records validated.
5640. Lost instruments concerning matters other than real property and water rights may be restored, how.
5641. Procedure for restoration of lost instruments not affecting real property or water rights.
5642. Idem—Court to issue citation—Notice—Citation not required in naturalization matter.
5643. Service on parties residing outside county, how made—Idem, outside state.
5644. Contest may be made, how—Effect of judgment restoring lost record.
5645. Limitation of record of judgment which has been restored.
5646. Costs, how taxed.

5630. Lost records rerecorded under date of original record—Affidavit—Force of copy.

SEC. 688. Whenever the records, or any material part thereof, of any county in this state have been lost or destroyed by fire or otherwise, or shall hereafter be lost or destroyed by fire or otherwise, any map, plat, deed, conveyance, contract, mortgage, deed of trust, power of attorney, or other instrument in writing, of whatsoever nature or character, or record in any proceeding authorized by law to be recorded, affecting the title to real estate or water rights in such county, which have been heretofore recorded, or which may be hereafter recorded, may be rerecorded in the proper office therefor; and in rerecording the same, the officer shall record the certificate of the previous record with the date of original filing for record shown by the official endorsement on such original instrument, which shall be deemed and taken as the date of the recording of the instrument to which it is attached. Where the party desiring such record shall produce to the recorder an affidavit showing that the original is lost or destroyed, or that the same is not in his possession or control, a duly certified copy of such original may be recorded in the same manner and with the same force and effect as the original under this chapter. Copies of records herein authorized to be made, duly certified, shall have the same force and effect as evidence as certified copies of the original instrument or record.

5631. What deeds considered prima facie evidence, what not.

SEC. 689. In all cases where real estate has been sold by a sheriff, executor, administrator, guardian, assignee, receiver, trustee or commissioner of court, or other person appointed or authorized by the court, and the record of the action in which such sale had been made is lost or destroyed by fire or otherwise, the deed to such property made by said

sheriff, executor, administrator, guardian, assignee, receiver, trustee, commissioner of court, or other person appointed or authorized by the court, shall be prima facie evidence of the legality and regularity of such sale, and of the correctness of the proceeding in the action or proceeding wherein said property was sold; but the deeds made by the treasurer of any county of lands sold at delinquent or forfeited tax sales shall not be prima facie evidence of the title in the purchasers of such lands, and no such presumption shall be indulged in favor of such tax deeds or sales when the records of the sales and the proceedings upon which the sale was based have been lost or destroyed by fire or otherwise.

5632. Records of liens, mortgages, judgments may be restored—Subsequent purchasers or incumbrances—Limitations.

SEC. 690. Whenever the record and entry of any judgment, or the record of any mechanic's lien, mortgage or other incumbrance or lien upon property is lost or destroyed by fire or otherwise, and the original documents or instruments or certified copies thereof cannot be found, the judgment creditor or his assignee and the person holding or entitled to the said mechanic's lien, mortgage or other incumbrance or lien on property, may, as to such judgments, begin a proceeding in the court wherein the same was rendered, and as to mortgages, mechanic's liens or other incumbrances or liens, begin a proceeding in any court having jurisdiction over such property, to have established the fact of the existence, prior to such loss or destruction, of the record of such judgment, mortgage, mechanic's lien or other incumbrance or lien, and the substance and effect thereof; and the decree in any such case shall be recorded in the records of the same office in which the original judgment, mortgage, mechanic's lien or other incumbrance or lien was recorded or entered; *provided, however,* no judgment, mortgage, mechanic's lien or other incumbrance upon property, the record whereof has been lost or destroyed as aforesaid, shall continue to be a lien upon such property, or affect the title thereto as against any purchaser for value or subsequent lienholder, unless the action or proceeding to establish the existence of such record, prior to the loss or destruction thereof as aforesaid, shall be begun within six (6) months from and after such loss or destruction, or within six (6) months from and after the passage of this act where the record was lost or destroyed prior to such passage, nor shall any judgment, mortgage, deed of trust, mechanic's lien or other lien or incumbrance, the record whereof has been lost or destroyed as aforesaid, be held binding and in force or be executed or foreclosed, unless the action or proceeding to reestablish the existence of such judgment or instrument, prior to the destruction of the record thereof, shall be begun within one (1) year from and after such loss or destruction or from and after the passage of this act where such record was lost or destroyed previous to such passage.

5633. Records of deeds or instruments affecting title—Wills, action to restore—Parties.

SEC. 691. Whenever the record of any deed or other instrument affecting the title to or concerning any interest in real estate or water rights in this state, which is authorized or required by law to be recorded, or any will, or the probate thereof, is lost or destroyed by fire or otherwise, and the original of such deed or will or the probate thereof, or other instrument, or a certified copy thereof, cannot be found, any person claiming title to such real estate or water right or any interest under said will may institute a proceeding in the district court of the county in which the property so affected is situated, to establish the fact of the existence, contents and record of such deed, will and probate thereof, or other instrument, prior

to such loss or destruction, and the decree in the case shall be entered in the proper office of such county. Any person having or claiming an interest in said real estate or water right or being in possession and enjoyment thereof, as well as the parties to the said lost deed or other instrument, and their privies, and all persons interested under said will, shall be made parties defendant in such proceeding.

5634. Idem—Complaint, what to allege—Summons—Waiver—Decree.

SEC. 692. The proceeding provided in the foregoing section for the restoration of lost records shall be begun by filing a complaint in the court having jurisdiction thereof as herein provided, setting forth the nature, character and substance of the instrument and record thereof so lost or destroyed, the date of the loss or destruction as near as may be, the office in which such instrument was originally recorded, with the date when same was originally filed for record as near as may be, and that the restoration of such records is necessary to secure the legal rights of the applicant, or of some other person for whose benefit such application is made, which complaint shall be verified in the manner provided for the verification of pleadings in other civil actions, and thereupon summons shall issue, and actual service thereof, or service by publication, shall be made upon all persons interested in or affected by said original instrument or record in the manner provided by law for the commencement of civil actions; *provided,* the parties may waive the issuing or service of summons and enter their appearance to such application; and upon hearing such application without further pleadings, if the court or judge finds that such instrument and the record thereof have been lost or destroyed and that neither such instrument, record or certified copy thereof can be found or produced by the applicant in such proceeding, and the court or judge is enabled by the evidence produced to find the substance of such instrument or record, an order and decree shall be made setting forth the interest or record according to its substance and effect, and requiring the proper officer to reproduce such record which shall recite the substance and effect of said lost or destroyed record, or part thereof, as found by said order and decree, and such record shall have the same effect as the original record would have if the same had not been lost or destroyed, so far as it concerns the rights of the applicant, or person or parties so served with summons or entering their appearance, or persons claiming under them by title acquired subsequently to the filing of the application.

5635. Character of evidence which may be received.

SEC. 693. Upon the hearing of the application provided in the preceding sections, the court or judge may admit in evidence oral testimony, and any complete or partial abstract of such lost or destroyed instrument, record, docket entries or indexes, and any other written evidence of the contents or effect of such instrument or record, or published reports concerning such instrument or record when the court or judge is of the opinion that such abstracts, writings, and publications were fairly and honestly made before the loss or destruction of such instrument or record.

5636. Action brought in county where property situated.

SEC. 694. The district court of any county in which the property is situated which will be affected by proceedings to restore lost records, as provided in this chapter, shall have jurisdiction of such proceedings.

5637. Idem—Division of county after destruction of records.

SEC. 695. Whenever a county is segregated after the loss or destruction of the public records thereof, or any part of such records, and a portion of its territory is included in some new county created by act of legislature,

all original instruments or duly certified copies of such instruments mentioned in section 688 shall be recorded in the office of the county recorder of the county in which the property affected thereby is situated after such segregation, and all proceedings to restore lost records as provided in this act, which are commenced after the creation of such new county, shall be begun in the county in which the lands affected by such records are then situated.

5638. Limitations affecting restored records.

SEC. 696. Where any judgment, mortgage, deed of trust, lien or the record thereof has been restored under this chapter, such judgment, mortgage, deed of trust or lien shall not continue to extend beyond the limitation prescribed by law at the time the original judgment, mortgage, deed of trust or lien was entered, recorded or created.

5639. Restored records validated.

SEC. 697. Whenever the records or any material part thereof of any county in this state have been lost or destroyed by fire or otherwise, and any map, plat, deed or other instrument in writing mentioned in section 688, affecting the title to any real estate or water rights in any such county, shall have been rerecorded therein, or where a duly certified copy of such instrument shall have been recorded in such county, prior to the passage of this act, the record so made is hereby validated and given the same force and effect as records hereafter restored in accordance with the provisions of section 688.

AFFECTING OTHER INSTRUMENTS

5640. Lost instruments concerning matters other than real property and water rights may be restored, how.

SEC. 698. In all cases where the records of any judgments, not affecting real property or water rights, which said judgments have not expired by limitation, or other records of any court of either general or limited jurisdiction in this state, and all records of proceedings taken by, or in behalf of any alien to become a citizen of the United States in this state, have been lost or destroyed, the same may be restored and replaced, and become the records of said courts, in the manner prescribed in the following sections of this chapter.

5641. Procedure for restoration of lost instruments not affecting real property or water rights.

SEC. 699. When any record of any court in this state, not affecting real property or water rights, has been lost, destroyed, or defaced, so that its contents cannot be distinguished, the same may be restored by any party interested, by making and filing an affidavit in said court whose records it is proposed to restore, and that said affidavit shall set forth the nature of the action, demand or claim upon which said lost, destroyed, or defaced records was obtained, about the date of the discovery of its loss or destruction as near as may be, and when the record sought to be restored is that of a judgment, the affidavit shall set forth the amount and character of the judgment as nearly as can be ascertained, and in all cases the affidavit shall set forth that the restoration of said record or records is necessary to secure the legal rights of the affiant, or of some other person, for whose benefit the record or records is sought to be restored.

5642. Idem—Court to issue citation—Notice—Citation not required in naturalization matter.

SEC. 700. Upon making and filing of the said affidavits, the court or the judge thereof shall thereupon issue a citation to all parties interested,

notifying them to appear and show cause why the record referred to in said case should not be restored; and that in said notice or citation shall be set forth, that the motion to restore said lost record is based upon affidavit on file in said court, and if the hearing of said case is before the district court, ten days' notice shall be given to all parties interested, and if before a justice court not less than five nor more than ten days' notice shall be required; *provided*, that in all cases of citizenship or naturalization no citation is required to issue.

5643. Service on parties residing outside county, how made—Idem—Outside state.

SEC. 701. When parties upon whom citation is required to be served reside outside of the county, but within this state, service shall be made in the same manner as is prescribed by law for the service of summons in civil actions in this state, and upon a citation issued from a justice's court under this chapter, the service of the same upon parties residing out of the county, but within the state, shall be in the same manner as that required for the service of summons in civil actions in the district courts, and where the parties upon whom service is required to be made reside out of this state, service shall be made by publication, in the same manner as is required for service of summons in civil cases in the courts of this state.

5644. Contest may be made, how—Effect of judgment restoring lost record.

SEC. 702. In all cases the parties interested shall, upon said motion, have an opportunity of appearing and using counter affidavits and contesting said application, and if it appear to the court at the hearing that the record in said case is lost, destroyed, or defaced, and what its contents were, it may then make, order, or cause to be made, a new roll or record, corresponding to the old one as near as can be done, and enter the same as of record in said court, and the matter thus substituted will thenceforward be received in all courts and given in all respects the same effect as though it were the original record.

5645. Limitation of record of judgment which has been restored.

SEC. 703. Where any record of a judgment has been restored under this chapter said judgment shall not continue or extend beyond the limitation prescribed by law at the time the original judgment so restored was entered.

5646. Costs, how taxed.

SEC. 704. The costs to be taxed upon an application to restore a lost or destroyed record, as provided in this chapter, shall be the same as are provided for like service in civil actions, and may be adjudged against either or any party to such proceeding or application, or may, in the discretion of the court, be apportioned between such parties.

CHAPTER 68

DEATH BY WRONGFUL ACT, ACTION FOR

5647. Liability for death by wrongful act.

SEC. 705. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof then, and in every such case, the persons who, or the corporation which would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the

death of the person injured; and although the death shall have been caused under such circumstances as amount in law to a felony.

Kerr, C. C. P., 377.

The right to bring an action for death by wrongful act in a foreign jurisdiction does not rest upon principles of comity, but exists because the action is transitory, and not local. Christensen v. Floriston P. Co., 29 Nev. 552, 557 (92 P. 210).

Courts will enforce a cause of action for death by wrongful act growing out of the laws of another state, when not contrary to the public policy of the state of the forum. Idem.

The public policy of a state in respect to enforcing the remedy in an action for death by wrongful act only goes to the extent that it by legislation has changed the common law, and unless the lex fori is substantially the same as the lex loci, the latter law will not be deemed consistent with the public policy of the forum. Idem.

Where the lex loci and lex fori in respect to actions for death by negligent acts give the same remedy to the same persons, that the former places no restrictions upon the transitory nature of the action, while the latter does, does not affect the policy of the latter so far as it recognizes the cause of action and its enforcement. Idem.

Injury to servant — Negligence — Proximate cause—Question for jury. In an action for death, the question whether decedent was guilty of negligence proximately causing the accident is for the jury. Idem.

In an action for death, an abstract instruction that no person has a right to unnecessarily so use his own property as to endanger the physical safety of another is not prejudicial, where, when taken in connection with other instructions, the jury could not have been misled. Idem.

In an action for death, an instruction that it is the duty of a master to provide a safe place for his servants to work, and he cannot escape responsibility for a failure to do so unless it is shown that the servant was guilty of "proximate negligence" in the assumption of obvious risks which resulted in his injury, was not prejudicial, there being no evidence of contributory negligence. Idem.

Parents have a legal right to financial support from a child during his whole life, and their right to recover for his death is not affected by the amount of his contributions during his life, though the same may be a material factor in determining the amount of damages. Idem.

In an action for the death of a man 30 years old performing manual labor for good wages, an instruction that there was no evidence that decedent had any expectancy of life beyond the day of his death, or that his parents had any expectancy of life beyond the time of the trial, and in the event of a finding for plaintiff only nominal damages should be allowed, was properly refused. Idem.

In an action for death inflicted in another state, the recovery of damages is governed by the lex loci. Idem.

In an action for death, only actual monetary damages sustained by the person for whose benefit the action is brought are recoverable, and, when more than nominal damages are claimed, their amount must be largely determined upon questions of relationship and dependency existing between decedent and beneficiary at the time of his death. Idem.

While the jury is allowed great latitude in awarding damages in actions for tortious death and their decision will not be disturbed except in extreme cases, yet the size of the judgment must be justified by the evidence. Idem.

A verdict of $10,000 for the death of a laborer 30 years old, earning $3 a day, is excessive, where it does not appear that he contributed anything to his parents for whose benefit the action is brought, nor that they are in need of assistance, and there is no proof of the expectancy of life of the decedent or beneficiaries except their ages. Idem.

5648. Judgment for damages not liable for debts—Distribution, how made.

SEC. 706. The proceeds of any judgment obtained in any action brought under the provisions of this chapter shall not be liable for any debt of the deceased; *provided,* he or she shall have left a husband, wife, child, father, mother, brother, sister, or child or children of a deceased child; but shall be distributed as follows:

1. If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife, and a child or children, or grandchildren, then, equally to each, the grandchild or children taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or children, then to such child or children and grandchild or children by right of representation; if there be no child or grandchild, then to a surviving father or mother; if there be no father or mother, then to a surviving brother or sister, or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, then

the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons; *provided,* every such action shall be brought by and in the name of the personal representative or representatives of such deceased person; and, *provided, further,* the jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the kindred as herein named.

Kerr, C. C. P., 377.

Where one already diseased has suffered from a personal injury, the mere fact of personal condition does not deny him all the damages suffered from the accident, and this is true whether the damages proximately result from the wrong complained of, or whether the disease existed at the time of the injury and was aggravated by it. Murphy v. Southern Pacific, 31 Nev. 122 (101 P. 322).

See Christensen v. Floriston P. Co., under sec. 705 of this act.

CHAPTER 69

PERSONAL INJURIES, ACTION FOR

5649. Person causing injury liable—Fellow servant, when liable.
5650. Common carriers and mill and mine owners and operators liable for injury to employees, when.
5651. When contributory negligence of employee slight will not bar recovery.
5652. Contract of insurance or indemnity will not bar recovery by injured employee.

5649. Person causing injury liable—Fellow servant, when liable.

SEC. 707. Whenever any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury shall be liable to the person injured for damages; and where the person causing such injury is employed by another person or corporation responsible for his conduct, such person or corporation so responsible shall be liable to the person injured for damages.

Murphy v. Southern Pacific, 31 Nev. 122 (101 P. 322); Burch v. Southern Pacific, 32 Nev, 75 (104 P. 225); Sherman v. Southern Pacific, 33 Nev. — (111 P. 416); Cutler v. Pittsburg Silver Peak M. Co., 34 Nev. — (116 P. 418).

5650. Common carriers and mill and mine owners and operators liable for injury to employees, when.

SEC. 708. That every common carrier engaged in trade or commerce in the State of Nevada, and every mine and mill owner and operator actually engaged in mining, or in milling or reduction of ores, in the State of Nevada, shall be liable to any of its employees, or, in case of the death of such employee, to his personal representative for the benefit of his widow and children, if any, and if none, then for his next of kin, for all damages which may result from the negligence of the officers, agents, or employees of said common carrier or mine or mill operator, or by reason of any defect or insufficiency due to their negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works, or to their negligent handling or storing of explosives.

5651. When contributory negligence of employee slight will not bar recovery.

SEC. 709. That in all actions hereinafter brought against any common carrier or mine or mill owner and operator to recover damages for personal injuries to or death of an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and the negligence of the employer, or its officers, agents, or employees was gross in comparison. All questions of negligence and contributory negligence shall be for the jury.

5652. Contract of insurance or indemnity will not bar recovery by injured employee.

SEC. 710. That no contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employee, nor the acceptance of any insurance, relief benefit or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to, or death of such employee; *provided, however,* that upon the trial of such action the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the person entitled thereto.

CHAPTER 70

ACTIONS AGAINST THE STATE

5653. Actions on rejected claims against the state may be brought in Ormsby County—Summons served on controller.

SEC. 711. An officer or person who has presented a claim against the state for services or advances authorized by law, and for which an appropriation has been made, but of which the amount has not been fixed by law, to the board of examiners, which claim said board or the state controller has refused to audit and allow, in whole or in part, may commence an action in any court in Ormsby County having jurisdiction of the amount, for the recovery of such portion of the claim as shall have been rejected. In such action the State of Nevada shall be named as defendant, and the summons shall be served upon the state controller, and the action shall proceed as other civil actions to final judgment.

The constitution states that provision may be made by general law for bringing suit against the state for certain liabilities, Const., sec. 280.

See Ormsby Co. v. State, 6 Nev. 283, 285, 286; State v. Hallock, 20 Nev. 326, 330.

5654. Idem—Attorney-general to defend—Controller may appeal.

SEC. 712. The attorney-general shall defend all such actions on the part of the state. The controller shall cause to be subpenaed and examined such witnesses, and procure and cause to be introduced such documentary evidence as he shall deem necessary for the defense. Appeals may be taken in all such actions by the controller in behalf of the state.

5655. Controller to draw warrant for amount of judgment.

SEC. 713. Upon the presentation of a certified copy of a final judgment in favor of the claimant in any such action, the controller shall draw his warrant in favor of the claimant for the amount awarded by the judgment.

See citations under sec. 711 of this act.

CHAPTER 71

QUO WARRANTO

5656. Action in the name of state, against whom.
5657. Action in the name of state, against corporation.
5658. Attorney-general to begin action, when.
5659. Action begun upon whose relation—Security for costs.
5660. Action for usurpation by claimant in name of state—Bond.
5661. Action for usurpation by claimant—Contents of complaint.
5662. All claimants to the same office made defendants.
5663. Jurisdiction in supreme or district court.
5664. Application to file complaint—Notice to defendant.
5665. Summons, when issued—When unnecessary.
5666. Pleadings.
5667. Judgment of ouster—Costs—Delivery of books—Violation by corporation.
5668. Judgment ousting director of corporation.
5669. Action for damages, within one year.
5670. Judgment against corporation—Dissolution or restraint.
5671. Court shall appoint trustee for dissolved corporation—Compensation.
5672. Idem—Bond of trustee.

5673. Suit on bond of trustee, by whom may be brought.
5674. Trustee to collect debts and divide surplus.
5675. Court may order books and effects delivered to trustee.
5676. Trustee to file sworn inventory with clerk.
5677. Trustee to sue for debts—Responsibility.
5678. Liability of corporation directors when judgment of ouster rendered.
5679. Penalty for refusal to obey order of court.
5680. Quo warranto actions take precedence.
5681. Procedure in supreme court same as in district court—Jury.
5682. Appeal does not stay judgment of ouster.

5656. Action in the name of state, against whom.

SEC. 714. A civil action may be brought in the name of the state:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this state, or an officer in a corporation created by the authority of this state.

2. Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, works a forfeiture of his office.

3. Against an association of persons who act as a corporation within this state without being legally incorporated.

Kerr, C. C. P., 803; Mont. Civ. P., 1410; Utah, 3609.

See citations under Const., sec. 319, p. 94, ante.

Statement in quo warranto held sufficient. Greeley v. Holland, 14 Nev. 320, 323.

The affirmative of the issue and the burden of proof is on the state. State v. Haskell, 14 Nev. 209, 210.

The question of the constitutionality of the statute increasing the number of district judges to four and the right of respondent to hold the office of district judge under that statute, can only be raised by a direct proceeding of quo warranto and is not properly before the court by a proceeding for a writ of prohibition. Walcott v. Wells, 21 Nev. 47 (37 A. S. 478, 9 L. R. A. 59, 24 P. 367).

Collateral questions will not be inquired into on quo warranto. State ex rel. Davenport v. Horton, 19 Nev. 199 (8 P. 171).

An information in the nature of quo warranto, filed against the incumbent of an office for the sole purpose of having a judicial determination as to who possesses the power of appointment to such office, it being apparent that defendant will remain in office whatever will be the decision, will be dismissed. State ex rel. Alexander v. McCullough, 20 Nev. 154 (18 P. 756).

Stats. 1865, 164, sec. 14, as to propriety of allowing relator to prosecute the action in his own name, cited in State ex rel. Mack v. Torreyson, 21 Nev. 517 (34 P. 879).

Under the common law any information in the nature of quo warranto will lie only for usurping a public office, and is never exercised in the case of a mere agency or employment determinable at the will of the employer. State ex rel. Ryan v. Cronan, 23 Nev. 437, 446 (49 P. 41).

The provisions of sec. 1, Stats. 1865, 164, while it extends the remedy to any office in a corporation created under the laws of this state, the question of what constitutes an office within the settled rule is not affected by the statute. Idem.

Under the provisions of sec. 1, Stats. 1865, 164, it was held: A private individual may file an information against any "person unlawfully holding or exercising any public office or franchise or when any persons act as a corporation without being authorized by law, or when they exercise powers not conferred by law," and such proceeding is the proper remedy to determine questions involving the corporate existence or the constitutionality of an act incorporating a city, or the right to exercise in any manner the functions of a city council. State ex rel. Fletcher v. Osburn, 24 Nev. 187, 191 (51 P. 837).

When the attorney-general refuses to bring an action, a person claiming election to a state office may, by leave of court, bring quo warranto on his own relation, where he has no other remedy. State ex rel. McMillan v. Sadler, 25 Nev. 131, 165 (83 A. S. 753, 58 P. 284); State ex rel. Springmeyer v. Baker, 34 Nev. —; State ex rel. Legate v. Josephs, 34 Nev. —.

Quo warranto is the only remedy a person, who may be duly elected to a state office, has to oust one unlawfully holding the same and have himself instituted. Idem.

5657. Action in the name of state, against a corporation.

SEC. 715. A like action may be brought against a corporation:

1. When it has offended against a provision of an act by or under which it was created, altered, or renewed, or any act altering or amending such acts.

2. When it has forfeited its privileges and franchises by a nonuser.

3. When it has committed or omitted an act which amounts to a sur-

render or a forfeiture of its corporate rights, privileges, and franchises.

4. When it has misused a franchise or privilege conferred upon it by law, or exercised a franchise or privilege not so conferred.

Mont. Civ. P. 1411; Utah, 3610.
Against telegraph company, sec. 4630.

5658. Attorney-general to begin action, when.

SEC. 716. The attorney-general, when directed by the governor, shall commence any such action; and when, upon complaint or otherwise, he has good reason to believe that any case specified in the preceding section can be established by proof, he shall commence an action.

Mont. Civ. P., 1412; Utah, 3611.

5659. Action begun, upon whose relation—Security for costs.

SEC. 717. Such officer may, upon his own relation, bring any such action, or he may, on the leave of the court, or a judge thereof in vacation, bring the action upon the relation of another person; and, if the action be brought under subdivision one of the first section of this chapter, he may require security for costs to be given as in other cases.

Mont. Civ. P., 1413; Utah, 3612.

5660. Action for usurpation by claimant in name of state—Bond.

SEC. 718. A person claiming to be entitled to a public office unlawfully held and exercised by another may, by himself or by an attorney and counselor at law, bring an action therefor in the name of the state, as provided in this chapter. On filing the complaint, such person shall enter into an undertaking with two sufficient sureties, to be approved by the judge, or any judge of the court in which the action is brought conditioned that such person will pay any judgment for costs or damages recovered against him, and all costs and expenses incurred in the prosecution of the action, which undertaking shall be filed with the clerk of the court.

Mont. Civ. P., 1414; Utah, 3613.

5661. Action for usurpation by claimant—Contents of complaint.

SEC. 719. When the action is against a person for usurping, intruding into, or unlawfully holding or exercising an office, the complaint shall set forth the name of the person who claims to be entitled thereto, with an averment of his right thereto, and judgment may be rendered upon the right of the defendant, and also upon the right of the person so averred to be entitled, or only upon the right of the defendant, as justice requires.

Mont. Civ. P., 1415; Utah, 3614.

5662. All claimants to the same office made defendants.

SEC. 720. All persons who claim to be entitled to the same office or franchise may be made defendants in the same action to try their respective rights to such office or franchise.

Mont. Civ. P., 1416; Utah, 3615.

5663. Jurisdiction in supreme or district court.

SEC. 721. An action under this chapter can be brought in the supreme court of the state, or in the district court of the proper county.

Mont. Civ. P., 1417; Utah, 3616.
Regarding jurisdiction of the supreme court to issue writs of quo warranto, see Const., sec. 319; for jurisdiction of the district courts and the judges thereof to issue writs of quo warranto, see Const., sec. 321.

5664. Application to file complaint—Notice to defendant.

SEC. 722. Upon application for leave to file a complaint, the court or judge may, in its discretion, direct notice thereof to be given to the defendant previous to granting such leave, and may hear the defendant in opposi-

tion thereto; and if leave be granted, an entry thereof shall be made on the minutes of the court, or the fact shall be endorsed by the judge on the complaint, which shall then be filed.

Mont. Civ. P., 1418; Utah, 3617.

5665. Summons, when issued—When unnecessary.

SEC. 723. When the complaint is filed without leave and notice, or upon leave and notice in case all the defendants do not appear, a summons shall issue and be served as in other cases. When all the defendants appear to oppose the filing of the complaint, no summons need issue.

Mont. Civ. P., 1419; Utah, 3618.

5666. Pleadings.

SEC. 724. The pleadings shall be as in other cases.

Mont. Civ. P., 1421; Utah, 3619.

5667. Judgment of ouster—Costs—Delivery of books—Violation by corporation.

SEC. 725. When a defendant is found guilty of usurping, intruding into or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom, and that the relator recover his costs. The court, after such judgment, shall order the defendant to deliver over all books and papers in his custody, or under his control, belonging to said office, to the parties entitled thereto. If the defendant be found guilty of unlawfully holding or exercising any office, franchise, or privilege; or if a corporation be found to have violated the law by which it holds its existence, or in any other manner to have done acts which amount to a surrender or a forfeiture of its privileges, judgment shall be rendered that such defendant be ousted and altogether excluded from such office, franchise, or privilege, and also that he pay the costs of the proceedings. If the defendant be found to have exercised merely certain individual powers and privileges to which he is not entitled, the judgment shall be the same as above directed, but only in relation to those particulars in which he is thus exceeding the lawful exercise of his rights and privileges. In case judgment is rendered against a pretended, but not real, corporation, the costs may be collected from any person who has been acting as an officer or proprietor of such pretended corporation.

Kerr, C. C. P., 809; Mont. Civ. P., 1422; Utah, 3620.

5668. Judgment ousting director of corporation.

SEC. 726. When the action is against a director of a corporation and the court finds that at his election, either illegal votes were received or legal votes were rejected, or both, sufficient to change the result, judgment may be rendered that the defendant be ousted, and judgment of induction entered in favor of the person who was entitled to be declared elected at such election.

Mont. Civ. P., 1423; Utah, 3621.

5669. Action for damages within one year.

SEC. 727. Such person may, at any time within one year after the date of such judgment, bring an action against the person ousted and recover the damages he sustained by reason of such usurpation.

Mont. Civ. P., 1426; Utah, 3622.

5670. Judgment against corporation—Dissolution or restraint.

SEC. 728. When, in any such action, it is found and adjudged, that a corporation has, by an act done or omitted, surrendered or forfeited its corporate rights, privileges, or franchises, or has not used the same during

a term of two years, judgment shall be entered that it be ousted and excluded therefrom, and that it be dissolved; and when it is found and adjudged that a corporation has offended in any matter or manner which does not work such surrender or forfeiture or has misused a franchise, or exercised a power not conferred by law, judgment shall be entered that it be enjoined from the continuance of such offense or the exercise of such power.

Mont. Civ. P., 1428; Utah, 3623.

5671. Court shall appoint trustee for dissolved corporation—Compensation.

SEC. 729. If a corporation is ousted and dissolved by the proceedings herein authorized, the court shall appoint some disinterested person as trustee of the creditors and stockholders, who shall receive a compensation for his services to be fixed by the court.

5672. Idem—Bond of trustee.

SEC. 730. Said trustee shall enter into bond in such a penalty, and with such security, as the court approves, conditioned for the faithful discharge of his duties.

5673. Suit on bond of trustee, by whom may be brought.

SEC. 731. Suit may be brought on such bond by any person injured by the negligence or wrongful act of the trustee in the discharge of his duties.

5674. Trustee to collect debts and divide surplus.

SEC. 732. The trustee shall proceed immediately to collect the debts and pay the liabilities of the corporation, and to divide the surplus among those thereto entitled.

5675. Court may order books and effects delivered to trustee.

SEC. 733. The court shall, upon an application for that purpose, order an officer of such corporation, or any other person having possession of any of the effects, books, or papers of the corporation, in anywise necessary for the settlement of its affairs, to deliver the same to the trustee.

5676. Trustee to file sworn inventory with clerk.

SEC. 734. As soon as practicable after his appointment, the trustee shall make and file in the office of the clerk of the court, an inventory of all the effects, rights, and credits, which come to his possession or knowledge, the truth of which inventory shall be sworn to.

5677. Trustee to sue for debts—Responsibility.

SEC. 735. He shall sue for and recover the debts and property of the corporation, and shall be responsible to the creditors and stockholders respectively, to the extent of the effects which come into his hands, in the same manner as though he was the executor of a deceased person.

5678. Liability of corporation directors when judgment of ouster rendered.

SEC. 736. When judgment of ouster is rendered against a corporation on account of the misconduct of the directors, or officers thereof, such officers shall be jointly and severally liable to an action by any one injured thereby.

5679. Penalty for refusal to obey order of court.

SEC. 737. Any person who, without good reason, refuses to obey an order of the court, as provided in this chapter, shall be deemed guilty of a contempt of court, and shall be fined in any sum not exceeding five thousand dollars, and imprisonment in the county jail until he comply with said

order, and shall be further liable for the damages resulting to any person on account of his refusal to obey such order.

5680. Quo warranto actions take precedence.

SEC. 738. Actions under this chapter in any court shall have precedence of any civil business pending therein; and the court, if the matter is of public concern, shall, on motion of the attorney-general, or of the attorney of the party, require as speedy a trial of the merits of the case as may be consistent with the rights of the parties.

Mont. Civ. P., 1433; Utah, 3624.

5681. Procedure in supreme same as in district court—Jury.

SEC. 739. Actions under this chapter commenced in the supreme court shall be conducted in the same manner as if commenced in the district court, and the clerk of the supreme court shall have the same authority to issue process and to enter orders and judgments as the clerk of the district court has in like cases. All pleadings and the conduct of the trial shall be the same as in the district court. If a jury is required to determine an issue of fact, the court shall order the question to be tried before a jury in the district court of any county designated in such order, and that the verdict be certified to the supreme court.

Mont. Civ. P., 1434; Utah, 3625.

5682. Appeal does not stay judgment of ouster.

SEC. 740. If the action is commenced in the district court, an appeal may be taken from the final judgment by either party to the supreme court as in other cases; but if there is judgment of ouster against the defendant, there shall be no stay of execution or proceedings pending such appeal.

Mont. Civ. P., 1435; Utah, 3626.

CHAPTER 72

CERTIORARI

5683. Writ of certiorari denominated writ of review.
5684. When the writ should be granted.
5685. Application for writ on affidavit, when court may grant.
5686. The writ, to whom directed.
5687. Idem—What to command.
5688. When stay of proceedings not wanted —Words requiring stay omitted.
5689. Service of writ.
5690. Review upon writ, extent of.
5691. Return of writ—Procedure—Court may give judgment, effect of.
5692. Clerk to transmit copy of judgment to officer having custody of record.
5693. Judgment roll, what constitutes—Appeal, how taken.

5683. Writ of certiorari denominated writ of review.

SEC. 741. The writ of certiorari may be denominated the writ of review.

Kerr, C. C. P., 1067.

A writ of certiorari is not inhibited to a party aggrieved in all proceedings or actions wherein a right of appeal is given. Paul v. Armstrong, 1 Nev. 82, 95.

The province of the writ of certiorari extends only to the question of jurisdictional power. State v. Washoe Co., 5 Nev. 317; Maxwell v. Rives, 11 Nev. 213.

See citations under Const., sec. 319, ante.

The only question which can be inquired into on certiorari is whether the inferior board or tribunal had jurisdiction to do the acts sought to be reviewed. State ex rel. Fall v. Humboldt Co., 6 Nev. 100, 101.

Inadmissible return, motion to strike out. State ex rel. Thompson v. Board of Equalization, 7 Nev. 83, 91, 93.

What return may include. Idem.

Certificate on information not certificate of fact. Idem.

Certiorari lies to annul a justice court judgment, void because in excess of the jurisdiction of the justice's court since there is no right of appeal. Fitchett v. Henley, 31 Nev. 327, 340 (102 P. 865); Williams v. Henderson, 22 Nev. 103 (36 P. 459).

5684. When the writ should be granted.

SEC. 742. This writ may be granted, on application, by the supreme court, a district court, or a judge of the district court. When the writ is

issued by the district court or a judge of the district court it shall be made returnable before the district court. The writ shall be granted in all cases when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.

Kerr, C. C. P., 1068.

Regarding jurisdiction of supreme court to issue writs of certiorari, see Const., sec. 319; and concerning power of district courts and judges to issue these writs, see Const., sec. 321.

Judgment of district court, when not a bar. Twaddle v. Washoe Co., 12 Nev. 17.

Where on certiorari an order of county commissioners discharging a supplemental assessment, the record showed that the commissioners acted within their jurisdiction, and it was objected that the evidence was in conflict with the order, it was held, that the question as to how they acted was not a subject of review on certiorari. State ex rel. Mason v. Ormsby Co., 7 Nev. 393, 396.

If a board of county commissioners regularly pursue its authority and act within its jurisdiction, there can be no error in its action which can be reviewed on certiorari. Hetzel v. Eureka Co., 8 Nev. 359, 362.

An appellate court cannot, upon the writ of certiorari, review contempt proceeding upon the merits. (Beatty, J., dissenting.) Phillips v. Welch, 12 Nev. 159, 175.

The review upon certiorari extends only to the question whether the inferior tribunal has kept within its jurisdiction. In re Wixom, 12 Nev. 219, 223.

The writ of certiorari can only be issued where the inferior tribunal, in the exercise of judicial functions, has exceeded its jurisdiction. In re Rourke, 13 Nev. 253, 256.

A justice of the peace in issuing execution upon a judgment acts ministerially, and such act, however erroneous, cannot be reviewed upon certiorari. Idem.

The action of a judicial officer in regard to matters which are exclusively executive or administrative in their nature, even when the act of the legislature requiring such duties to be performed is in violation of constitutional provisions, cannot be reviewed by certiorari. Esmeralda Co. v. District Court, 18 Nev. 438, 439 (5 P. 64).

The supreme court is only authorized to review the record and proceedings of inferior courts, officers or tribunals acting in a judicial capacity and exercising judicial functions. Idem. Also, State ex rel. Beck v. Washoe Co., 23 Nev. 247, 248 (45 P. 529).

The making of an order by a board of county commissioners for the employment of a firm of attorneys in certain litigation in which the county was interested is not the exercise of judicial functions, and such order will not be reviewed on certiorari. State ex rel. Beck v. Washoe Co., 23 Nev. 247, 248 (45 P. 529).

Upon this writ the supreme court has no power to pass upon the constitutionality of an act incorporating the city of Reno nor the right of respondents to exercise the functions of city council. State ex rel. Fletcher v. Osburn, 24 Nev. 187, 190 (51 P. 837).

Certiorari is the proper remedy by which to review municipal regulations and ordinances which are judicial in nature, but should never be allowed to review such ordinances or resolutions as are legislative in character. Idem.

The determination as to the result of an election by a canvass of the returns of a city council is not a judicial act. Idem.

The determination of a city council to issue bonds in conformity with the result of an election is not a judicial act. Idem.

The revocation of a lease by a board of county commissioners is not the exercise of judicial functions, and if the lessees obtained any right under the original order, certiorari is not a proper remedy therefor. Southern Development Co. v. Douglass, 26 Nev. 50, 54.

Where the action to review which certiorari is brought is dismissed by the successful party on the service of the writ, at his own costs, the writ will also be dismissed. State ex rel. Watt v. Jones, 27 Nev. 58 (71 P. 664).

Where on service of such writ, the successful party dismisses the action, it is a confession of error, and the costs of the certiorari will be awarded petitioner, without regard to whether the case was a proper one for certiorari. Idem.

Certiorari does not lie from the supreme court to review a conviction before a justice on the ground that the statute authorizing the conviction is unconstitutional. Chapman v. Justice Court, 29 Nev. 154, 158 (86 P. 552).

Certiorari will lie from the supreme court to review a judgment rendered on appeal from conviction before a justice, though it is claimed that the district court as well as the justice court has no jurisdiction. Idem.

Certiorari will not lie in a criminal case merely because the time for taking an appeal has been suffered to elapse. Idem.

Certiorari does not lie where there is an appeal. Leonard v. Peacock, 8 Nev. 157; Nev. Cent. R. Co. v. District Court, 21 Nev. 409 (32 P. 673).

See Paul v. Armstrong, under sec. 741 of this act.

A board of county commisioners in contracting for the indexing of the records did not exercise judicial functions, and

therefore the writ will not lie. State ex rel. Murphy v. White Pine Co., 31 Nev. 113, 117 (101 P. 104).

Certiorari will only lie to review the proceedings of a board exercising judicial functions, and then only when there is no other plain and adequate remedy. Idem.

Upon a return to a writ of certiorari the supreme court can only inquire whether the tribunal certifying its proceedings has, or has not, exceeded its jurisdiction. Maynard v. Railey, 2 Nev. 313, 314.

5685. Application for writ on affidavit, when court may grant.

SEC. 743. The application shall be made on affidavit by the party beneficially interested, and the court, or judge to whom the application is made, may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without further notice.

Kerr, C. C. P., 1069.

A writ of certiorari will not be issued to review claims against a county which have been audited, allowed and paid. State ex rel. Beck v. Washoe Co., 14 Nev. 69.

5686. The writ, to whom directed.

SEC. 744. The writ may be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, shall return the writ with the transcript required.

Kerr, C. C. P., 1070.

Though the return to a writ of certiorari may include, in addition to the record properly so called, such orders and proceedings in the nature of records, and as much of the evidence as may bear upon the question of jurisdiction, it cannot include matter which is neither a part of the record nor the proceedings before the inferior tribunal, such as affidavits presented to the clerk of such tribunal after the issuance of a writ or his certificate based thereon. State ex rel. Thompson v. Board of Equalization, 7 Nev. 83, 95.

5687. Idem—What to commmand.

SEC. 745. The writ of review shall command the party to whom it is directed to certify fully to the court before which the writ is returnable, at a specified time and place, and annex to the writ a transcript of the record and proceeding, describing or referring to them with convenient certainty, that the same may be reviewed by the court, and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed.

Kerr, C. C. P., 1071.

On certiorari against the board of county commissioners, a motion by respondent, to file and make a part of the record papers not embraced in the record or proceedings of the board, should be denied. State ex rel. Hayes v. White Pine Co., 22 Nev. 80 (35 P. 485).

See State ex rel. Thompson v. Board of Equalization, under sec. 744 of this act.

No more of the facts are required to be returned to a writ of certiorari than are necessary to determine jurisdiction, and the return being deemed conclusive, no evidence, not included therein, will be received and examined. Alexander v. Archer, 21 Nev. 23 (24 P. 373).

5688. When stay of proceedings not wanted—Words requiring stay omitted.

SEC. 746. If a stay of proceedings be not intended the words requiring the stay shall be omitted from the writ. These words may be inserted or omitted, in the sound discretion of the court or the judge issuing the writ, but if omitted, the power of the inferior court or officer shall not be suspended nor the proceedings stayed.

Kerr, C. C. P., 1072.

5689. Service of writ.

SEC. 747. The writ shall be served in the same manner as a summons

in civil action, except when otherwise expressly directed by the court, or judge issuing the writ.

Kerr, C. C. P., 1073.

5690. Review upon writ, extent of.

SEC. 748. The review upon this writ shall not be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer.

Kerr, C. C. P., 1074.

If the court erred in allowing any costs that were not taxable against the relator, it was not an excess of jurisdiction and its action cannot be reviewed upon certiorari. State ex rel. Quinn v. District Court, 16 Nev. 76.

Order on proceedings against garnishee not reviewable on certiorari. Birchfield v. Harris, 9 Nev. 382.

Criminal proceedings instituted for offense committed upon land, jurisdiction of which has been ceded to the United States, were annulled upon certiorari. State ex rel. Jones v. Mack, 23 Nev. 359 (62 A. S. 811, 47 P. 763).

See Maynard v. Railey, under sec. 742 of this act.

See Hetzel v. Eureka Co., Phillips v. Welch, In re Wixom, State ex rel. Fletcher v. Osburn, and State ex rel. Watt v. Jones, under sec. 745 of this act.

Error in allowing costs not properly taxable against a party cannot be reviewed on certiorari. State ex rel. Thompson v. District Court, 23 Nev. 243, 246 (45 P. 467).

Certiorari does not lie when a court has jurisdiction of the parties and the subject-matter, and jurisdiction is questioned only by a supplemental answer pleading a former judgment as a bar to the action. Wilson v. Morse, 25 Nev. 375, 376 (60 P. 832).

The inquiry on a writ of certiorari will not be extended further than to determine whether the inferior tribunal has jurisdiction to make the orders complained of; and, if the record discloses that it has complete jurisdiction, any error in an order will not be considered. Kapp v. District Court, 31 Nev. 444 (103 P. 235).

Where the court has jurisdiction of divorce action, and has discretion to make such allowance to the wife as the circumstances warrant, pendente lite, the supreme court will not annul such an order by writ of certiorari. Idem.

See State ex rel. Kerr v. Pike, 32 Nev. 189 (105 P. 1022); State ex rel. Cohn v. Mack, District Judge, 26 Nev. 253; So. Development Co. v. Board of Com. Esmeralda County, 26 Nev. 51; State ex rel. Watt v. Jones, District Judge, 27 Nev. 58; Jumbo M. Co. v. Murphy, District Judge, 28 Nev. 253; Andrews v. Cook, 28 Nev. 265; Lutz v. Murphy, District Judge, 29 Nev. 152; State v. Launiza, 29 Nev. 191; Chapman v. Brissell, 29 Nev. 154.

5691. Return of writ—Procedure—Court may give judgment, effect of.

SEC. 749. If the return to the writ be defective, the court may order a further return to be made. When a full return has been made, the court shall proceed to hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling or modifying the proceedings below.

Kerr, C. C. P., 1075.

See Phillips v. Welch, under sec. 742 of this act.

A party seeking to review by certiorari a justice's judgment in an action for trespass on the ground that title to real estate was involved, cannot on rehearing in the supreme court, after the dismissal of the writ, introduce an amended record showing that a general denial of the allegations of the complaint by oral answer was entered in the justice's court. State ex rel. Launiza v. Justice Court, 29 Nev. 192, 203 (87 P. 1).

A probate court has power to issue a writ of restitution, in an action of forcible entry and unlawful detainer brought before it on certiorari. Paul v. Armstrong, 1 Nev. 82, 104.

5692. Clerk to transmit copy of judgment to officer having custody of record.

SEC. 750. A copy of the judgment, signed by the clerk, shall be transmitted to the inferior tribunal, board, or officer having the custody of the record or proceeding certified up.

Kerr, C. C. P., 1076.

If proceedings of an inferior court are annulled on certiorari, there is no further positive or affirmative action to be taken by the inferior tribunal. Leonard v. Peacock, 8 Nev. 157, 160.

In certiorari cases the judgment roll is

preserved in the court granting the writ, as in the court of original jurisdiction in an ordinary case, and the copy only of the judgment is sent to the inferior tribunal. Idem.

5693. Judgment roll, what constitutes—Appeal, how taken.

SEC. 751. A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, shall constitute the judgment roll. If the proceedings be had in any other than the supreme court, an appeal may be taken from the judgment in the same manner and upon the same terms as from a judgment in a civil action.

Kerr, C. C. P., 1077.

CHAPTER 73

MANDAMUS

5694. Mandamus denominated writ of mandate.
5695. In what cases the writ may issue.
5696. Writ, when and how issued.
5697. Writ must be either alternative or peremptory—Form of.
5698. When alternative or peremptory will issue—Notice—Default—Hearing by court.
5699. Answer to writ may show cause, how made.
5700. When answer raises question of fact—Questions tried before jury.
5701. May object to sufficiency of answer and introduce proof.
5702. New trial may be had, when—Jury summoned within five days.
5703. Clerk to transmit verdict, when—Argument—Notice.
5704. If no answer filed, case how heard—If certain answer, argument to be heard.
5705. Execution may issue to enforce judgment.
5706. Writ, how served.
5707. Penalty for refusal to obey writ.

5694. Mandamus denominated writ of mandate.

SEC. 752. The writ of mandamus may be denominated the writ of mandate.

Kerr, C. C. P., 1084.

Mandamus is the proper remedy to put one into office where the title of the relator is clear, and no other person is claiming the office under color of right. State ex rel. Curtis v. McCullough, 3 Nev. 202.

The office of mandamus may be to compel the action, but it cannot be to correct the errors of an inferior court. When such court has acted, its action, however informal or erroneous, cannot be set aside or reversed by such writ. State ex rel. Treadway v. Wright, 4 Nev. 119, 123.

Cavanaugh v. Wright (2 Nev. 166), as to the propriety of mandamus to compel an inferior court to proceed with the trial, cited with approval. Idem.

A writ of mandamus requiring a board of trustees of a mining corporation to call an election, obliges them to take the proper steps for such election in the manner provided by law. Flagg v. Lady Bryan M. Co., 4 Nev. 401.

The writ of mandamus will not be issued to compel a district judge to try an action for malicious injury to real estate, transferred from a justice's court, because the district court has no jurisdiction of the offense. State ex rel. Murphy v. Rising, 10 Nev. 97.

See citations under Const., sec. 319, ante.

Mandamus is not the proper remedy when relator has a plain, speedy and adequate remedy at law. State ex rel. Elliott v. Guerrero, 12 Nev. 105.

Mandamus ought not to be issued to compel the trustees of a corporation to issue certain certificates of stock to relator where it appears, from the petition, that the stock is also claimed by other persons not parties to the proceedings before the court. Idem.

5695. In what cases the writ may issue.

SEC. 753. It may be issued by the supreme court, a district court, or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person. When issued by a district court or a judge of the district court it shall be made returnable before the district court.

Kerr, C. C. P., 1085.

Regarding jurisdiction of supreme court and district courts and judges to issue writs of mandamus, see Const., secs. 319, 321.

See Curtis v. McCullough and State ex rel. Treadway v. Wright, under sec. 752 of this act.

See citations of State ex rel. White v. Dickerson, under secs. 294 and 300, ante.

A mandamus will not issue to require the performance of a duty, unless it appears that the defendant has it in his power to perform the duty required. State ex rel. McGuire v. Waterman, 5 Nev. 323, 326.

The service of the alternative writ of mandamus upon the president of a corporation held sufficient in this case. The better practice is to serve each individual trustee. State ex rel. Sears v. Wright, 10 Nev. 174.

A mandamus directed against the individual trustees of a corporation is virtually the same as if directed against the board of trustees, and is sufficient. Idem.

The verification to a petition for mandamus in the form of a jurat to ordinary affidavits is sufficient. Idem.

To entitle a party to intervene in proceedings for a writ of mandamus, it must be shown that the applicant would either gain or lose by the direct legal operation or effect of any decision that might be rendered. Idem.

Before relator can obtain the writ of mandamus, he must establish sufficient facts to show that he has a legal right to have something done by respondents which they had refused to do. Idem.

The relator should not be compelled to contest his rights against third persons; the investigation should be limited to such facts as are necessary to determine the rights of the parties properly before the courts. Idem.

The mere fact that an action or proceeding will lie does not necessarily supersede the remedy by mandamus. The relator must not only have a specific, adequate and legal remedy, but it must be one competent to afford relief upon the very subject-matter of his application. Idem.

When the question is one of public rights, and the object of the writ of mandamus is to procure the enforcement of a public duty, the relator is not required to show that he has any legal or special interest in the result; he is interested, as a citizen, in having the laws executed and the right enforced. State ex rel. Piper v. Gracey, 11 Nev. 223, 233.

A private citizen and a taxpayer has such a direct and special interest in the collection of county taxes as entitles him to move for and prosecute the writ of mandamus to enforce that duty upon the part of public officers. Idem.

The proceeding by mandamus is a civil remedy having all the qualities and attributes of a civil action, and is applied solely for the protection of civil rights. Idem.

The alternative writ and the return thereto are usually regarded as constituting the pleadings, the writ standing in the place of the complaint and the return taking the place of the plea or answer in an ordinary action at law. Idem.

To justify the issuance of the writ to enforce the performance of an act by a public officer, the act must be one the performance of which the law specially enjoins as a duty resulting from his office, and an actual omission upon the part of the officer to perform. Idem.

The relator must show not only that the officer has failed to perform the required duty, but that the performance thereof is actually due from him at the time of the application. Idem.

The court cannot anticipate that a public officer will not perform his duties within the time prescribed by statute, and an actual default or omission of duty is just as essential a prerequisite to the issuance of the writ as is the want of an adequate remedy in the ordinary course of law. Idem.

Mandamus will not issue to compel a county treasurer to make a statement after his term of office has expired. State ex rel. Storey Co. v. Kirman, 17 Nev. 380, 381 (30 P. 1075).

Mandamus is the only speedy and adequate means by which a person entitled to a position of superintendent of a mining company, which he is unlawfully precluded from, may be placed in the enjoyment of the right which he claims. State ex rel. Ryan v. Cronan, 23 Nev. 437, 446 (49 P. 41).

Mandamus is the proper remedy to enforce the right of a licensed attorney to appear for his client, who is being prosecuted for an offense before a court-martial. State ex rel. Huffaker v. Crosby, 24 Nev. 116, 123 (77 A. S. 786, 50 P. 127).

Mandamus lies to compel commissioners to consider a petition to reduce a tax levy, but not to control exercise of their discretion in making a levy with the limitations prescribed by statute, where some tax must be levied (Talbot, C. J., dissenting). State ex rel. Holley v. Boerlin, 30 Nev. 473, 491, 494 (98 P. 402).

Mandamus does not lie to compel county commissioners to meet and abate a special tax levy where they have met and denied a petition to abate, though they have exceeded their powers. Idem.

Mandamus will not lie where there is a plain, speedy and adequate remedy at law. Idem.

Mandamus will not lie unless a clear legal right to the remedy is shown. Idem.

An order refusing to transfer a cause to United States court should be reviewed by appeal, and not by mandamus. State ex rel. Combination S. M. Co. v. Curler, 4 Nev. 445.

A registry agent may be compelled by mandamus to register the names of all persons applying and entitled under the constitution to vote. Davies v. McKeeby, 5 Nev. 369.

Where a discretion is to be exercised by an officer as to the manner in which an act may be done or the act depends upon his judgment, a writ of mandate directed to him will not control his discretion, but only command him to act without in any way

interfering with the manner of his action; but where a specific act is required to be done, and no discretion given, the writ may command the doing of the very act itself. Humboldt Co. v. Churchill Co., 6 Nev. 31.

When the performance of the duty sought to be enforced is of a character that could not be expected to be performed until demanded, the writ should not issue until demand made; but when the law unconditionally requires the doing of the specified act, no demand is necessary. Idem.

Where county commissioners were by statute absolutely required to set apart certain funds in the treasury for a specific purpose, and refused or neglected to do so, it was held that mandamus was the only plain, speedy and adequate remedy to compel them to do their duty. Idem.

Where the trustees of a public school refuse to admit a negro properly qualified for admission as a pupil in such school, an application for mandamus to compel such admission should be granted. State ex rel. Stoutmeyer v. Duffy, 7 Nev. 342 (8 A. R. 713).

Mandamus lies to compel an inferior tribunal to exercise its judgment and render a decision, when a failure of justice would otherwise result from delay or refusal to act; but it does not lie to review or correct its conclusions after it has acted. State v. Com. Eureka Co., 8 Nev. 309.

In a case where ejectment affords a plain, speedy and adequate remedy, mandamus cannot be maintained. Washoe Co. v. Hatch, 9 Nev. 357.

Costs, how taxed. State ex rel. Watkins v. Bonnifield, 10 Nev. 401.

Mandamus is not the proper remedy to try title to a public office. Denver v. Hobart, 10 Nev. 28.

If the acts which the state controller refuses to perform concern the public interests and are such as the law requires to be performed by him, the writ of mandamus should issue to compel the performance of such duty. State ex rel. Drake v. Hobart, 12 Nev. 408.

If the district court refuses to try a cause on the ground that it has no jurisdiction, the writ of mandamus will be issued to compel the court to hear and decide the cause upon its merits. Floral Springs W. Co. v. Rives, 14 Nev. 431.

Where the law specially enjoins a duty upon the county commissioners and leaves them no discretion, mandamus is the proper remedy to enforce performance of the law. Mau v. Liddle, 15 Nev. 271.

A writ of mandamus should not be issued before respondent is in actual default. State ex rel. Ah Chew v. Rising, 15 Nev. 164.

A subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment; and where it is vested with power to determine a question of fact, the duty is judicial, and however erroneous its decision may be, it cannot be compelled by mandamus to alter its determination. Hoole v. Kinkead, 16 Nev. 217.

Mandamus is the proper remedy to compel a district judge to settle a statement on motion for a new trial where it is his duty to settle the statement. State ex rel. Keane v. Murphy, 19 Nev. 89 (6 P. 840).

The rule that mandamus will not issue to control discretion, or revive judicial action, has no application to the determination or preliminary questions relating to the settlement of a statement on motion for a new trial. Idem.

Mandamus will not lie against the state controller to compel him to issue a warrant in any greater amount than audited and allowed by the board of examiners. State ex rel. Lyon Co. v. Hallock, 20 Nev. 326 (22 P. 123).

Where there are two or more simultaneous applicants for the same lands, and neither claims the preferred right by reason of prior occupancy or possession, mandamus to the land register to compel him to sell to one applicant, in preference to the others, will be denied. State ex rel. Sohl v. Preble, 20 Nev. 44 (14 P. 586).

Where there is but one applicant claiming a preferred right to purchase lands, the register should proceed at once to enter into a contract with the applicant, provided his claim presents a prima facie case, and was filed in time, and his duty in this respect, being ministerial, may be enforced by mandamus. State ex rel. Springer v. Preble, 20 Nev. 38 (14 P. 584).

Where a justice has dismissed an action, a writ of mandamus will not lie to compel him to proceed and try the action, although such dismissal was error. N. C. R. R. Co. v. District Court, 21 Nev. 409 (32 P. 673).

Where a board of commissioners, without legal justification, refuses to allow a claim based upon a judgment regularly obtained against the county, mandamus is the proper remedy. State ex rel. Humboldt Co. v. Lander Co., 22 Nev. 71 (35 P. 300).

The writ of mandamus should be resorted to only when the usual and ordinary remedies fail to afford adequate relief, and without it there would be a failure of justice. State ex rel. Torreyson v. Storey Co., 22 Nev. 263 (38 P. 668).

A petition for mandamus must show on its face a clear legal right to that for which it is sought in the proceeding. State ex rel. Pyne v. La Grave, 22 Nev. 417 (41 P. 115).

Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives, nor will the writ issue unless the relator shows a clear legal right to the relief demanded. State ex rel. Shaw v. Noyes, 25 Nev. 32 (56 P. 946).

On filing an application for mandamus, the general practice of the supreme court is to issue an order to respondents to show cause why the relief asked should not be

granted. State ex rel. Gleeson v. Jumbo Ex. M. Co., 30 Nev. 192 (133 A. S. 715, 94 P. 74).

While there is little difference whether the issues on a mandamus proceeding are raised by a motion to quash a citation or by demurrer, it is the better practice to raise any objection by demurrer or answer. Idem.

Where an affidavit for mandamus was entitled against a corporation and individuals, who were its directors, separate demurrers filed by the individual defendants and respondents are proper. Idem.

Mandamus to compel the issuance and delivery of the stock of a corporation will not lie unless the stock sought to be recovered has some pecuniary or special value peculiar in itself, differing from that of other like shares, or unless the shares are detained and the control of some corporation is at issue, and by securing the shares in question the party applying for a writ would obtain control; and in such cases it must affirmatively appear from the petition that the relator has a clear legal right to their possession and that he has no plain, speedy and adequate remedy at law. Idem.

See Turley v. Thomas, 31 Nev. 181.

Mandamus will issue to compel a judge who was of counsel in an action previous to his appointment as judge to change the place of trial of such action to some other judicial district, although no motion for that purpose was ever made in open court, where the application for the change, signed by petitioner's attorneys, was presented to the judge, the originals later being properly filed, and the motion for removal was informally made, and a list of authorities forwarded to him, he being engaged in judicial duties in another county, and, from his reasons for refusal, it was evident that he would not have granted the motion, had it been formally made. (Talbot, J., dissenting). State ex rel. Gamble et al. v. Murphy, 27 Nev. 233.

Mandamus will not lie to compel the assessor, after once making valuation of property for the purpose of taxation, to makes a revaluation, though the court finds the valuation fixed to be excessive. Hardin v. Guthrie, 26 Nev. 246.

As to when county treasurer will be compelled to apportion license money to state and city funds. State ex rel. City of Reno v. Boyd, 27 Nev. 249.

A writ of mandamus will issue to compel a district judge to settle statement on motion for new trial preliminary to appeal in estate proceedings to set aside a homestead to the widow. State ex rel. Cook v. Langan, 32 Nev. 176 (105 P. 568).

Mandamus will not lie where there is a plain, speedy, and adequate remedy, by motion to dismiss an appeal, for determination of the same matter. An appeal from an order setting aside a default entered by the clerk is not within the cases set forth in the section of the civil practice act providing when an appeal may be taken, and therefore mandamus will not lie. State ex rel. Botsford v. Langan, 29 Nev. 459 (91 P. 737).

The question whether the court has exceeded his power and jurisdiction cannot be determined in mandamus. State ex rel. Office Specialty Co. v. Curler, 26 Nev. 347.

Where relator's complaint for divorce against his wife alleged that the acts constituting the cause of action were committed by defendant before she became insane, her subsequent insanity constituted no ground for the trial court's refusal to try the cause which was at issue, during the continuance of such insanity. Where the trial judge did not deny or answer the allegation of a petition for mandamus, that he had refused ever to try petitioner's divorce case on account of the insanity of the defendant, such allegation would be regarded as admitted. State ex rel. Bachelder v. Murphy, 29 Nev. 149.

As to when controller will be compelled to draw warrant for salary of an appointive officer where an appropriation has been made by the legislature. See State ex rel. Davis v. Eggers, 29 Nev. 469, 16 L. R. A. (N. S.) 630, 91 P. 819; State ex rel. Fowler v. Eggers, 33 Nev. — (112 P. 699).

See, also, State ex rel. Mighels v. Eggers, 34 Nev. —.

As to when mandamus will lie to compel officers of mining company to stamp mining stock "treasury stock" or "promotion stock." "Treasury stock" and "promotion stock" defined. See State ex rel. Moore v. Man. Verde Co., 32 Nev. 474 (109 P. 442). See, also, State ex rel. Miles v. Wedge, 27 Nev. 63.

5696. Writ, when and how issued.

SEC. 754. This writ shall be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.

Kerr, C. C. P., 1086.

See State ex rel. Piper v. Gracey, State ex rel. Sears v. Wright, State ex rel. Ryan v. Cronan, State ex rel. Huffaker v. Crosby, and State ex rel. Holley v. Boerlin, under sec. 753 of this act.

The writ of mandamus will not be issued in a case where petitioner has a plain, speedy and adequate remedy at law. Mayberry v. Bowker, 14 Nev. 336, 340.

In view of the provisions of the above section, the old rule of practice, according to which mandamus proceedings are insti-

tuted in the name of the state upon the relation of the party interested, will not be disturbed. State ex rel. Office S. M. Co. v. Curler, 26 Nev. 347, 353 (67 P. 1075).

Under Stats. 1901, 93, it was held that, where the district judge heard the petition of a person claiming the benefit of the statute, but refused to appoint appraisers, mandamus would not issue to compel the judge to make such appointment, since the power to hear, given to him by the statute, involved the power to determine, and the determination upon such hearing being a judicial act, it could not be reviewed by mandamus. Idem.

The question whether the court has exceeded his power and jurisdiction cannot be determined in mandamus. Idem.

See State ex rel. Curtis v. McCullough, under sec. 752 of this act.

Where a district court refused to transfer a cause pending in it to a United States court, and mandamus was applied for to compel such transfer, it was held that such was not the proper remedy, for the reason that the writ could only direct the court below to act, not how to act, and that to entertain the application would be in effect to review judicial action, which is not the function of mandamus. State ex rel. Comb. S. M. Co. v. Curler, 4 Nev. 445, 447.

5697. Writ must be either alternative or peremptory—Form of.

SEC. 755. The writ shall be either alternative or peremptory. The alternative writ shall state generally the allegation against the party to whom it is directed, and command such party, immediately, after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ shall be in a similar form, except that the words requiring the party to show cause why he has not done as commanded shall be omitted, and a return day shall be inserted.

Kerr, C. C. P., 1087.

5698. When alternative or peremptory will issue—Notice—Default—Hearing by court.

SEC. 756. When the application to the court or district judge is made without notice to the adverse party, and the writ is allowed, the alternative shall be first issued; but if the application be upon due notice, and the writ is allowed, the peremptory may be issued in the first instance. The notice of the application, when given, shall be at least ten days. The writ shall not be granted by default. The case shall be heard by the court, whether the adverse party appear or not.

Kerr, C. C. P., 1088.

5699. Answer to writ may show cause, how made.

SEC. 757. On the return day of the alternative, or the day on which the application of the writ is noticed, or such further day as the court or district judge issuing the writ may allow, the party on whom the writ or notice shall have been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

Kerr, C. C. P., 1089.

It being shown by the affidavit and answer that relator was entitled to the office when he applied for the alternative writ, and so also when the original answer was filed, he is entitled to his costs incurred up to that time. State ex rel. Curtis v. McCullough, 3 Nev. 203, 223.

5700. When answer raises question of fact—Question tried before jury.

SEC. 758. If an answer is made, which raises a question as to matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for a writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had and the verdict certified to the court. The question to be tried shall be distinctly stated in the order for trial, and the county shall be designated in which the same shall be had.

The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

Kerr, C. C. P., 1090.

5701. May object to sufficiency of answer and introduce proof.

SEC. 759. On the trial the applicant shall not be precluded by the answer, of any valid objection to its sufficiency, and may contravail it by proof either in direct denial or by way of avoidance.

Kerr, C. C. P., 1091.

5702. New trial may be had, when—Jury summoned within five days.

SEC. 760. If either party is dissatisfied with the verdict of the jury, he may move for a new trial upon the minutes of the court as provided in section 379. The motion for a new trial may, upon reasonable notice, be brought on before the judge of the court in which the cause was tried either in term or vacation. If a new trial be granted, the jury shall, within five days thereafter, unless the parties agree on a longer time, be summoned to try the issue. After a second verdict in favor of the same party, a new trial shall not be had.

Kerr, C. C. P., 1092.

5703. Clerk to transmit verdict, when—Argument—Notice.

SEC. 761. If no notice for a new trial be given, or, if given, be denied, the clerk, within five days after the rendition of the verdict, or denial of the motion, shall transmit to the court in which the application for the writ is pending, a certified copy of the verdict, attached to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party.

Kerr, C. C. P., 1093.

5704. If no answer filed, case how heard—If certain answer, argument to be heard.

SEC. 762. If no answer be made, the case shall be heard on the papers of the applicant. If an answer be made which does not raise a question such as is mentioned in section 758, but only such matters as may be explained or avoided by a reply, the court may, in its discretion, grant time for replying. If the answer, or answer and reply, raise only questions of law, or put in issue immaterial statements, not affecting the substantial rights of the parties, the court shall proceed to hear, or fix a day for hearing, the argument of the case.

Kerr, C. C. P., 1094.

See State ex rel. Piper v. Gracey, under sec. 753 of this act.

5705. Execution may issue to enforce judgment.

SEC. 763. If judgment be given for the applicant, he shall recover the damages which he shall have sustained as found by the jury, or as may be determined by the court or referees, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and peremptory mandate shall also be awarded without delay.

Kerr, C. C. P., 1095.

5706. Writ, how served.

SEC. 764. The writ shall be served in the same manner as a summons in a civil action, except when otherwise expressly directed by the order of the court or district judge issuing the writ.

Kerr, C. C. P., 1096.

This section seems expressly to authorize the court to make the writ returnable at any time. State ex rel. Curtis v. McCullough, 3 Nev. 214.

5707. Penalty for refusal to obey writ.

SEC. 765. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court that any member of such tribunal, corporation, or board, or such person, upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, after notice and hearing adjudge the party guilty of contempt and upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned for a period not exceeding three months and may make any orders necessary and proper for the complete enforcement of the writ. If a fine be imposed upon a judge or officer who draws a salary from the state or county, a certified copy of the order shall be forwarded to the controller or county treasurer, as the case may be, and the amount thereof may be retained from the salary of such judge or officer. Such judge or officer for his wilful disobedience shall also be deemed guilty of a misdemeanor in office. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not.

Kerr, C. C. P., 1096, 1097.

CHAPTER 74

PROHIBITION

5708. Writ of prohibition defined.

SEC. 766. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.

Kerr, C. C. P., 1102.

5709. Where and when issued.

SEC. 767. It may be issued only by the supreme court, to an inferior tribunal, or to a corporation, board, or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.

Kerr, C. C. P., 1103.

Regarding jurisdiction of supreme court to issue writs of prohibition, see Const., sec. 319.

5710. Writ may be alternative or peremptory—Form of.

SEC. 768. The writ must be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed and command such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter.

The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted and a return day inserted.

Kerr, C. C. P., 1104.

The order of prohibition may issue from the supreme court in a proper case to arrest the progress of a trial. But such order should not issue where there is other and adequate remedy. The office of such writ is not to correct errors, but to prevent courts transcending the boundaries of their jurisdiction. Upon a writ of prohibition we cannot review an interlocutory order made in the court below. That can only be reviewed

on appeal from the final judgment. Low v. Crown Point M. Co., 2 Nev. 75, 77.

If the district court did not have power to proceed originally by indictment in a criminal case, prohibition is the proper remedy to prevent it from taking jurisdiction. Moore v. Orr, 30 Nev. 458 (90 P. 398).

A writ of prohibition will not issue to prevent an inferior court from trying an action once properly before it, but claimed to have been afterwards dismissed, as the question of dismissal was a proper one for the inferior court to decide; nor will the writ issue upon the claim that the action has been transferred to the circuit court of the United States, as that question is also a proper one for the inferior court to decide, subject to appeal, and for the further reason that the decision of this court would not be final should the United States court decide otherwise and remand the action to the state court for trial, and in either event error in the inferior court is only reviewable on appeal or by petition to the United States court. Walcott v. Wells, 21 Nev. 47 (37 A. S. 478, 9 L. R. A. 59, 24 P. 367).

A writ of prohibition cannot ordinarily be used to correct errors by inferior tribunals, and will not issue either in civil or criminal proceedings, where there is an adequate remedy by appeal or writ of certiorari.

Where an action was brought to recover possession of certain mining ground on an agreement containing a provision for plaintiff's taking possession of and working the mines, and the court had original jurisdiction to hear and determine the issues, if it erred in ordering judgment for plaintiff for possession and for an accounting, or for damages for defendant's refusal to deliver possession under the agreement, its decision was reviewable by appeal only, and not on a writ of prohibition.

Where defendants, in an action to recover a mining claim, contended that a provision of the decree in favor of plaintiff and directing an accounting was not within the issues, whether the court had jurisdiction to decree such an accounting was reviewable by appeal, and not by a writ of prohibition. Silver Peak Mines v. Second Judicial District Court, 33 Nev. — (110 P. 503).

While the great function of the writ of prohibition is to restrain courts and judicial tribunals from exceeding their jurisdiction, nevertheless, the writ has not been restricted exclusively to such class of cases, but it has run to other officers exercising or attempting to exercise judicial or quasi-judicial functions beyond their powers, where no other adequate remedy existed. State ex rel. Schloss v. Stevens, 33 Nev. — (116 P. 105).

The power conferred upon the supreme court to issue writs of mandamus, quo warranto, and other writs is an original jurisdiction, and not merely auxiliary to its appellate jurisdiction. Curtis v. McCullough, 3 Nev. 202, 214, 215, 216.

Where petitioners were sought to be removed from office for malfeasance, under our law, authorizing the filing of a complaint by a private complainant, the hearing of the matter by summary proceedings, and declaring that, if an appeal is taken from an order of removal, the officer removed shall not occupy the office pending appeal, and it was claimed that such sections were unconstitutional, petitioners' remedy by appeal was not adequate, and they were therefore entitled to a determination of the constitutionality of the statute on writ of prohibition to restrain the further prosecution of the removal proceedings against them. Bell v. District Court, 28 Nev. 280.

The writ of prohibition will not lie to restrain a judge of the district court from canvassing the returns from an election precinct in an election contest, since the party aggrieved by an erroneous action of the court has an adequate remedy by appeal. Turner v. Langan, 29 Nev. 281.

Proceedings for contempt being quasi-criminal, the petition or affidavit must show contempt before the court has jurisdiction to punish, and where the court attempts to punish for violation of a void order by referees, prohibition will issue, and the party is not required to review by appeal. Cline v. Langan, 31 Nev. 239.

Where a court; in appointing a receiver of a bank, had no jurisdiction of the proceeding because necessary parties had not been served with notice, prohibition is the proper remedy to restrain the court and the receivers appointed from proceeding under the order appointing the receiver and all orders subsequent thereto and based thereon. Golden v. District Court, 31 Nev. 250.

CHAPTER 75

GENERAL PROVISIONS AS TO CERTIORARI, MANDAMUS AND PROHIBITION

5711. Court may order return and hearing at any time.

SEC. 769. Writs of certiorari, mandamus, and prohibition may, in the discretion of the court, or judge issuing the writ, be made returnable and a hearing thereon be had at any time.

5712. Civil procedure applicable—Exception.

SEC. 770. Except as otherwise provided in the three chapters next preceding, the provisions of this code relative to civil actions in the district courts are applicable to and constitute the rules of practice in the proceedings mentioned in those chapters.

5713. New trials and appeals.

SEC. 771. The provisions of this act relative to new trials in, and appeals from the district court, except so far as they are inconsistent with the provisions of the three chapters next preceding, apply to the proceedings mentioned in those chapters.

See section 319 State Constitution and authorities thereunder cited, pages 93-95, ante.

CHAPTER 76

JUSTICES' COURTS—JURISDICTION

5714. Justices' courts, where held—Always open—Jurisdiction.

SEC. 772. The courts held by justices of the peace are denominated justices' courts. They shall have no terms, but shall always be open. Justices' courts shall be held in their respective townships, precincts or cities.

Justices' courts shall have jurisdiction of the following actions and proceedings:

1. In actions arising on contract for the recovery of money only if the sum claimed, exclusive of interest, does not exceed three hundred dollars.

2. In actions for damages for injury to the person, or for taking, detaining, or injuring personal property, or for injury to real property where no issue is raised by the verified answer of the defendant involving the title to or possession of the same, if the damage claimed does not exceed three hundred dollars.

3. In actions for a fine, penalty, or forfeiture, not exceeding three hundred dollars, given by statute, or the ordinance of an incorporated or unincorporated city, where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine.

4. In actions upon bonds or undertakings conditioned for the payment of money, if the sum claimed does not exceed three hundred dollars, though the penalty may exceed that sum.

5. Of an action upon a surety bond or undertaking, though the penalty exceed, if the amount claimed does not exceed three hundred dollars.

6. In actions to recover the possession of personal property if the value of such property does not exceed three hundred dollars.

7. To take and enter judgment on the confession of a defendant, when the amount confessed, exclusive of interest, does not exceed three hundred dollars.

8. Of actions for the possession of lands and tenements, where the relation of landlord and tenant exists.

9. Of actions when the possession of lands and tenements has been unlawfully or fraudulently obtained or withheld, in which case the proceedings shall be as prescribed by the acts upon that subject.

10. Of suits for the collection of taxes, where the amount of the tax sued for does not exceed three hundred dollars.

11. Concurrent jurisdiction with the district courts of actions for the enforcement of mechanics' liens, where the amount of the lien sought to be enforced, exclusive of interest, does not exceed three hundred dollars.

The jurisdiction conferred by this section shall not extend to a civil action, in which the title of real property or mining claims, or questions affecting the boundaries of land, are involved, or to actions to enforce mechanics' liens; and if questions of title to real property be involved, cases involving such questions shall be disposed of as hereinafter provided in this act.

Regarding jurisdiction of justices of the peace, see Const., sec. 323. Jurisdiction in criminal cases, sec. 4851; extends to limits of the county, sec. 7470.

Trials before justice of the peace for misdemeanors, sec. 7470, et seq.

Duties of as committing magistrate, sec. 6929, et seq.
In case of illness or absence may call another, sec. 4926.
Ex officio registry agent, and as such may appoint deputy, sec. 1705.
Violation of town ordinances, see sec. 866.
Proceedings for sale of personal property for taxes, sec. 3679.
See Children, sec. 741, 742.
Official bond and oath, sec. 4927.
See Const., sec. 321, 323.

Consent of parties cannot give jurisdiction. Paul v. Armstrong, 1 Nev. 82, 100.

Courts of justices of the peace, being mere creatures of statutes, have no jurisdiction except that which is expressly granted them by law. Paul v. Beegan 1 Nev. 327, 330, 331.

When any rights are claimed by virtue of a judgment of a court of special or limited jurisdiction, all the facts necessary to confer jurisdiction must be affirmatively shown. Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188.

A mere recital in a transcript from a justice's docket that defendant was duly served is not sufficient. Before the transcript can be admitted to establish the rights of one holding under the judgment of a justice, the facts in regard to the service of summons must appear. McDonald v. Prescott, 2 Nev. 109.

Under sec. 539, Stats. 1869, 196, it was decided: Justices of the peace have jurisdiction to try an action for malicious injury to real estate in cases where the defendant claims an adverse title to the property. State ex rel. Murphy v. Rising, 10 Nev. 97.

Stats. 1869, 196, sec. 509, provides that in cases where the damages claimed for an injury to real property do not exceed $300, the justices' courts shall have jurisdiction. Secs. 1 and 2, Stats. 1893, 30, provide for damages against anyone raising live stock on land to which another has title, or on which first payment has been made by another. A complaint filed in the district court alleged trespass by defendant's sheep on plaintiff's land to his damage in the sum of $100. Defendant demurred for lack of jurisdiction because of the amount involved. It was held that, no issue being made save that of law raised by demurrer, the court could not have known whether title to real estate be involved, and properly sustained a demurrer. Dangberg v. Ruhenstroth, 26 Nev. 455, 459 (70 P. 320).

Courts of justices of the peace, being of special and limited jurisdiction, can take nothing by intendment or implication. Paul v. Armstrong, 1 Nev. 82.

Where a statute prescribes the mode of acquiring jurisdiction, that mode must be complied with or the proceedings will be a nullity. Idem.

A justice of the peace has jurisdiction of an action against a county for a sum less than $300. Floral Springs W. Co. v. Rives, 14 Nev. 431.

CHAPTER 77

JUSTICES' COURTS—PLACE OF TRIAL

5715. Actions, in what township or city may be commenced.
5716. Place of trial may be changed in certain cases.
5717. Limitation on the right to change.
5718. To what court transferred.
5719. Proceedings after order changing place of trial.
5720. Effect of an order changing place of trial.
5721. Transfer of cases to the district court.

5715. Actions, in what township or city may be commenced.

SEC. 773. Actions in justices' courts must be commenced, and, subject to the right to change the place of trial, as in this chapter provided, must be tried:

1. If there is no justices' court for the township or city in which the defendant resides: in any city or township of the county in which he resides.

2. When two or more persons are jointly, or jointly and severally, bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties: in the township or city in which any of the persons liable may reside.

3. In cases of injury to the person or property: in the township or city where the injury was committed, or where the defendant resides.

4. If for the recovery of personal property, or the value thereof, or damages for taking or detaining the same: in the township or city in which the property may be found, or in which the property was taken, or in which the defendant resides.

5. When the defendant is a nonresident of the county: in any township or city wherein he may be found.

6. When the defendant is a nonresident of the state: in any township or city in the state.

7. When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city: in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred shall be deemed to be the township or city in which it is to be performed, unless there is a special contract to the contrary.

8. When the parties voluntarily appear and plead without summons: in any township or city in the state.

9. In all other cases: in the township or city in which the defendant resides.

Kerr, C. C. P., 832.

If a judgment be rendered by a justice of the peace in a case in which he has acquired no jurisdiction, his action is void; and where there is no other plain, speedy and adequate remedy, it will be annulled on certiorari. Roy v. Whitford, 9 Nev. 370, 372.

5716. Place of trial may be changed in certain cases.

SEC. 774. The court may, at any time before the trial, on motion, change the place of trial in the following cases:

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

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

3. When a jury has been demanded, and either party makes and files an affidavit that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township or city against him.

4. When, from any cause, the justice is disqualified from acting.

5. When the justice is sick or unable to act.

In lieu of changing the place of trial, the justice before whom the action is pending, may for any of the cases mentioned in the 1, 2, 4 and 5 subdivisions of this section call another justice of the county to conduct the trial.

Kerr, C. C. P., 833.

5717. Limitation on the right to change.

SEC. 775. The place of trial cannot be changed, on motion of the same party, more than once, upon any or all the grounds specified in the first, second, and third subdivisions of the preceding section.

Kerr, C. C. P., 834.

5718. To what court transferred.

SEC. 776. When the court orders the place of trial to be changed, the action must be transferred for trial to a court the parties may agree upon; and if they do not so agree, then to another justice's court in the same county.

Kerr, C. C. P., 835.

5719. Proceedings after order changing place of trial.

SEC. 777. After an order has been made, transferring the action for trial to another court, the following proceedings must be had:

1. The justice ordering the transfer must immediately transmit to the justice of the court to which it is transferred, on payment by the party

applying of all the costs that have accrued, all the papers in the action, together with a certified transcript from his docket of the proceedings therein.

2. Upon the receipt by him of such papers, the justice to whom the case is transferred has thereafter the same jurisdiction over the action as though it had been commenced in his court. He must issue a notice, stating when and where the trial will take place, which notice must be served upon the parties at least one day before the time fixed for trial.

Kerr, C. C. P., 836.

5720. Effect of an order changing place of trial.

SEC. 778. From the time the order changing the place of trial is made the court to which the action is thereby transferred has the same jurisdiction over it as though it had been commenced in such court.

Kerr, C. C. P., 837.

5721. Transfer of cases to the district court.

SEC. 779. The parties to an action in a justice's court cannot give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine; nor can any issue presenting such question be tried by such court; and if it appear, from the plaintiff's own showing on the trial, or from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, or the legality of any tax, impost, assessment, toll, or municipal fine, the justice must suspend all further proceedings in the action and certify the pleadings, and, if any of the pleadings are oral, a transcript of the same, from his docket to the clerk of the district court of the county; and from the time of filing such pleadings or transcript with the clerk, the district court shall have over the action the same jurisdiction as if it had been commenced therein; *provided,* that in cases of forcible entry and detainer, of which justices' courts have jurisdiction, any evidence, otherwise competent, may be given, and any question properly involved therein may be determined.

Kerr, C. C. P., 838.
See sec. 833.

Where the trial of a case in a justice's court, involves a question of possession and right of possession of real estate, the case should be transferred to the district court. Tull v. Anderson, 15 Nev. 426.

Where plaintiff suing in a justice's court for trespass on land gave no evidence of his title by patent, deed, prior possession or otherwise, to any part of the land, the justice had jurisdiction to enter judgment for defendant for the costs, title to land not being involved. State ex rel. Launiza v. Justice Court, 29 Nev. 191, 198 (87 P. 1).

Where, in trespass on land, action brought in a justice's court, and plaintiff did not prove ownership to the land, and there was no evidence that the same belonged to a third person, and defendant made no claim to the land, title to land was not necessarily involved. Idem.

A justice of the peace cannot certify a case to the district court, on the ground that title to real estate is involved, unless it appears by the verified answer or on plaintiff's own showing that title is involved. Idem.

See Const., sec. 323, ante.

It may be that the district court would have power to remand in cases where a justice of the peace had erroneously certified a case to the district court upon the mistaken theory that a question involving title to real estate, or the legality of a tax, impost, assessment, toll or municipal fine was involved. Bancroft v. Pike, 33 Nev. — (110 P. 2).

CHAPTER 78

MANNER OF COMMENCING ACTIONS IN JUSTICES' COURTS

5722. Actions, how commenced.
5723. Summons may issue within a year.
5724. Defendant may waive summons.
5725. Parties may appear in person or by attorney.
5726. When guardian necessary, appointed, how.

5727. Summons, how issued, directed, and what to contain.
5728. Time for appearance of defendant.
5729. Alias summons.
5730. Same.
5731. Summons, limitation on service of.
5732. Summons, by whom and how served.
5733. Notice of hearing.

5722. Actions, how commenced.

SEC. 780. An action in a justice's court is commenced by filing a complaint and the issuance of a summons thereon.

Kerr, C. C. P., 839.

An account was filed in the justice's court against "Irving, McKay & Co."; the summons was returned served on "the defendants," and the judgment was entered by default: Held, that the complaint and summons were sufficient to sustain the judgment. Martin v. District Court, 13 Nev. 85, 88.

5723. Summons may issue within a year.

SEC. 781. The court must indorse on the complaint the date upon which it was filed, and at any time within one year thereafter the plaintiff may have summons issued.

Kerr, C. C. P., 840.

5724. Defendant may waive summons.

SEC. 782. At any time after the complaint is filed, the defendant may, in writing, or by appearing and pleading, waive the issuing of summons.

Kerr, C. C. P., 841.

5725. Parties may appear in person or by attorney.

SEC. 783. Parties in justices' courts may appear and act in person or by attorney; and any person except the constable by whom the summons or jury process was served, may act as attorney.

Kerr, C. C. P., 842.

5726. When guardian necessary, how appointed.

SEC. 784. When an infant, insane, or incompetent person is a party, he must appear, either by his general guardian if he have one, or by a guardian ad litem appointed by the justice. When a guardian ad litem is appointed by the justice, he must be appointed as follows:

1. If the infant, insane, or incompetent person be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years; if under that age, or if insane or incompetent, upon the application of a relative or friend.

2. If the infant, insane, or incompetent person be defendant, the appointment must be made at the time the summons is returned or before the answer, upon the application of the infant, if he be of the age of fourteen years, and apply at or before the summons is returned; if he be under the age of fourteen, or be insane or incompetent, or neglect so to apply, then upon the application of a relative or friend, or any other party to the action, or by the justice, on his own motion.

Kerr, C. C. P., 843.

5727. Summons, how issued, directed, and what to contain.

SEC. 785. The summons must be directed to the defendant, signed by the justice, and must contain:

1. The title of the court, name of the county, or township in which the action is brought, and the names of the parties thereto.

2. A direction that the defendant appear and answer before the justice, at his office, as specified in section 786.

3. A notice that unless the defendant so appear and answer, the plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or will apply to the court for the relief

demanded in the complaint. If the plaintiff appears by attorney, the name of the attorney must be indorsed upon the summons.

Kerr, C. C. P., 844.

Cited, Martin v. District Court, 13 Nev. 89.

It is improper to take judgment on the completion of the publication in cases where a personal service cannot be had. The defendant is entitled to twenty days in which to make his appearance as in the case of personal service against one served elsewhere than within the county in which the action is brought. Forsyth v. Chambers, 30 Nev. 337, 340 (96 P. 930).

This section does not require that the names of the attorneys shall be included in the notice of publication. Idem.

5728. Time for appearance of defendant.

SEC. 786. The time specified in the summons for the appearance of the defendant must be as follows:

1. If an order of arrest be indorsed upon the summons, forthwith.

2. In all other cases, the summons must contain a direction that the defendant must appear and answer the complaint within five days, if the summons be served in the county, township, or city, in which the action is brought; within ten days, if served out of the township or city, but in the county in which the action is brought, and within twenty days, if served elsewhere.

Kerr, C. C. P., 845.

A justice of the peace has no jurisdiction to enter judgment in a case where the summons was personally served on defendant without the state in lieu of publication until after the expiration of six weeks from date of service. Pratt v. Stone, 25 Nev. 365, 370, 373 (60 P. 514).

See Forsyth v. Chambers, under sec. 785 of this act.

5729. Alias summons.

SEC. 787. If the summons is returned without being served upon any or all of the defendants, the justice, upon the demand of the plaintiff, may issue an alias summons, in the same form as the original, except that he may fix the time for the appearance of the defendant at a period not to exceed ninety days from its date.

Kerr, C. C. P., 846.

5730. Same.

SEC. 788. The justice may issue as many alias summons as may be demanded by the plaintiff.

Kerr, C. C. P., 847.

5731. Summons, limitation on service of.

SEC. 789. The summons cannot be served out of the county wherein the action is brought, except in the following cases:

1. When the action is upon the joint contract or obligation of two or more persons, one of whom resides within the county.

2. When the action is brought against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county, in which case the summons may be served in the county where he resides.

3. When the action is for injury to person or property, and the defendant resides in a different county, in which case summons may be served in the county wherein he may be found.

4. In all cases where the defendant was a resident of the county when the action was brought, and thereafter departed therefrom, in which event he may be served wherever he may be found.

5. In actions of forcible entry and detainer, or to enforce and foreclose liens on, or to recover possession of, personal property, situate within the county.

Kerr, C. C. P., 848.

5732. Summons, by whom and how served.

SEC. 790. The summons may be served by a sheriff or constable of any of the counties of this state or by any other person of the age of twenty-one years or over, not a party to the action. When a summons issued by a justice of the peace is to be served out of the county in which it was issued, the summons must have attached to it a certificate, under seal, by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace at the date of the summons, and must be served and returned, as provided in chapter 8 of this act, or it may be served by publication; and sections 84 to 88, both inclusive, of this act, so far as they relate to the publication of summons, are made applicable to justices' courts, the word "justice" being substituted for the word "judge" wherever the latter word occurs.

Kerr, C. C. P., 849.

Cited, Nesbitt v. Delamar's N. G. M. Co., 24 Nev. 282 (77 A. S. 867, 177 U. S. 523, 52 P. 609).

5733. Notice of hearing.

SEC. 791. When all the parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix the day for the trial of said cause, whether the issue is one of law or fact, and give notice thereof to the plaintiff and the defendants who have appeared, but in case any of the parties are represented by an attorney, then to such attorney. Such notice shall be in writing, signed by the justice, and substantially in the following form (filling blanks according to the facts):

In the justice court,.....township (or city), county of....., State of Nevada. ....., plaintiff, vs. ....., defendant. To....., plaintiff, or ....., attorney for plaintiff, and to ....., defendant, or ....., attorney for defendant.

You and each of you will please take notice that the undersigned justice of the peace before whom the above-entitled cause is pending, has set for hearing the demurrer of ....., filed in said cause (or has set the said cause for trial, as the case may be), before me at my office in said township (or city), at .... o'clock ....m., on the ..... day of ....., 19.....

Dated this.....day of....., 19.....

(Signed).....,

Justice of the peace.

Said notice shall be served by mail or personally. When served by mail the justice of the peace shall deposit copies thereof in a sealed envelope in the postoffice at least ten days before the trial or hearing addressed to each of the persons on whom it is to be served at their place of residence and the postage prepaid thereon; *provided,* that such notice shall be served by mail only when the attorney on whom service is to be made, resides out of the county in which said justice's court is situated. When personally served said notice shall be served at least five days before the trial or hearing on the persons on whom it is to be served by any person competent and qualified to serve a summons in a justice's court and when personally served it shall be served, returned and filed in like manner as a summons. The justice shall enter in his docket the date of trial or hearing; and when such notice shall have been served by mail the justice shall enter in his docket the date of mailing such notice of trial or hearing, and such entry shall be prima facie evidence of the fact of such service. The parties are entitled to one hour in which to appear after the time fixed in said notice, but are not bound to remain longer than that time unless both parties have appeared and the justice, being present, is engaged in the trial of another cause.

Kerr, C. C. P., 850.

CHAPTER 79

PLEADINGS IN JUSTICES' COURTS

5734. Form of pleadings.
5735. Pleadings in justices' courts.
5736. Complaint defined.
5737. When demurrer to complaint may be put in.
5738. Answer.
5739. If the defendant omits to set up counterclaim.
5740. When plaintiff may demur to answer.
5741. Proceedings on demurrer.
5742. Amendments of pleadings—Adjournment — Costs — Relief from judgment by default.
5743. Answer on demurrer to amended pleadings.

5734. Form of pleadings.

SEC. 792. Pleadings in justices' courts:

1. Are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.
2. May, except the complaint, be oral or in writing.
3. Must not be verified, unless otherwise provided in this title.
4. If in writing, must be filed with the justice.
5. If oral, an entry of their substance must be made in the docket.

Kerr, C. C. P., 851.

Under sec. 534, Stats. 1869, 196, it was held that the sufficiency of pleadings in justices' courts is not to be tested by the rules that are applied in the higher courts. The statute makes the copy of an account a sufficient complaint in justices' courts. It is allowed to import allegations that must be expressly made in similar actions commenced in the district court. Martin v. District Court, 13 Nev. 88.

Above was quoted with approval in Pratt v. Stone, 25 Nev. 371 (60 P. 514).

5735. Pleadings in justices' courts.

SEC. 793. The pleadings are:

1. The complaint by the plaintiff.
2. The demurrer to the complaint.
3. The answer by the defendant.
4. The demurrer to the answer.

Kerr, C. C. P., 852.

5736. Complaint defined.

SEC. 794. The complaint in justices' courts is a concise statement, in writing, of the facts constituting the plaintiff's cause of action; or a copy of the account, note, bill, bond, or instrument upon which the action is based.

Kerr, C. C. P., 853.

5737. When demurrer to complaint may be put in.

SEC. 795. The defendant may, at any time before answering, demur to the complaint.

Kerr, C. C. P., 854.

5738. Answer.

SEC. 796. The answer may contain a denial of any or all of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defense or counterclaim, upon which an action might be brought by the defendant against the plaintiff in a justice's court.

Kerr, C. C. P., 855.

An equitable defense to an action in a justice's court cannot be plead. Duffy v. Moran, 12 Nev. 96.

5739. If the defendant omits to set up counterclaim.

SEC. 797. If the defendant omit to set up a counterclaim in the cases mentioned in the last section, neither he nor his assignee can afterward maintain an action against the plaintiff therefor.

Kerr, C. C. P., 856.

5740. When plaintiff may demur to answer.

SEC. 798. When the answer contains new matter in avoidance, or constituting a defense or a counterclaim, the plaintiff may, at any time before the trial, demur to the same for insufficiency stating therein the grounds of such demurrer.

Kerr, C. C. P., 857.

If the defendant, in an action commenced in a justice's court, thinks the complaint states no cause of action, he may object to it upon that ground, and if he chooses he may stand upon that issue and appeal upon it, but if he does it will be the only issue triable in the district court. If he wishes to make an issue of fact, he must make it in the justice's court, or he cannot have it tried in the district court. Martin v. District Court, 13 Nev. 91.

5741. Proceedings on demurrer.

SEC. 799. The proceedings on demurrer are as follows:

1. If the demurrer to the complaint is sustained, the plaintiff may, within such time, not exceeding two days, as the court allows, amend his complaint.

2. If the demurrer to a complaint is overruled, the defendant may answer forthwith.

3. If the demurrer to an answer is sustained, the defendant may amend his answer within such time, not exceeding two days as the court may allow.

4. If the demurrer to an answer is overruled, the action must proceed as if no demurrer had been interposed.

Kerr, C. C. P., 858.

5742. Amendments of pleadings—Adjournment—Costs—Relief from judgment by default.

SEC. 800. Either party may at any time before the conclusion of the trial, amend any pleading; but if the amendment is made after the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. The court may also, in its discretion, when an adjournment will by the amendment be rendered necessary, require, as a condition to the allowance of such amendment, made after issue joined, the payment of costs to the adverse party, to be fixed by the court, not exceeding twenty dollars. The court may also, on such terms as may be just, and on payment of costs, relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after notice of the entry of the judgment and upon an affidavit showing good cause therefor.

Kerr, C. C. P., 859.

Cited, Martin v. District Court, 13 Nev. 91.

5743. Answer or demurrer to amended pleadings.

SEC. 801. When a pleading is amended, the adverse party may answer or demur to it within such time, not exceeding two days, as the court may allow.

Kerr, C. C. P., 860.

CHAPTER 80

PROVISIONAL REMEDIES IN JUSTICES' COURTS

5744. Order of arrest, and arrest of defendant.
5745. Affidavit and undertaking for order of arrest.
5746. A defendant arrested must be taken before the justice immediately.
5747. The officer must give notice to the plaintiff of arrest.

5748. The officer must detain the defendant.
5749. Attachment to issue upon affidavit.
5750. Undertaking on attachment — Exception to sureties — Justification — Waiver.
5751. Writ of attachment, substance of.
5752. Certain provisions apply to all attachments in justices' courts.
5753. How claim and delivery enforced.

5744. Order of arrest, and arrest of defendant.

SEC. 802. An order to arrest the defendant may be indorsed on a summons issued by the justice, and the defendant may be arrested thereon by the sheriff or constable, at the time of serving the summons, and brought before the justice, and there detained until duly discharged, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state, with intent to defraud his creditors.

2. In an action for a fine or penalty, or for money or property embezzled or fraudulently misapplied, or converted to his own use by one who received it in a fiduciary capacity.

3. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought.

4. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female can be arrested in any action.

Kerr, C. C. P., 861.

5745. Affidavit and undertaking for order of arrest.

SEC. 803. Before an order for an arrest can be made, the party applying must prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts upon which the application is founded. The plaintiff must also execute and deliver to the justice a written undertaking in the sum of three hundred dollars, with sufficient sureties, to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking.

Kerr, C. C. P., 862.
See Const., sec. 243.

5746. A defendant arrested must be taken before the justice immediately.

SEC. 804. The defendant, immediately upon being arrested, must be taken to the office of the justice who made the order, and if he is absent or unable to try the action, or if it appears to him by the affidavit of defendant, that he is a material witness in the action, the officer must immediately take the defendant before another justice of the township or city, if there is another, and if not, then before the justice of an adjoining township, who must take jurisdiction of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him.

Kerr, C. C. P., 863.

5747. The officer must give notice to the plaintiff of arrest.

SEC. 805. The officer making the arrest must immediately give notice thereof to the plaintiff, or his attorney or agent, and indorse on the summons, and subscribe a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff.

Kerr, C. C. P., 864.

5748. The officer must detain the defendant.

SEC. 806. The officer making the arrest must keep the defendant in custody until he is discharged by order of the justice.

Kerr, C. C. P., 865.

ATTACHMENT

5749. Attachment to issue upon affidavit.

SEC. 807. A writ to attach the property of the defendant must be issued by the justice at the time of, or after, issuing summons, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in section 205.

Kerr, C. C. P., 866.
See sec. 5147.

An affidavit reciting that an action had been brought to recover a sum of money for goods sold and delivered at defendant's request, and that defendant was indebted to plaintiff in such sum over and above all set-offs and counterclaims, and averring the existence of two grounds for attachment, was sufficient to warrant the issuance of an attachment by a justice of the peace. Pratt v. Stone, 25 Nev. 365, 372 (60 P. 514).

Attachment, when dissolved. Ranft v. Young, 21 Nev. 401.

5750. Undertaking on attachment—Exception to sureties—Justification—Waiver.

SEC. 808. Before issuing the writ, the justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, in the amount sued for, and for not less than fifty dollars, to the effect that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. At any time after the issuing of the attachment, but not later than five days after notice of its levy, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to they must justify at a time fixed by the justice and within three days, otherwise the justice must order the writ of attachment vacated.

Kerr, C. C. P., 867.

5751. Writ of attachment, substance of.

SEC. 809. The writ may be directed to the sheriff or any constable of the county, or the sheriff of any other county, and must require him to attach and safely keep all the property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security, by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand besides costs; in which case, to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties; *provided*, that where a writ of attachment issued by a justice of the peace is to be served out of the county in which it was issued, the writ of attachment shall have attached to it a certificate under seal, by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace of said county at the date of the writ.

Kerr, C. C. P., 868.

5752. Certain provisions apply to all attachments in justices' courts.

SEC. 810. The sections of this act from section 209 to 216, both inclusive, are applicable to attachments issued in justices' courts, the word "constable" being substituted for the word "sheriff," whenever the writ is directed to a constable, and the word "justice" being substituted for the word "judge."

Kerr, C. C. P., 869.
See secs. 5151–5158.

CLAIM AND DELIVERY

5753. How claim and delivery enforced.

SEC. 811. In an action to recover possession of personal property, the plaintiff may, at the time of issuing summons, or at any time thereafter before answer, claim the delivery of such property to him; and the sections of this act from section 182 to 193, both inclusive, are applicable to such claim when made in justices' courts, the powers therein given and duties imposed on sheriffs being extended to constables, and the word "justice" being substituted for "judge."

Kerr, C. C. P., 870.

See secs. 5125-5135.

CHAPTER 81

TRIALS AND JUDGMENTS IN JUSTICES' COURTS

5754. Judgment when defendant fails to appear.
5755. Judgment against defendant on demurrer.
5756. Time when trial must be commenced.
5757. When court may of its own motion postpone trial.
5758. Postponement by consent.
5759. Postponement on application of a party.
5760. No continuance for more than ten days to be granted, unless upon filing of undertaking.
5761. Issue defined, and the different kinds.
5762. Issue of law, how raised.
5763. Issue of fact, how raised.
5764. Issue of law, how tried.
5765. Issue of fact, how tried.
5766. Jury, how waived.
5767. Trial of either party failing to appear.
5768. Jury, how summoned—Number of challenges.
5769. Written instrument—Order of inspection—Evidence.
5770. Original copy or instrument—Signatures deemed admitted, unless denied under oath.
5771. Judgment by confession.
5772. Judgment of dismissal entered in certain cases without prejudice.
5773. Judgment upon verdict.
5774. Judgment after trial by the court.
5775. Judgment when the defendant is subject to arrest.
5776. If sum found due exceeds jurisdiction, excess may be remitted.
5777. Offer to compromise before trial.
5778. Costs must be included in the judgment.
5779. Abstract of judgment.
5780. Abstract may be filed and docketed in district court.
5781. Effect of docketing — Execution to other counties.
5782. Filing abstract in recorder's office makes judgment a lien.

5754. Judgment when defendant fails to appear.

SEC. 812. If the defendant fails to appear, and to answer or demur within the time specified in the summons, then, upon proof of service of summons, the following proceedings must be had:

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

2. In all other actions the court must hear the evidence offered by the plaintiff and must render judgment in his favor for such sum (not exceeding the amount stated in the summons) as appears by such evidence to be just.

Kerr, C. C. P., 871.

5755. Judgment against defendant on demurrer.

SEC. 813. In the following cases the same proceedings must be had, and judgment must be rendered in like manner, as if the defendant had failed to appear and answer or demur:

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

2. If the demurrer to the complaint is overruled, and the defendant fails to answer at once.

3. If the demurrer to the answer is sustained, and the defendant fails to amend the answer within the time allowed by the court.

Kerr, C. C. P., 872.

5756. Time when trial must be commenced.

SEC. 814. Unless postponed, as provided in this chapter, or unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the notice mentioned in section 791, and the trial must be continued, without adjournment for more than twenty-four hours at any one time, until all the issues therein are disposed of.

Kerr, C. C. P., 873.
See sec. 5733.

5757. When court may, of its own motion, postpone trial.

SEC. 815. The court may, of its own motion, postpone the trial:

1. For not exceeding one day, if, at the time fixed by law or by an order of the court for the trial, the court is engaged in the trial of another action.

2. For not exceeding two days, if, by an amendment of the pleadings, or the allowance of time to make such amendment or to plead, a postponement is rendered necessary.

3. For not exceeding three days, if the trial is upon issues of fact, and a jury has been demanded.

Kerr, C. C. P., 874.

5758. Postponement by consent.

SEC. 816. The court may, by consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties.

Kerr, C. C. P., 875.

5759. Postponement upon application of a party.

SEC. 817. The trial may be postponed upon the application of either party, for a period not exceeding four months:

1. The party making the application must prove, by his own oath or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so.

2. If the application is on the part of the plaintiff, and the defendant is under arrest, a postponement for more than three hours discharges the defendant from custody, but the action may proceed, notwithstanding, and the defendant is subject to arrest on execution, in the same manner as if he had not been discharged.

3. If the application is on the part of a defendant under arrest, before it can be granted he must execute an undertaking, with two or more sufficient sureties, to be approved by, and in a sum to be fixed by the justice, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action, not exceeding the amount specified in the undertaking. On filing the undertaking specified in this subdivision, the justice must order the defendant to be discharged from custody.

4. The party making the application must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, may be then taken by deposition before the justice, and that the testimony so taken may be read on the trial, with the same effect and subject to the same objections, as if the witness was produced; but the court may require the party making the application to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given and that it be con-

sidered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.

Kerr, C. C. P., 876.

5760. No continuance for more than ten days to be granted, unless upon filing of undertaking.

SEC. 818. No adjournment must, unless by consent, be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking, in an amount fixed by the justice, with two sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying, not exceeding the sum specified in the undertaking.

Kerr, C. C. P., 877.

Where by consent of parties a case in a justice's court is adjourned for more than ten days, the undertaking provided by this section is not required, and a dismissal of the action, for the reason that such undertaking has not been given, is error. Nev. Cent. R. Co. v. District Court, 21 Nev. 409, 411 (32 P. 673).

5761. Issues defined, and the different kinds.

SEC. 819. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

Kerr, C. C. P., 878.

5762. Issue of law, how raised.

SEC. 820. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

Kerr, C. C. P., 879.

5763. Issue of fact, how raised.

SEC. 821. An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; and,
2. Upon new matter in the answer, except an issue of law is joined thereon.

Kerr, C. C. P., 880.

5764. Issue of law, how tried.

SEC. 822. An issue of law must be tried by the court.

Kerr, C. C. P., 881.

5765. Issue of fact, how tried.

SEC. 823. An issue of fact must be tried by a jury, unless a jury is waived, in which case it must be tried by the court.

Kerr, C. C. P., 882.

5766. Jury, how waived.

SEC. 824. A jury may be waived:

1. By consent of parties, entered in the docket.
2. By a failure of either party to demand a jury before the commencement of the trial of an issue of fact.
3. By the failure of either party to appear at the time fixed for the trial of an issue of fact.

Kerr, C. C. P., 883.

5767. Trial on either party failing to appear.

SEC. 825. If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party.

Kerr, C. C. P., 884.

5768. Jury, how summoned—Number of challenges.

SEC. 826. The jury shall be summoned upon an order of the justice, from the citizens of the city, precinct, or township, and not from the bystanders. At the time appointed for the trial the justice shall proceed to call from the jurors summoned the names of the persons to constitute the jury for the trial of the issue. The jury, by consent of the parties, may consist of any number, not more than twelve nor less than four. If a sufficient number of competent and indifferent jurors do not attend, the justice shall direct others to be summoned from the vicinity, and not from the bystanders, sufficient to complete the jury. The challenges are either peremptory or for cause. Each party is entitled to three peremptory challenges. Either party may challenge for cause on any grounds set forth in section 264. Challenges for cause must be tried by the justice.

Kerr, C. C. P., 885.
See sec. 5206.

5769. Written instrument—Order of inspection—Evidence.

SEC. 827. When the cause of action or counterclaim arises upon an account or instrument for the payment of money only, the court, at any time before the trial, may, by an order under his hand, require the original to be exhibited to the inspection of, and a copy to be furnished to, the adverse party, at such time as may be fixed in the order; or, if such order is not obeyed, the account or instrument cannot be given in evidence.

Kerr, C. C. P., 886.
Cited, Martin v. District Court, 13 Nev. 88.

5770. Original copy or instrument—Signatures deemed admitted, unless denied under oath.

SEC. 828. If the plaintiff annex to his complaint, or file with the justice at the time of issuing the summons, the original or a copy of the promissory note, bill of exchange, or other written obligation for the payment of money, upon which the action is brought, the defendant is deemed to admit the genuineness of the signatures of the makers, indorsers, or assignors thereof, unless he specifically deny the same in his answer, and verify the answer by his oath.

Kerr, C. C. P., 887.

5771. Judgment by confession.

SEC. 829. Judgments upon confession may be entered up in any justice's court specified in the confession.

Kerr, C. C. P., 889.

5772. Judgment of dismissal entered in certain cases without prejudice.

SEC. 830. Judgment that the action be dismissed, without prejudice to a new action, may be entered with costs, in the following cases:

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

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

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

4. When it is objected at the trial, and appears by the evidence, that the

action is brought in the wrong county, or township, or city; but if the objection is taken and overruled, it is cause only of reversal on appeal and does not otherwise invalidate the judgment; if not taken at the trial, it is waived.

Kerr, C. C. P., 890.

5773. Judgment upon verdict.

SEC. 831. When a trial by jury has been had, judgment must be entered by the justice, at once, in conformity with the verdict.

Kerr, C. C. P., 891.

A justice should enter up judgment immediately on the rendition of a verdict. But if he omits to do so the day the verdict is rendered, still he may complete his record by afterwards entering the judgment.

The filing of notice of appeal and undertaking on appeal in a justice's court after the rendition of a verdict by the jury, but before the entry of judgment thereon, does not deprive the justice of authority to enter up judgment on the verdict. Fugitt v. Cox, 2 Nev. 370.

5774. Judgment after trial by the court.

SEC. 832. When the trial is by the court, judgment must be entered at the close of the trial.

Kerr, C. C. P., 892.

5775. Judgment when the defendant is subject to arrest.

SEC. 833. The judgment in justices' courts must be entered substantially in the form required by section 327. When the judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, the fact that the defendant is so subject, must be stated in the judgment.

Kerr, C. C. P., 893.
See sec. 5266.

5776. If sum found due exceeds jurisdiction, excess may be remitted.

SEC. 834. When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

Kerr, C. C. P., 894.

5777. Offer to compromise before trial.

SEC. 835. If the defendant, at any time before the trial, offers, in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he does not accept such offer before the trial, and fails to recover in the action a sum in excess of the offer, he cannot recover costs incurred after the offer, but costs must be adjudged against him, and, if he recovers, be deducted from his recovery. The offer and failure to accept it cannot be given in evidence nor affect the recovery, otherwise than as to costs.

Kerr, C. C. P., 895.

5778. Costs must be included in the judgment.

SEC. 836. The justice must tax and include in the judgment the costs allowed by law to the prevailing party.

Kerr, C. C. P., 896.
See secs. 5376–5393.

5779. Abstract of judgment.

SEC. 837. The justice, on demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in substantially the following form (filling blanks according to the facts): State of Nevada, ...county, ..., plaintiff, v. ....., defendant. In justice's court, before....., justice of the peace, ...town-

ship (or city), county ....., 19..... (inserting date of abstract). Judgment entered for plaintiff (or defendant) for $....., on the..... day of..... I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court, ..., or (as the case may be) in the court of ....., justice of the peace, as appears by his docket, now in my possession, as his successor in office. ....., justice of the peace.

Kerr, C. C. P., 897.

The issuance of an execution before a transcript of the judgment of the justice court had been filed and docketed in the office of the clerk of the district court, is illegal, and the execution void. In re Rourke, 13 Nev. 255, 256.

Cited, State ex rel. N. T. G. & T. Co. v. Grimes, 29 Nev. 58.

5780. Abstract may be filed and docketed in district court.

SEC. 838. The abstract may be filed in the office of the county clerk of the county in which the judgment was rendered, and the judgment docketed in the judgment docket of the district court thereof. The time of the receipt of the abstract by the clerk must be noted by him thereon, and entered in the docket.

Kerr, C. C. P., 898.

5781. Effect of docketing—Execution to other counties.

SEC. 839. From the time of docketing in the county clerk's office, execution may be issued thereon by the county clerk to the sheriff of any county in the state, other than the county in which the judgment was rendered, in the same manner and with like effect as if issued on a judgment of the district court.

Kerr, C. C. P., 899.

5782. Filing abstract in recorder's office makes judgment a lien.

SEC. 840. A judgment rendered in a justice's court creates no lien upon any lands of the defendant, unless such an abstract is filed in the office of the recorder of the county in which the lands are situated. When so filed, and from the time of filing, the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards, and before the lien expires, acquire. The lien continues for two years, unless the judgment be previously satisfied.

Kerr, C. C. P., 900.

CHAPTER 82

EXECUTIONS FROM JUSTICES' COURTS

5783. Execution may issue at any time within five years—Stay of execution of judgment.
5784. Execution, contents of.
5785. Renewal of execution.
5786. Duty of officer receiving execution.
5787. Proceedings supplementary to execution.

5783. Execution may issue at any time within five years—Stay of execution of judgment.

SEC. 841. Execution for the enforcement of a judgment of a justice's court may be issued by the justice who entered the judgment, or his successor in office, on the application of the party entitled thereto, at any time within five years from the entry of judgment. The court, or any justice thereof, may stay the execution of any judgment, including any judgment in a case of forcible or unlawful detainer, for a period not exceeding ten days.

Kerr, C. C. P., 901, 901a.

5784. Execution, contents of.

SEC. 842. The execution must be directed to the sheriff or to a constable

of the county, and must be subscribed by the justice, and bear date the day of its delivery to the officer. It must intelligibly refer to the judgment, by stating the names of the parties, and the name of the justice before whom, and of the county and the township or city where, and the time when it was rendered; the amount of judgment, if it be for money; and, if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable, as are required by the provisions of chapter 42 of this act, in an execution to the sheriff.

Kerr, C. C. P., 902.
See secs. 5280–5306.

Where in an action to restrain proceedings under a writ of execution issued by a justice of the peace in a certain tax suit commenced before him, and in which he had denied a motion to transfer to the district court, in accordance with this section, the complaint set forth the fact of an appeal from the judgment to the district court, but failed to allege any motion to either the justice or district court to stay the execution issued, it was held that, as there was a plain, adequate and convenient remedy by simple motion in the original suit, no case for injunction was made out. Hamer v. Kane, 7 Nev. 61, 62.

5785. Renewal of execution.

SEC. 843. An execution may, at the request of the judgment creditor, be renewed before the expiration of the time fixed for its return, by the word "renewed" written thereon, with the date thereof, and subscribed by the justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterwards issued.

Kerr, C. C. P., 903.

5786. Duty of officer receiving execution.

SEC. 844. The sheriff or constable to whom the execution is directed must execute the same, in the same manner as the sheriff is required by the provisions of chapter 42 of this act, to proceed upon executions directed to him; and the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff.

Kerr, C. C. P., 904.
See secs. 5280–5306.

5787. Proceedings supplementary to execution.

SEC. 845. The provisions of chapter 43 of this act are applicable to justices' courts, the word "constable" being substituted, to that end, for the word "sheriff," and the word "justice" for the word "judge."

Kerr, C. C. P., 905.
See secs. 5307–5314.

CHAPTER 83

NEW TRIALS AND APPEALS FROM JUSTICES' COURTS

5788. Appeal from judgment of justice's court.
5789. Appeal on questions of law, statement.
5790. Appeal on questions of fact, or law and fact.
5791. Transmission of papers to appellate court.
5792. Undertaking on appeal to the district court — Deposit — Justification of sureties.
5793. Stay of proceedings on filing undertaking.
5794. Powers of district court on appeal—Dismissal—Damages—Costs—Judgment.

5788. Appeal from judgment of justice's court.

SEC. 846. Any party dissatisfied with a judgment rendered in a civil action in a justice's court, may appeal therefrom to the district court of the county, at any time within thirty days after the notice of entry of the judgment. The appeal is taken by filing a notice of appeal with the justice and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and

if from a part, what part, and whether the appeal is taken on questions of law or fact, or both.

Kerr, C. C. P., 974.

An appeal will lie from a judgment rendered in a justice's court improperly dismissing the action. Especially is that the case where both issues of law and of fact have been made in a justice's court. Nev. Cent. R. Co. v. District Court, 21 Nev. 410 (32 P. 673).

Where the notice of appeal properly describes a judgment from which the appeal is taken, the addition of other words indicating that the appeal is taken from the order dismissing the action, on which the judgment is founded, should be treated as surplusage and they do not invalidate the appeal (Murphy, C. J., dissenting). N. C. R. R. Co. v. District Court, 21 Nev. 411, 413 (32 P. 653).

The order in which the notice is served and filed is immaterial. State ex rel. Jones v. Brown, 30 Nev. 495, 496, 499, 503 (98 P. 871).

No appeal lies from a judgment rendered by default in a justice's court. The district court can only retry issues of law or fact that were made in the justice's court. Martin v. District Court, 13 Nev. 86.

5789. Appeal on questions of law, statement.

SEC. 847. When a party appeals to the district court on questions of law alone, he must, within ten days from the rendition of the judgment, prepare a statement of the case and file the same with the justice. The statement must contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more. Within ten days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments. The proposed statement and amendments must be settled by the justice, and if no amendment be filed, the original statement stands as adopted. The statement thus adopted, or as settled by the justice, with a copy of the docket of the justice, and all motions filed with him by the parties during the trial, and the notice of appeal, may be used on the hearing of the appeal before the district court.

Kerr, C. C. P., 975.

5790. Appeal on questions of fact, or law and fact.

SEC. 848. When a party appeals to the district court on questions of fact, or on questions of both law and fact, no statement need be made, but the action must be tried anew in the district court.

Kerr, C. C. P., 976.

See sec. 837.

"Tried anew" means in the same manner, with the same effect, and upon the issues tried in the court below. Paul v. Armstrong, 1 Nev. 96.

See Martin v. District Court, under sec. 846 of this act.

District courts have no power to impose damages for frivolous appeals, nor to directly, and without trial, reverse or affirm judgments brought by appeal from justices' courts. Such cases must be tried anew. State ex rel. Barnett v. District Court, 18 Nev. 286, 289 (3 P. 417).

Cited, Nev. Cent. R. Co. v. District Court, 21 Nev. 412 (32 P. 673).

Error in allowing costs not properly taxable against a party cannot be reviewed on certiorari. State ex rel. Thompson v. District Court, 23 Nev. 243, 245 (45 P. 467).

A party appealing to the district court from a justice's judgment and there obtaining a reduction of such judgment is not entitled to costs as a matter of right, but the question whether such reduced judgment is more favorable to him is a question for the sound discretion of the district court. State ex rel. Cohn v. District Court, 26 Nev. 253, 257 (66 P. 743).

The supreme court has power and will impose damages for frivolous appeals taken for delay. Paroni v. Simonsen, 33 Nev. — (115 P. 415).

5791. Transmission of papers to appellate court.

SEC. 849. Upon receiving the notice of appeal, and on payment of the fees of the justice, payable on appeal and not included in the judgment, and filing an undertaking as required in the next section, and after settlement or adoption of statement, if any, the justice must, within five days, transmit to the clerk of the district court, if the appeal be on questions of law alone, a certified copy of his docket, the statement as admitted or as

settled, the notice of appeal, and the undertaking filed; or, if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions, and all other papers filed in the cause, the notice of appeal, and the undertaking filed; and the justice may be compelled by the district court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice by the party or his attorney. In the district court, either party may have the benefit of all legal objections made in the justice's court.

Kerr, C. C. P., 977.

A district court on appeal has exactly the same jurisdiction as the justice of the peace from whose court the appeal is taken. Peacock, v. Leonard, 8 Nev. 84.

As a justice of the peace has no jurisdiction of an action of forcible entry, a district court has no jurisdiction thereof on appeal; and its proceedings and judgment to the contrary will be annulled on certiorari. Idem.

If the decisions of the justice upon motions are erroneous or arbitrary, the party aggrieved may renew his motion or objection in the district court. Martin v. District Court, 13 Nev. 91.

Petitioner applied by motion to the district court for an order requiring the justice before whom the cause was tried, to transmit to the district court the papers on appeal. The order was refused. Petitioner thereafter, upon the same state of facts, applied to the supreme court for a writ of mandamus to compel the justice to transmit said papers to the district court. It was held that the order of the district court denying the petitioner's motion was a final judgment in that proceeding, from which an appeal lies (Beatty, C. J., dissenting). Mayberry v. Bowker, 14 Nev. 336, 338, 340.

5792. Undertaking on appeal to the district court—Deposit—Justification of sureties.

SEC. 850. An appeal from a justice's court where no stay of proceedings is claimed is not effectual for any purpose unless an undertaking is filed, with two or more sureties, in the sum of one hundred dollars, for the payment of the costs on the appeal. If a stay of proceedings is claimed, the appellant must file an additional undertaking, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property, and which must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from, and all costs, if the appeal is withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the district court.

When the action is for the recovery of, or to enforce or foreclose a lien on, specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal is withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the district court, and will obey any order made by the court therein. When the judgment appealed from directs the delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking is executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the appeal is dismissed or withdrawn, or the judgment affirmed, or judgment be recovered against him in the action in the district court, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, or that he will pay any judgment and costs that may be recovered against him in said action in the district court, not exceeding a sum to be fixed by the justice of the court from which the appeal is taken, and which sum must be specified in the undertaking. A deposit of the amount of the

judgment, including all costs, appealed from or of the value of the property, including all costs, in actions for the recovery of specific personal property, with the justice, is equivalent to the filing of the undertaking, and in such cases the justice must transmit the money to the clerk of the district court, to be by him paid out on the order of the court. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given.

Kerr, C. C. P., 978.

An undertaking for $600, reciting a desire to appeal and binding appellant to pay the judgment and all costs on withdrawal or dismissal of the appeal, or to pay the judgment on appeal, is good as an undertaking to pay the costs on appeal, and is sufficient to perfect the appeal, regardless of its sufficiency to stay proceedings (Sweeney, J., dissenting). State ex rel. Jones v. Brown, 30 Nev. 495, 500 (98 P. 871).

5793. Stay of proceedings on filing undertaking.

SEC. 851. If an execution be issued on the filing of the undertaking staying proceedings, the justice must, by order, direct the officer to stay all proceedings on the same. Such officer must, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon, and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

Kerr, C. C. P., 979.

5794. Powers of district court on appeal—Dismissal—Damages—Costs—Judgment.

SEC. 852. Upon an appeal heard upon a statement of the case, the district court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial. When the action is tried anew on appeal, the trial must be conducted in all respects as other trials in the district court. The provisions of this act as to changing the place of trial, and all the provisions as to trials in the district court, are applicable to trials on appeal in the district court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the district court, after notice, may order the appeal to be dismissed, with costs; and if it appear to such court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding twenty-five per cent of the judgment appealed from. Judgments rendered in the district court on appeal shall have the same force and effect, and may be enforced in the same manner, as judgments in actions commenced in the district court.

Kerr, C. C. P., 980.

CHAPTER 84

JUSTICES' COURTS—CONTEMPTS AND GENERAL PROVISIONS

5795. Contempts a justice may punish for.
5796. Proceedings for contempts—Immediate view and presence.
5797. Idem—Not in immediate view and presence.
5798. Punishments and contempts.
5799. The conviction must be entered in the docket.
5800. Docket, what to contain.
5801. Entries therein prima facie evidence of facts.
5802. An index to the docket must be kept.
5803. Dockets must be delivered by justice to successor or county clerk.
5804. Proceedings when office becomes vacant, and before successor is appointed.
5805. Justice may issue execution or other process upon docket of predecessor.
5806. Who successor of justice.
5807. Designation of succeeding justice.
5808. Justice may issue subpenas and final process to any part of county.

5809. Blanks must be filled in all papers issued by a justice, except subpenas.
5810. Justices to receive all moneys collected and pay same to parties.
5811. In case of disability of justice another justice may attend on his behalf.
5812. Justices may require security for costs.
5813. Who entitled to costs.
5814. Attorney's fees may be recovered.
5815. What provisions of code applicable to justices' courts.
5816. Deposit instead of undertaking.

5795. Contempts a justice may punish for.

SEC. 853. A justice may punish as for contempt persons guilty of the following acts, and no other:

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

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

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

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

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of the court held by him.

Kerr, C. C. P., 906.

5796. Proceedings for contempts—Immediate view and presence.

SEC. 854. When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily; to that end an order must be made, reciting the facts as they occurred, and adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed.

Kerr, C. C. P., 907.

5797. Idem—Not in immediate view and presence.

SEC. 855. When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defense or excuse must be given. The justice may, thereupon, discharge him, or may convict him of the offense.

Kerr, C. C. P., 908.
Ex Parte Hedden, 29 Nev. 352 (90 P. 737).

5798. Punishments for contempts.

SEC. 856. A justice may punish for contempts by fine or imprisonment, or both; such fine not to exceed, in any case, one hundred dollars, and such imprisonment one day, or both.

Kerr, C. C. P., 909.

5799. The conviction must be entered in the docket.

SEC. 857. The conviction, specifying particularly the offense and the judgment thereon, must be entered by the justice in his docket.

Kerr, C. C. P., 910.

5800. Docket, what to contain.

SEC. 858. Every justice must keep a book, denominated a "docket," in which he must enter:

1. The title of every action or proceeding.

2. The object of the action or proceeding; and if a sum of money be claimed, the amount thereof.

3. The date of the summons, and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of the fact.

4. The time when the parties, or either of them, appear, or their non-appearance, if default be made; a minute of the pleadings and motions; if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleading.

5. Every adjournment, stating on whose application and to what time.

6. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the return of the jury and for the trial.

7. The names of the jurors who appear and are sworn, and the names of all witnesses sworn, and at whose request.

8. The verdict of the jury, and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge.

9. The judgment of the court, specifying the costs included, and the time when rendered.

10. The issuing of the execution, when issued and to whom; the renewals thereof, if any, and when made, and a statement of any money paid to the justice, when and by whom.

11. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed.

Kerr, C. C. P., 911.

The docket of a justice of the peace is only primary evidence of those facts which it is required to contain, and it is not required to contain any finding that summons has been served; but only the date of the summons and the time of its return. Scorpion S. M. Co. v. Marsano, 10 Nev. 370, 382.

See Martin v. District Court, under sec. 849 of this act.

Ex Parte Breckenridge, 34 Nev. —.

5801. Entries therein prima facie evidence of facts.

SEC. 859. The several particulars of the last section specified must be entered under the title of the action to which they relate, and (unless otherwise in this title provided) at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice, or his successor in office, are prima facie evidence of the facts so stated.

Kerr, C. C. P., 912.

5802. An index to the docket must be kept.

SEC. 860. A justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs must be entered in the index, in the alphabetical order of the first letter of the family name.

Kerr, C. C. P., 913.

5803. Dockets must be delivered by justice to successor or county clerk.

SEC. 861. Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official dockets, and all papers filed in his office, as well his own as those of his predecessors, or any other which may be in his custody, to be kept as public records.

Kerr, C. C. P., 914.

5804. Proceedings when office becomes vacant, and before successor appointed.

SEC. 862. If the office of a justice become vacant by his death or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the township, to be by him

delivered to the successor of such justice. If there is no other justice in the township, then the docket and papers of such justice must be deposited in the office of the county clerk of the county, to be by him delivered to the successor in office of the justice.

Kerr, C. C. P., 915.

5805. Justice may issue execution or other process upon docket of predecessor.

SEC. 863. Any justice with whom the docket of his predecessor, or of any other justice, is deposited, has and may exercise over all actions and proceedings entered in such docket, the same jurisdiction as if originally commenced before him. In case of the creation of a new county, or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory may come, is, for the purposes of this section, considered the successor of such former justice.

Kerr, C. C. P., 916.

5806. Who successor of justice.

SEC. 864. The justice elected to fill a vacancy is the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township or city, from that time is the successor.

Kerr, C. C. P., 917.

5807. Designation of succeeding justice.

SEC. 865. When two or more justices are equally entitled, under the last section, to be deemed the successors in office of the justice, a judge of the district court must, by a certificate subscribed by him and filed in the office of the county clerk, designate which justice is the successor of a justice going out of office, or whose office has become vacant.

Kerr, C. C. P., 918.

5808. Justices may issue subpenas and final process to any part of county.

SEC. 866. Justices of the peace may issue subpenas in any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county.

Kerr, C. C. P., 919.

5809. Blanks must be filled in all papers issued by a justice, except subpenas.

SEC. 867. The summons, execution, and every other paper made or issued by a justice, except a subpena, must be issued without a blank left to be filled by another, otherwise it is void.

Kerr, C. C. P., 920.

5810. Justices to receive all moneys collected and pay same to parties.

SEC. 868. Justices of the peace must receive from the sheriff or constables of their county, all moneys collected on any process or order issued from their courts respectively, and must pay the same, and all moneys paid to them in their official capacity, over to the parties entitled or authorized to receive them; without delay.

Kerr, C. C. P., 921.

5811. In case of disability of justice another justice may attend on his behalf.

SEC. 869. In case of the sickness or other disability, or necessary absence of a justice, on a return of a summons, or at the time appointed for a trial, another justice of the same township or city may, at his request,

attend in his behalf, and thereupon is vested with the power, for the time being, of the justice before whom the summons was returnable. In that case, the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction.

Kerr, C. C. P., 922.

5812. Justices may require security for costs.

SEC. 870. Justices may, in all cases require a deposit of money or an undertaking, as security for costs of court, before issuing a summons.

Kerr, C. C. P., 923.

5813. Who entitled to costs.

SEC. 871. The prevailing party in justices' courts is entitled to costs of the action, and also of any proceedings taken by him in aid of an execution issued upon any judgment recovered therein.

Kerr, C. C. P., 924.

5814. Attorneys' fees may be recovered.

SEC. 872. The prevailing party in any civil action at law in the justice courts of this state shall receive in addition to the costs of court as now allowed by law, a reasonable attorney's fee, said fee to be fixed by the justice of the peace, and taxed as costs against the losing party.

5815. What provisions of code applicable to justices' courts.

SEC. 873. Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this act which are, in their nature, applicable to the organization, powers, and course of proceedings in justices' courts or which have been made applicable by special provisions in this title, are applicable to justices' courts and the proceedings therein.

Kerr, C. C. P., 925.

5816. Deposit instead of undertaking.

SEC. 874. In all civil cases arising in justices' courts, wherein an undertaking is required as prescribed in this act, the plaintiff or defendant may deposit with said justice a sum of money in United States gold coin equal to the amount required by the said undertaking, which said sum of money shall be taken as security in place of said undertaking.

Kerr, C. C. P., 926.

CHAPTER 85

CONCERNING THE REPEAL OF CERTAIN PROVISIONS OF THE CIVIL PRACTICE ACT AND ACTS IN RELATION THERETO

5817. Same provisions in this act as in existing acts deemed continuation thereof.
5718. Existing or prior existing rights preserved.
5819. Limitations not affected.
5820. Act to take effect January 1, 1912.
5821. Schedule of acts repealed.

5817. Same provisions in this act as in existing acts deemed continuation thereof.

SEC. 875. The provisions of this act, so far as they are substantially the same as those of existing statutes, shall be construed as a continuation thereof and not as new enactments, and a reference in a statute which has not been repealed to provisions of law which are revised and reenacted herein shall be construed as applying to such provisions as so incorporated in this act.

Act cited generally, in dissenting opinion of Fitzgerald, J., to the effect that such sections of the acts of 1861, 314, as were contained in the act of 1869, 196, in the same identical words, were not to have the force of later enactments of the legislature, and therefore to be the latest and true expression of the legislative will, but were to be considered merely as continuations of the old enactment. Peters v. Jones, 26 Nev. 265 (66 P. 745).

5818. Existing or prior existing rights preserved.

SEC. 876. The repeal of a law by this act shall not affect any act done, ratified or confirmed, or any right accrued or established, or any action, suit or proceeding commenced or had in a civil case, before the repeal takes effect, but the proceedings in such case shall, as far as practicable, conform to the provisions of this act.

5819. Limitations not affected.

SEC. 877. If a limitation or period of time prescribed in any of the acts repealed for acquiring a right, barring a remedy or any other purpose has begun to run, and the same or a similar limitation is prescribed in any law of the state, the time of limitation shall continue to run and shall have like effect as if the whole period had begun and ended under the operation of the law then in force.

5820. Act to take effect January 1, 1912.

SEC. 878. This act shall take effect on the first day of January, one thousand nine hundred and twelve.

5821. Schedule of acts repealed.

SEC. 879. The acts, and parts of acts, which are specified in the annexed schedule shall be expressly repealed from and after the first day of January in the year nineteen hundred and twelve, subject to all the provisions contained in this chapter; but no implication shall be drawn from such repeal that said acts were in force until so repealed:

SCHEDULE

An act adopting the common law, approved January 24, 1883;

An act to regulate proceedings in civil cases in the courts of justice of this state, and to repeal all other acts in relation thereto, approved March 8, 1869;

An act to provide for an alias summons, approved February 23, 1899;

An act defining the time of commencing civil actions, approved November 21, 1861;

An act supplementary to an act of the governor and legislative assembly of the Territory of Nevada, approved November 21, 1861, entitled "An act defining the time of commencing civil actions," approved February 27, 1869;

An act relating to the manner of commencing civil actions, approved December 20, 1862;

An act prescribing the manner of commencing and maintaining actions by or against counties, approved February 16, 1864;

An act regulating proceedings upon quo warranto and information in the nature thereof, approved February 21, 1865;

An act concerning forcible entries and unlawful detainers, approved February 16, 1865;

An act concerning unlawful holding over lands, tenements, and other possessions, approved March 8, 1865;

An act to regulate appeals in the courts of justice of this state, approved March 11, 1865;

An act regulating appeals to the supreme court, approved March 13, 1895;

An act relating to statements on appeal and motions for new trial, approved January 24, 1889;

An act for the punishment of contempts and trespasses, approved March 11, 1865;
An act supplementary to an act entitled "An act to secure liens to mechanics and others, and to repeal all other acts in relation thereto," approved March 2, 1875, approved February 24, 1877;
An act for the relief of persons imprisoned on civil process, approved December 19, 1862;
An act to enable a certain class of claimants against the state to appeal to the courts, approved March 2, 1869;
An act requiring compensation for causing death by wrongful acts, neglect, or default, approved February 28, 1871;
An act concerning the determination of conflicting rights to mining claims in certain cases, approved February 10, 1873;
An act to provide for the substitution of other defendants in certain cases, and for the action of interpleader by the custodian of property claimed adversely by different parties, approved March 29, 1907;
An act making attorneys' fees taxable as costs in favor of the prevailing party in civil actions in the justice courts of Nevada, approved March 24, 1909;
An act to regulate the condemnation of property for public use, approved February 27, 1897;
An act to regulate the exercise of the right of eminent domain, approved March 27, 1907;
An act for the protection of mines and mining claims, approved December 17, 1862;
An act to encourage the mining, milling, smelting, or other reduction of ores in the State of Nevada, approved March 1, 1875;
Sections 1 and 3 of an act to protect the wages of labor, approved February 21, 1873;
Sections 1 and 2 of an act to secure liens to ranchmen and other persons, approved February 14, 1866;
Sections 1 and 2 of an act limiting the time in which proceedings for contesting the election of any officer may be begun, approved March 25, 1903;
Also all acts amendatory of the foregoing acts specified, and all other acts and parts of acts not particularly referred to, in conflict with this act.

MINERAL CABINETS EXEMPT FROM EXECUTION

An Act to encourage the collection of geological, paleontological, and mineral specimens in this state.

Approved March 5, 1879. 64.

5822. Specimen cabinets exempt from execution.

SECTION 1. Any person who shall be the bona fide owner of a collection, or cabinet of metal-bearing ores, geological specimens, art curiosities, or paleontological remains, and who shall properly arrange, classify, number, and catalogue in a suitable book or books of reference any such collection of ores, specimens, curiosities, or remains, whether the same shall be kept at a private residence or in a public hall, or in a place of public business or traffic, the said bona fide owner of such collection shall be entitled to hold the same exempt from execution, as other property is exempted from execution under the provisions of section 221 of an act entitled "An act to regulate proceedings in civil cases in the courts of justice of this state, and to repeal all other acts in relation thereto," approved March eighth, eighteen hundred and sixty-nine.

5823. Idem—Numismatic collections defined—Not exempt.

SEC. 2. Nothing in section 1 of this act shall be construed so as to exempt

from execution any numismatic collection, such as gold and silver coins, paper currency, bank notes, legal tender currency, national or state bonds, or any negotiable note, or valuable copper, bronze, nickel, platinum, or other coin whatsoever.

5824. Idem—Must keep catalogues.

SEC. 3. It is hereby made the duty of the owner of any such collection or cabinet, as described in section 1 of this act, to keep constantly at or near such collections or cabinet, for the free inspection of all visitors who may desire to examine the same, either written or printed catalogues, as provided in section 1 of this act; and any person owning such collection or cabinet, who shall fail or neglect to comply with the provisions of this section of this act, shall forfeit all right to hold such collections or cabinet as exempt from legal execution, as provided in section 1 of this act.

ADOPTION OF CHILDREN

Abandonment of child, sections 6446, 6447.
Abandonment of illegitimate child, section 766.
Apprentices, section 482, et seq.
Billiard halls, minors excluded from, section 6506.
Children, sections 728–766.
Civil practice act, sections 4943–5821.
Compulsory education, sections 3443–3451.
Employment of minors prohibited, section 6823.
Failure to keep at school, section 3445.
Failure to support, sections 766, 6481–6483.
Guardians, sections 6149–6201.
Husband and wife, sections 2155–2194.
Jurisdiction over estates of minors in district court, section 4849.
Juvenile court law, section 729, et seq.
Liquor selling to minors unlawful, section 6506.
Production of pretended heirs, section 6370.
Protection of school children, sections 3452–3454.
Substitution of child, section 6371.
Tobacco selling to minors unlawful, section 6502.
Wills, sections 6202–6222.

An Act to provide for the adoption of children.

Approved February 20, 1885, 29

5825. Adoption of children—Requirements.
5826. Idem—Necessary consent—Appearance before district judge — Agreement to support.
5827. Unlawfully separated married persons shall not adopt without consent of spouse—Exception.
5828. Consent of parents — Exception, proviso—Illegitimate child—Child over twelve must consent in writing.
5829. Judge to examine under oath—Order of adoption — Rights of adopted child same as lawful child.
5830. May take name of adopting party—Legal relation of parties.
5831. If abandonment of child be shown, consent not necessary—Consent of absent parents, how obtained—Custodian or next friend cited and examined.
5832. Papers to be filed by judge—Order entered in court minutes—Copy recorded with county recorder—Record of legal notice.
5833. When illegitimate child is deemed adopted by conduct of father—Effect—Acknowledged by father becomes legitimate from its birth.
5834. Shall not apply to Mongolians.

5825. Adoption of children—Requirements.

SECTION 1. Any minor child may be adopted by any adult person or by any husband and wife, in the cases and subject to the provisions prescribed in this act. The person or persons adopting a child must be at least ten years older than the child adopted; *provided*, that in the case of a husband and wife adopting a child, if only one of them shall be ten years older than the child, it shall be sufficient.

See sec. 746.

5826. Idem—Necessary consent — Appearance before district judge — Agreement to support.

SEC. 2. The person or persons adopting a child, and the child adopted, and the other persons, if known, if within or residents of this state, whose consent is necessary, must appear before the district judge of the county where the person or persons adopting reside, and the necessary consent must thereupon be signed and an agreement be executed by the person or persons adopting, to the effect that the child shall be adopted and treated in all respects as his, or her, or their own lawful child should be treated, including the rights of support, protection and inheritance.

5827. Unlawfully separated married persons shall not adopt without consent of spouse—Exception.

SEC. 3. A married man, not lawfully separated from his wife, or a married woman, not thus separated from her husband, cannot adopt a child without the consent of the other spouse; *provided*, the husband or wife not consenting is capable of giving such consent.

5828. Consent of parents — Exception — Proviso — Illegitimate child— Child over twelve must consent in writing.

SEC. 4. A legitimate child cannot be adopted without the consent of its parents, if they be living and known, nor an illegitimate child without the consent of its mother, if she be living and known, and not without the consent of the father of such illegitimate child also, if he be living and known, and if he shall have adopted such illegitimate child as his own, by the acts and in the manner prescribed by section 8 [9] of this act; *provided*, that such consent shall not be necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery, or cruelty, abandonment, or for either of said causes, divorced, or adjudged to be a habitual drunkard, or has been judicially deprived of the custody of the child on account of adultery, drunkenness, cruelty or neglect; *and, provided further*, that no child over the age of twelve years shall be adopted without his or her own consent in writing.

5829. Judge to examine under oath—Order of adoption — Rights of adopted child same as lawful child.

SEC. 5. The judge must examine, under oath, all persons appearing before him under the provisions of this act, and if satisfied that the interest of the child will be promoted by the adoption, he shall make an order declaring that the child shall henceforth be regarded and treated in all respects as, and have all rights, including the right of support, and of protection, and of inheritance, of a lawful child of the person or persons so adopting the child.

5830. May take name of adopting party—Legal relation of parties.

SEC. 6. A child, when adopted, may take the family name of the person or persons adopting, and after adoption the persons adopting, and the child, shall sustain towards each other the legal relation of parent and child, and have all the rights, including the rights of support, maintenance, protection, and inheritance, and be subject to all of the duties of that relation; and the natural parents of an adopted child are, from the time of the adoption, relieved of all parental duties toward, and all responsibilities for, the child so adopted, and have no rights over it.

5831. Consent of absent parents, how obtained—If abandonment of child be shown, consent not necessary—Custodian or next friend cited and examined.

SEC. 7. If the persons whose consent is necessary to the adoption of the child are not within this state, their consent, in writing, if they be known and their whereabouts can be ascertained, must be obtained and filed with

the judge, duly executed and acknowledged, in like manner as conveyances of real estate are required to be executed and acknowledged; *provided*, that if the judge shall find that the person or persons whose consent is required have abandoned such child, or if such persons are unknown, or their whereabouts cannot be ascertained, then in that case the judge may, in his discretion, proceed to make the order of adoption without such consent; but in that case it shall be the duty of the judge to cause to appear before him, by citation or otherwise, the persons in whose custody the child is, and may also bring before him, in his discretion, such of the next friends of the child as he may deem proper, and shall examine them under oath, and if he deem it for the best interests of the child, he shall make the order of adoption.

5832. Papers to be filed by judge—Order entered in court minutes—Copy recorded with county recorder—Legal notice.

SEC. 8. The district judge shall file in the office of the county clerk all papers presented before him, or copies thereof, in the matter of the adoption of any child, and shall cause the order of adoption to be entered in the minutes of the district court of the county where the proceeding is had, and a certified copy of such minute entry to be filed and recorded in the office of the county recorder of said county, and such records shall be notice to the world of such adoption of the child.

5833. When illegitimate child deemed adopted by conduct of father—Effect—Acknowledged by father becomes legitimate from birth.

SEC. 9. The father of an illegitimate child, by publicly acknowledging it as his own, or receiving it as such, with the consent of his wife, if he is married, into his family, or otherwise treating it as his legitimate child, thereby adopts it as such; and such child shall, thereupon and thenceforth, be deemed, for all purposes, legitimate from the time of its birth. The provisions of the foregoing sections of this act do not apply to such an adoption, except as specified in section 4 of this act.

See sec. 6117.

5834. Shall not apply to Mongolians.

SEC. 10. The provisions of this act shall not apply to any Mongolian, either as the adopting or adopted party.

CHANGING NAMES OF PERSONS

An Act in relation to changing the names of individuals.

Approved February 10, 1869, 60

5835. Name, how may be changed—Verified petition filed with clerk of court.

SECTION 1. Any person desiring to have his or her name changed, may file with the clerk of the district court, of the district in which he or she may reside, a petition, verified by his or her oath, addressed to said court, stating his or her present name, the name which he or she desires to bear in future, and the reason for desiring said change.

Change of name of female in divorce proceeding, section 5844.

5836. Idem—Notice published.

SEC. 2. Upon the filing of said petition the applicant shall make out and procure to be published in some newspaper of general circulation in the county, for the period of thirty days, a notice, stating the fact of the filing of the petition, its object, his or her present name, and the name which he or she desires to bear in future.

5837. Court to make order, when—Objections determined—Recorded as judgment.

SEC. 3. If, within ten days after the expiration of the thirty days, no

written objection shall be filed with said clerk, upon proof of the filing of the petition and publication of notice, as required in section 2, and upon being satisfied by the statements in the petition, or by other evidence, that good reason exists therefor, the said court shall make an order, changing the name of the applicant as prayed for in the petition. If, within said period, objection be filed, the court shall appoint a day for hearing the proofs respectively of the applicant and the objection, upon reasonable notice; and upon said day shall hear the proofs, and grant or refuse the prayer of the petitioner, according as the proofs shall or shall not show satisfactory reasons for making said change. Upon the making of an order, granting the prayer of the petitioner, the same shall be recorded as a judgment of said court, and the name of the applicant shall thereupon be as stated in said order.

DIVORCE

Abandonment of wife, sections 6446, 6447.
Advertising for divorce business, section 6462.
Age of majority, section 431.
Bigamy, sections 6456, 6457.
Changing names, sections 5835, 5844.
Children, sections 728–766.
Civil practice act, sections 4943–5821.
Failure to support wife, sections 6481–6483.
Forcing woman to marry, section 6444.
Guardians, section 6149.
Husband and wife, sections 2155–2194.
Incest, section 6458.
Marriage, sections 2338–2357.
Marriage between Caucasian and other races prohibited, section 6514.

An Act relating to marriage and divorce.

Approved November 28, 1861, 94

5838. Divorce from bonds of matrimony, how obtained—Grounds for divorce.
5839. Nonresident defendants to be notified —Court may make order—Publication—Service of summons—Compulsory process may issue, when.
5840. Disposition of children pending proceedings and upon divorce—Judge may order production of child—Orders, how enforced.
5841. Disposition of property—What considerations determine — Effect of decree on matters not specifically mentioned—Preliminary restraining orders.
5842. Testimony, pleadings, and orders.
5843. Disposition of property rights—Rule where wife obtains decree on ground of imprisonment or adultery of husband—Alimony pendente lite—Procedure—Orders.
5844. Effect of divorce—Contract dissolved as to both parties—Female's name may be changed.
5845. Jury trial.

[Sections 1–21, relating to marriage, will be found under that head, secs. 2338–2357.]

5838. Divorce from bonds of matrimony, how obtained—Grounds for divorce.

SEC. 22. Divorce from the bonds of matrimony may be obtained, by complaint under oath, to the district court of the county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, if the latter be either the county in which the parties last cohabited, or in which the plaintiff shall have resided six months before suit be brought, for the following causes:

First—Impotency at the time of the marriage continuing to the time of the divorce.

Second—Adultery, since the marriage, remaining unforgiven.

Third—Wilful desertion, at any time, of either party by the other, for the period of one year.

Fourth—Conviction of felony or infamous crime.

Fifth—Habitual gross drunkenness, contracted since marriage of either party, which shall incapacitate such party from contributing his or her share to the support of the family.

Sixth—Extreme cruelty in either party.

Seventh—Neglect of the husband, for the period of one year, to provide the common necessaries of life, when such neglect is not the result of poverty on the part of the husband, which he could not avoid by ordinary industry. *As amended, Stats. 1875, 63.*

Kerr, Civ. C., 92-107.

For sections relating to annulment of void marriage, see secs. 2354-2357.

Cited, Sheckles v. Sheckles, 3 Nev. 407.

The acts or character of treatment which will amount to extreme cruelty sufficient to constitute a ground of divorce must in a great measure depend on the character of the respective parties, and the peculiar circumstances of each case. Reed v. Reed, 4 Nev. 395.

There may be extreme cruelty without the slightest violence; if it appear probable that the life of one of the parties will be rendered miserable by any character of misconduct upon the part of the other, although no personal violence be apprehended, a separation should be decreed. Idem.

A mere act of violence, where there is no apprehension of its repetition, and which is the result of rashness rather than malignity, does not furnish a ground of divorce for extreme cruelty, because this relief is not granted to punish the party guilty of misconduct, but to relieve the other party from future suffering or violence. Idem.

A divorce will not be granted on the ground of extreme cruelty where it appears that the complaining party has wilfully provoked the violence or misconduct complained of, unless such violence greatly exceeds the provocation. Idem.

In an action for divorce for extreme cruelty, where nothing is said in the pleading about the disposition of the common property, it is error to award it all to one of the parties. Howe v. Howe, 4 Nev. 469.

Where the decree of divorce for extreme cruelty in an action in which there was no averment in the pleadings as to the common property, awarded it all to the plaintiff, it was held that in so far as it purported to make disposition of or direction concerning such property, it should be reversed, and the cause remanded for amendment of the pleadings and for further proceedings. Idem.

The element of danger to life, limb or health, or the reasonable apprehension of such danger, must exist in order to constitute legal cruelty. There may, however, be cruelty without personal violence, and such cruelty working upon the mind may affect the health. Kelly v. Kelly, 18 Nev. 49 (51 A. R. 732, 1 P. 194).

False accusations, by the wife, of marital infidelity on the part of the husband, may in certain cases constitute such extreme cruelty as to entitle the husband to a divorce. The statute contemplates cases in which the husband may be the complaining party, and in such cases it affords him the same relief it extends to a complaining wife. Idem.

Evidence held sufficient to constitute a cause of action for divorce on the ground of extreme cruelty (Belknap, J., dissenting). Gardner v. Gardner, 23 Nev. 207 (45 P. 139).

In an action for divorce on the ground of extreme cruelty, the evidence is not necessarily to be limited to the particular facts charged, but evidence of other facts whether before or after suit brought, which serves to give character to the acts of cruelty alleged and proved, is admissible. Idem.

The admission of incompetent evidence in a divorce suit is not ground for reversal where it appears that the finding of the court was not based thereon. Idem.

A complaint, in an action by wife for divorce, alleging that defendant inhumanly caught plaintiff by the throat in an angry and threatening manner, and forced her out of the house; threatened her and commanded that she leave; called her vile and opprobrious names, thereby causing her to become weak and nervous, fearful of suffering bodily injury at defendant's hands—sufficiently alleged extreme cruelty. Kapp v. District Court, 31 Nev. 444 (103 P. 235).

An attorney, who published and advertised a pamphlet to attract nonresidents to the state to apply for divorce through him, will be shown leniency and suspended for only eight months and till the further order of the court, he having discontinued the advertising when his attention was called to his methods being condemned by the bar association, and his being the first case of the character brought to the attention of the court. In re Schnitzer, 33 Nev. — (112 P. 848, 851).

For an attorney to publish and advertise a pamphlet, the purpose of which is to attract nonresidents to the state to apply to its courts for divorce, through his agency as an attorney, that he may profit financially thereby, is "misconduct" within the meaning of the law providing for removal or suspension of attorneys. Idem.

For further cases of misconduct of attorneys, and suspension therefor, see sec. 511, ante.

See application of Reno Bar Association for disbarment of Robert Scoutar, 34 Nev.—.

5839. Nonresident defendants to be notified—Court may make order—Publication—Service of summons—Compulsory process may issue, when.

SEC. 23. If the defendant is not a resident of the territory, or cannot, for any cause, be personally summoned, the court, or judge, in vacation, may order notice of the pendency of the suit to be given in such manner, and during such time, as shall appear most likely to convey a knowledge thereof to the defendant, without undue expense or delay; and if no such order be made, it shall be sufficient to publish such notice in a weekly newspaper, printed in, or nearest to, the county in which the suit is pending, three months in succession; and if the defendant fail to appear and make defense, at the first term after such notice, or after thirty days' personal service of summons, the evidence may be heard, and the cause decided, at that term; or compulsory process may be had to obtain an appearance, or answer, if it be necessary to the disposition of property, or of children.

Kerr, Civ. C., 130.
See Residence, secs. 3609–3616.
Summons, service of, as provided in civil practice act, see secs. 5016–5034.
Cited, Wuest v. Wuest, 17 Nev. 217 (30 P. 886).

5840. Disposition of children pending proceedings and upon divorce—Judge may order production of child—Orders, how enforced.

SEC. 24. The court, in granting a divorce, shall make such disposition of, and provision for, the children, as shall appear most expedient under all the circumstances, and most for the present comfort and future well-being of such children; and when, at the commencement, or during the pendency, of the suit, it shall be made to appear to the court, or to the judge, in vacation, that any child of the wife, whether she be plaintiff or defendant, which is too young to dispense with the care of its mother, or other female, has been or is likely to be, taken or detained from her, or that any child of either party, has been, or is likely to be taken, or removed, by, or at the instance of, the other party, out of the country, or concealed within the same, it shall be the duty of the court, or of such judge in vacation, forthwith to order such child to be produced before him, and then to make such disposition of the same, during the pendency of the suit, as shall appear most advantageous to such child, and most likely to secure to it the benefit of the final order to be made in its behalf; and all such orders may be enforced, and made effectual, by attachment, commitment, and requiring security for obedience thereto, or by other means, according to the usages of courts, and to the circumstances of the case; *provided*, the court, upon good cause shown, may change the custody of such minor children, if they should be satisfied that such change will be for the welfare of such children.

Kerr, Civ. C., 138.

A complaint praying for divorce and that the defendant be awarded custody of the children and for such other and further relief as may seem just and equitable, does not authorize award of custody of the children to plaintiff and payments to her by defendant for support of plaintiff and the children. Mitchell v. Mitchell, 28 Nev. 110, 125 (79 P. 50).

The method of proceeding by a petition or complaint reciting an order for alimony pendente lite, its nonpayment, the amount accrued and unpaid, and defendant's refusal to pay, and praying for judgment that plaintiff have execution against defendant's property subject thereto, is substantially a writ of scire facias, unknown to the Nevada practice. Kapp v. District Court, 32 Nev. 264 (107 P. 95).

Execution will not ordinarily issue except to enforce a final judgment. Idem.

As execution ordinarily issues only to enforce a final judgment, an interlocutory order for alimony pendente lite will not be so enforced except where special statutory provision warrants it. Idem.

Section 27 of the act relating to marriage and divorce provides for the enforcement of orders for alimony pendente lite as is provided in section 24, which provides for enforcing orders by attachment, commitment, and requiring security, "or by other means, according to the usages of the courts." Held, that the words quoted do not

authorize an order that execution issue to enforce an interlocutory order, as enforcement of such orders to pay money is not according to such usage. Idem.

An order or judgment for execution to enforce payment of alimony pendente lite, not mentioning specific property, cannot be supported on the theory that it directs application of specific property of defendant to such object, and if execution were permitted to issue, it would be left entirely with the sheriff under the law governing such cases. Idem.

5841. Disposition of property, what considerations determine—Effect of decree on matters not specifically mentioned — Preliminary restraining orders.

SEC. 25. In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it, for the benefit of the children. And all property and pecuniary rights and interests, and all rights touching the children, their custody and guardianship, not otherwise disposed of or regulated by the order of the court, shall, by such divorce, be divested out of the guilty party, and vested in the party at whose instance the divorce was granted. And if after the filing of the petition, it shall be made to appear probable to the court or the judge, in vacation, that either party is about to do any act that would defeat or render less effectual any order which the court might ultimately make concerning property or pecuniary interests, an order shall be made for the prevention thereof, to be enforced as such preliminary orders are enforced respecting children.

Kerr, Civ. C., 138.
See sec. 2166.
Cited, Wuest v. Wuest, 17 Nev. 217 (30 P. 886).
See Lake v. Bender, and Darrenberger v. Haupt, under sec. 27 of this act.

5842. Testimony, pleadings, and orders.

SEC. 26. The testimony of witnesses in suits for divorce, shall be given orally in court, with the right to either party to take and use depositions, on the same terms and in the same manner as in actions at law; and the proceedings, pleadings, and practice, shall conform to those at law, as nearly as conveniently may be, but all preliminary and final orders may be in such form as will best effect the object of this act, and produce substantial justice.

5843. Disposition of property rights—Rule when wife obtains decree on ground of imprisonment or adultery of husband—Alimony pendente lite—Procedure—Orders.

SEC. 27. When the marriage shall be dissolved by the husband being sentenced to imprisonment, and when a divorce shall be ordered for the cause of adultery committed by the husband, the wife shall be entitled to the same proportion of his lands and property as if he were dead; but in other cases the court may set apart such portion for her support, and the support of their children, as shall be deemed just and equitable. In any suit for divorce now pending, or which may hereafter be commenced, the court or judge may, in its discretion, upon application, of which due notice shall have been given to the husband, or his attorney, at any time after the filing of the complaint, require the husband to pay such sums as may be necessary to enable the wife to carry on or defend such suit, and for her support and the support of the children of the parties during the pendency of such suit; and the court or judge may direct the application of specific property of the husband to such object, and may also direct the payment to the wife for such purpose of any sum or sums that may be due and owing to the husband from any quarter, and may enforce all orders made in this behalf, as is provided in section 24 of this act. *As amended, Stats. 1865, 99.*

Kerr, Civ. C., 137, 139, 146.
See sec. 2166.

The court cannot make an order for the payment of past expenses after the suit has been finally decided against the wife, although the motion was made before the decision of the case. Wilde v. Wilde, 2 Nev. 306, 307.

When an allowance is made to a wife for expenses of procuring attendance of witnesses in one district, and the case is afterwards removed to another district, where all witnesses reside, it would be proper for the judge of the latter district to review the allowance made, and modify it according to his views of the necessary costs in his district. Sheckles v. Sheckles, 3 Nev. 404.

See Howe v. Howe, under sec. 22 of this act.

The rights of husband and wife to property acquired before the adoption of the state constitution and before the passage by the legislature of any statute providing for the separate or common property of husband and wife, must be governed by the rules of the common law. Darrenberger v. Haupt, 10 Nev. 43, 46, 47.

It was the intention of the legislature that in case of a divorce for the misconduct of the husband other than imprisonment or adultery, his individual or sole property is subject to the order of the court. Idem.

In an action for divorce, the notice of application for the allowance of counsel fees must be served upon the attorney, if there is one, instead of the party. Lake v. Lake, 16 Nev. 363, 366.

The power of the court to make an allowance of counsel fees, while the cause is pending, is incident to divorce suits, and may be made as often as the circumstances may require. Idem.

Where the wife obtained a decree of divorce and the court adjudged a large estate, claimed by her as community property, to be the separate property of the husband and awarded it all to him, it was held that the court was justified in making an allowance of counsel fees to enable her to proceed further and contest the question relating to the property, it appearing that such proceedings were contemplated in good faith. Idem.

Where the husband appeals from an order of the district court allowing counsel fees to the wife, the supreme court has the power to make an allowance of counsel fees to the wife so as to enable her to appear, by counsel, in the supreme court upon such appeal. Idem.

See Kapp v. District Court, under sec. 22 of this act.

The court has power to award without abusing its discretion all of the property of the husband to the wife, and require him to pay twenty dollars per month for the support of an infant child. Wuest v. Wuest, 17 Nev. 218 (30 P. 886).

Having awarded all the property of the husband to the wife, it was held that the court erred in ordering the husband to pay counsel fees to the attorney for the wife. Idem.

In an action for divorce and division of community property, where a divorce is first granted and subsequently the issues relating to the property are determined, the district court has power to grant a new trial of the issues relating to the property rights alone, provided there is any material error affecting that branch of the case only without ordering a retrial of all the issues in the case. Lake v. Bender, 18 Nev. 361, 402, 403.

Upon granting a divorce the question as to the amount of allowance for the support of the wife is left to the legal discretion of the trial court and should not be interfered with in the appellate court, unless the discretion has been abused. Idem.

It is the duty of the district court to allow such sum for the wife's support as is just and equitable under the circumstances of the case and the surroundings of the parties. Idem.

In this case the allowance by the district court was increased in the supreme court. Idem.

An order increasing alimony pendente lite is not appealable. Kapp v. Kapp, 31 Nev. 70 (99 P. 1077).

See Kapp v. District Court, under sec. 24 of this act.

The court may, where it has jurisdiction, during a divorce action, increase or diminish the allowance from time to time as the circumstances may require. Kapp v. District Court, 31 Nev. 444 (103 P. 235).

Where the court has jurisdiction of divorce action, and has discretion to make such an allowance to the wife as the circumstances warrant, pendente lite, the supreme court will not annul such an order by writ of certiorari. Idem.

5844. Effect of divorce—Contract dissolved as to both parties—Female's name may be changed.

SEC. 28. Whenever an order of divorce from the bonds of matrimony is granted in this territory by the court of competent authority, such order shall fully and completely dissolve the marriage contract as to both parties; and in all suits for a divorce brought by a female, if a divorce be granted, the court may, for just and reasonable cause, change the name of such female, and shall, in its order, decree and appoint.

When a divorce is granted at the instance of a wife against her husband, on the ground of extreme cruelty, the court is authorized to set aside such portion of the husband's separate property for the support of the wife and children as shall be deemed just, and the court, in a proper case, has power to invest the wife with the husband's

title to the property as one of the means of securing such support (Wuest v. Wuest, 17 Nev. 221, affirmed). Powell v. Campbell, 20 Nev. 232, 239, 240 (19 A. S. 350, 2 L. R. A. 615, 20 P. 156).

In an action in equity the court will, at the instance of the wife, set aside the deed of such purchaser and require the legal title to the property to be conveyed to her. Idem.

To such suit the former husband, who was duly served with process in the divorce action and all his interests in the land divested by the decree therein, is not a necessary party. Idem.

In an action for divorce where the wife alleges her necessities and her husband's abilities, and prays that specific real property be set apart for her support, it was held that the rule of lis pendens applies against a purchaser, pendente lite, with actual knowledge of all the facts. Idem.

5845. Jury trial.

SEC. 29. Either party, on application to the court, may be entitled, at such trial, to have the issue of fact involved in such case and presented by the pleadings, tried by a jury, in accordance with the general rules governing the trial of civil actions in the district court.

Public may be excluded from hearing in certain cases, sec. 4863.

JOINT DEBTORS

An Act concerning the liabilities of joint debtors.

Approved February 15, 1866, 67

5846. Joint debtor may be released—Effect of release.

SECTION 1. Any one of two or more joint debtors, or parties jointly, or jointly and severally, bound by any contract or judgment, may be released from his, her, or its liability upon such contract or judgment by the creditor or creditors, and such release shall not operate, nor be held to operate, in law as a release to the other debtor or debtors upon such contract or judgment, except as to the released debtor's proportion of such liability or debt, estimated upon the basis of the number of such debtors; but such release shall operate only as a release of all liability of such debtor to the creditor in such contract or judgment, and as a credit upon the same of such proportionate sum as herein provided.

Hoppin v. First Nat. Bank, 25 Nev. 84.

The conveyance of one joint mortgageor of her interests in the mortgaged premises to the plaintiff in satisfaction of the mortgage would operate as a release of her proportionate part of the mortgage debt. Hoppin v. First National Bank, 25 Nev. 84 (56 P. 1121).

5847. Not necessary party to action against other joint debtors.

SEC. 2. It shall not be necessary to make the party released, as provided in the foregoing section, a party to any action upon such contract, but the creditor or creditors aforesaid may pursue the remaining debtors for the remaining portion of such debt, the same as though no such release had been made.

5848. Credit on judgment—Release from liability.

SEC. 3. In case a release as aforesaid be made to any judgment debtor by the judgment creditor, the judge or justice shall order the proper credit, as aforesaid, made upon such judgment, and that such debtor be released from liability upon the same.

POSSESSORY ACTIONS

Civil practice act, sections 4943–5821.
Public lands, page 870, et seq.
Unlawful enclosure of public lands, sections 3173–3176.

An Act prescribing the mode of maintaining and defending possessory actions on public lands in this state.

Approved March 9, 1865, 343

5849. Action to defend possession—Not to affect mining rights.
5850. Extent of claim 160 acres.
5851. Possessory claims to be surveyed and recorded—Affidavit.

5852. Land improved in certain time—Value of improvements.
5853. Occupant may absent himself—Fee to be paid—How disposed of.
5854. Proof of actual enclosure not required.
5855. All lands deemed public, exception—Action for unlawful entry.
5856. Acts repealed.

5849. Action to defend possession—Not to affect mining rights.

SECTION 1. Any person now legally occupying and settled upon, or who may hereafter occupy or settle upon, any of the public lands in this state, for the purpose of cultivating or grazing the same, may commence and maintain any action for interference with, or injuries done to, his or her possession of said land, against any person or persons so interfering with or injuring such land or possession; *provided*, that if the lands so occupied and possessed contain mines of any of the precious metals, the possession or claim of the person or persons occupying the same, for the purposes aforesaid, shall not preclude the working of such mines by any person or persons desiring so to do, as fully and unreservedly as they might or could do had no possession or claim been made for grazing or agricultural purposes.

What facts are sufficient to constitute such a possession of public land as will maintain ejectment, must, in a great measure, depend upon the character of the land, the locality and the object for which it is taken up. Sankey v. Noyes, 1 Nev. 68.

Possession is prima facie evidence of title and sufficient to maintain ejectment, but where possession alone is relied on, it must be an actual bona fide occupation. Idem.

The mere staking off of land, without occupation or other acts of ownership, would not constitute such a possession as would maintain ejectment. Idem.

Until there is some decisive act to show an ouster or adverse possession, the possession of one joint tenant, or tenant in common, inures to the benefit of all. Van Valkenburg v. Huff, 1 Nev. 142.

Facts held to constitute possession. Brown v. Roberts, 1 Nev. 462.

Cited, Whitman M. Co. v. Baker, 3 Nev. 392, 393; Rivers v. Burbank, 13 Nev. 399, 409.

A title to public land, not surveyed or brought into market by government, sufficient to maintain ejectment may be acquired only in one of two ways; either by compliance with the requirements of this statute, or by actual possession or occupation of such land. Stainінger v. Andrews, 4 Nev. 59, 66.

A settler on public land is entitled to a reasonable time after his location to enclose it, or to make such improvements as may be necessary to its enjoyment; and during such time he will be protected precisely the same as if he had perfected by possession, by enclosure, or otherwise. Idem.

A settler on public land, if ousted after the lapse of a reasonable time within which to improve it, can recover against the person in possession only by showing an actual, notorious prior possession. Idem.

Actual possession of land is the purpose to enjoy the same, united with or manifested by such visible acts, improvements or enclosures as will give to the locator the absolute and exclusive enjoyment of it. Idem.

A locator upon public land, who shows that he first entered upon it, marked out the boundaries, and diligently proceeded, or diligently made preparations, to do such acts as were necessary to constitute an actual possession, will be entitled, even without showing an actual possession, to recover against a person subsequently entering. Idem.

The question as to whether a settler on public land has proceeded with reasonable diligence to follow up his location with the necessary improvements, so as to recover against a subsequent possessor, is a question of fact for the jury. Idem.

In an action to determine an adverse claim to land lying on both sides of a river, the refusal of an instruction asked by defendant "that, if they found from the evidence that plaintiff had shown a right only to that portion of the land on the north side of the river, he was not entitled to recover with respect to that located on the south side," was held error. Van Vliet v. Olin, 4 Nev. 95, 97 (97 A. D. 513).

Facts held an insufficient showing to maintain ejectment. Kraft v. Carlow, 9 Nev. 20, 22; Courtney v. Turner, 12 Nev. 345, 348.

Where possession is relied upon to maintain ejectment, it must be an actual bona fide possession, a subjection to the will and dominion of a claimant, as distinguished from the mere assertion of title and the exercise of occasional acts of ownership. Idem.

Actual possession of land—Acts necessary to constitute possession—Natural boundaries. Eureka Con. M. & S. Co. v. Way, 11 Nev. 171; Lechler v. Chapin, 12 Nev. 65.

When agricultural land need not be fenced. Courtney v. Turner, 12 Nev. 345.

Evidence held wholly insufficient to create any possessory right to land. Rivers v. Burbank, 13 Nev. 399, 409.

When no better right than possession is shown, he who is prior in time is prior in right. Brown v. Killabrew, 21 Nev. 437 (33 P. 865).

One who has purchased and received a conveyance of the improvements and possessory right of a settler on unsurveyed public lands, is entitled to recover in ejectment against one who entered by his permission

and afterwards refused to surrender possession. Idem.

Actual possession of land consists in subjecting it to the will and dominion of the occupant, and must be evidenced by those things which are essential to its beneficial use. The law requires that the extent of the claim should be clearly defined, and that the possession should be open, notorious and continuous. Robinson v. Imp. M. Co., 5 Nev. 44; Rogers v. Cooney, 7 Nev. 213.

Possession of land—When enclosure not necessary. Hamburg M. Co. v. Stephenson, 17 Nev. 449 (30 P. 1088).

Prior possession of land by the plaintiff, and ouster by the defendant, makes a prima facie case for plaintiff, and throws the burden of proof on defendant to show that he has some superior right. McFarland v. Culbertson, 2 Nev. 280.

What parties must show. Idem.

Preemption claim under United States laws—When cannot be made. Nickals v. Winn, 17 Nev. 188; Nickals v. Bird, 17 Nev. 195.

Prior possession—Question of fact. In ejectment for land, on the ground of prior possession, if there is some evidence tending to prove acts of appropriate domain, its sufficiency is a question of fact for the jury, and not one of law for the court to decide. Sharon v. Davidson, 4 Nev. 416.

Insufficiency of evidence—Nonsuit—Error to grant if there is some evidence tending to show possession. Idem.

Possession to maintain trespass quare clausum fregit. It was formerly held necessary for the plaintiff to establish an actual possession of the locus in quo; but under more modern decisions a constructive possession is held sufficient. Courchaine v. Bullion Co., 4 Nev. 369.

Right of possession in defendant—Right of preemptor of government land—Recognized preemption rights—Effect of land office decision—Preemption rights relate back to first steps. Idem.

5850. Extent of claim 160 acres.

SEC. 2. Every such claim, to entitle the holder to maintain any action as aforesaid, shall not contain more than one hundred and sixty acres, and the same shall be surveyed and marked by metes and bounds, so that the boundaries may be readily traced and the extent of such claim easily known; and no person shall be entitled to maintain any such action for possession of, or injury to, any claim, unless he or she occupy the same, and shall have complied with the provisions of the third and fourth sections of this act.

5851. Possessory claims surveyed and recorded—Affidavit.

SEC. 3. Any person claiming any of the public lands in this state shall have the same surveyed by the county surveyor of the county in which said lands are situated, and shall have the plot of such survey duly certified to by said surveyor, recorded in the office of the county recorder, and shall take and subscribe his or her affidavit that he or she has taken no other claim under this act, and that, to the best of his or her knowledge and belief, the said lands are not claimed under any existing title.

5852. Land improved in certain time—Value of improvements.

SEC. 4. Within ninety days after the date of said record, the party recording is hereby required to improve the lands thus recorded to the value of two hundred dollars, by putting such improvements thereon as shall partake of the realty, unless such improvements shall have been made prior to the application for survey and record, according to section 3 of this act.

5853. Occupant may absent himself—Fee to be paid—How disposed of.

SEC. 5. At any time after the provisions of the second, third and fourth sections of this act shall have been complied with, the party so complying shall be permitted to absent himself or herself from such claim, without being required to occupy the same, for a period of not more than twelve months; *provided*, the person so wishing to absent himself or herself shall first pay to the treasurer of the county in which said claim shall be situated, the sum of fifteen dollars, in gold or silver coin, upon which payment the treasurer shall issue a receipt for the same. At any time within twelve months after the date thereof, such receipt shall be received as prima facie evidence of possession in any court having jurisdiction in such cases. Any person absenting himself or herself from said claim for a longer period than sixty days, without first paying the sum provided in this section, shall for-

ever forfeit his or her claim to the lands. One-half of the amount paid to any county treasurer, under the provisions of this section, shall be paid by said treasurer into the general fund of such county, and the balance into the state treasury, whenever making his regular settlements with the state treasurer. The state treasurer shall set apart and retain all moneys received from such source as a special fund, which may hereafter be appropriated by law for the maintenance and protection of the insane.

5854. Proof of actual enclosure not required.

SEC. 6. On the trial of any such causes, the possession or possessory right of the plaintiff, shall be considered as extending to the boundaries embraced in such survey, so as to enable him or her, according to section 3 of this act, to have and maintain any action as aforesaid, without being compelled to prove an actual inclosure.

5855. All lands deemed public—Exception—Action for unlawful entry.

SEC. 7. All lands in this state shall be deemed and regarded as public lands, until the legal title is known to have passed from the government to private individuals or parties. Every person who shall have complied with the provisions of this act shall be deemed and held to have the right or title of possession of all the lands embraced within their survey, not to exceed one hundred and sixty acres; and any person who shall thereafter, without the consent of the person so complying, enter into or upon said lands adversely, shall be deemed and held guilty of an unlawful and fraudulent entry thereon, and may be removed therefrom by proceedings had before any justice of the peace of the township in which the lands are situated (or in case of the absence or other disability of such justice, before any other justice of an adjoining township). Such proceedings may be commenced and prosecuted under the provisions of an act of the legislature of the State of Nevada, entitled "An act concerning forcible entries and unlawful detainers," approved February sixteenth, eighteen hundred and sixty-five; and all the provisions contained in said act are made applicable to proceedings under this act. *As amended, Stats. 1869, 72.*

See secs. 5585–5605, 5714.

5856. Acts repealed.

SEC. 8. Sections 10 and 13 of an act passed by the legislative assembly of the Territory of Nevada, entitled "An act to regulate surveys and surveying," approved November twenty-ninth, one thousand eight hundred and sixty-one, and all other acts or parts of acts, so far as the same are inconsistent with or repugnant to the provisions of this act, are hereby repealed.

ESTATES OF DECEASED PERSONS

General act to regulate the settlement of estates of deceased persons, sections 5857–6139.

Act supplemental to the above-entitled act, relating to descent of estates of widow and widower, sections 6140–6142.

Act supplemental to act to regulate the settlement of estates of deceased persons, relating to notices, objections, and duties of clerk, sections 6143, 6144.

Act making wages preferred claims against estate of deceased person, section 6145.

Act supplemental to act regulating the settlement of estates of deceased persons, authorizing the court to order the mortgaging of the property of estates by the executor or administrator, section 6146.

Act providing for the execution of conveyances of property in compliance with the contracts of deceased persons, sections 6147, 6148.

Adoption of children, sections 5825–5835.
Bonds and undertakings by surety companies, sections 695–701.
Community property, decree to divide, section 2166.

Courts and court officers, sections 4828–4928.
Guardians, sections 6149–6201.
Guardians in estates of deceased persons, sec. 6190–6192.
Homestead to be set apart on death of husband, section 2165.
Jurisdiction over estate of deceased persons in district court, section 4849.
Wills, sections 6202–6226.

An Act to regulate the settlement of the estates of deceased persons.

Approved March 23, 1897. 119

5857. District court — Jurisdiction — Residence of decedent controls—Nonresident decedent.
5858. Wills delivered to court or executor.
5859. Person named as executor—Duty to present will.
5860. Renunciation of trust—Petition for probate—Averments—Defects, how cured.
5861. Liability for neglect.
5862. Who may petition for probate.
5863. Idem—By any interested person.
5864. Order for production of will.
5865. Idem—Penalty for refusal—Contempt.
5866. Petition signed and filed—Notice of hearing, how given.
5867. Powers of judge to enforce orders.
5868. Citation to heirs—Service of.
5869. Citation to persons named to execute.
5870. Subpenas to subscribing witnesses.
5871. Hearing of proof—Oral testimony.
5872. Who may contest — Court to appoint attorney for minor or absent heirs.
5873. One witness sufficient if no contest—Ex parte affidavit, when adopted.
5874. Contest and proceedings—Issue of fact, how tried.
5875. Idem — Subscribing witnesses examined—Exception.
5876. Decree admitting to probate—Record.
5877. Exemplified copy of record—Evidence.
5878. Foreign wills admitted to probate, when.
5879. Idem—Procedure as in case of original will.
5880. Lost or destroyed will, how proven.
5881. Idem—What to be proved—Amount of proof.
5882. Idem—Pending proof may restrain administration.
5883. Letters testamentary to be issued, when.
5884. Executors, who competent—Letters with will annexed.
5885. Objections to executors — Hearing — Petition for letters with will annexed.
5886. Marriage of unmarried women extinguishes authority—Married woman named as executrix may act.
5887. Executor of executor cannot act—Letters with will annexed.
5888. Letters testamentary to minors, when may issue—Joint executors.
5889. Power of one or more of several executors—Absence or disability—Majority to control.
5890. Power of administrators with will annexed.
5891. Letters signed and sealed by clerk.
5892. Form of letters testamentary.
5893. Form of, with will annexed.
5894. Who entitled to letters of administration—Precedence.
5895. Idem—Males preferred to females—Whole blood to half blood.
5896. Persons equally entitled—Court may grant to one or more.
5897. Who not entitled to letters.
5898. Marriage of unmarried woman extinguishes authority.
5899. Application for letters by petition—What to state—Defects, how cured—Notice, how given.
5900. Who may contest—May pray for letters.
5901. Hearing of application—Order for letters.
5902. Minute entry of proof of notice conclusive evidence.
5903. Letters may be granted to persons of lesser right, when.
5904. Proof of death and of intestacy—Value of property—Witnesses.
5905. Granted to one not entitled at request of others entitled—How request made.
5906. Certain persons entitled to preference may obtain revocation of letters to others.
5907. Idem—Procedure—Hearing—Order.
5908. Idem—Surviving husband or wife—May assert prior right—Revocation.
5909. Form of letters of administration.
5910. Executor or administrator to take oath—Form of—Filed and recorded—Certified copies of records and papers have force of originals.
5911. Bond to be given—Form of—Judge to approve—Additional bond, when.
5912. Bond in force until penalty exhausted.
5913. Sureties to justify, before whom—When penalty exceeds $2,000 sureties may qualify for $500 or more.
5914. Doubtful sureties—Reexamination may be required — Citation — Additional surety.
5915. Idem—Failure to give surety—Rights cease—New appointee.
5916. Letters testamentary without bond when will so provides — May be required for cause.
5917. Persons interested may apply for additional security.
5918. Idem — Investigation — Citation to issue—How served.
5919. Idem—Hearing of application—Additional security may be required.

5920. Idem—Letters revoked for failure to comply.
5921. Idem — Pending application — Court may suspend authority.
5922. Court may require further security upon own motion.
5923. Sureties released how—Citation and hearing.
5924. Idem—Released sureties not liable for subsequent acts.
5925. Letters revoked upon failure to furnish required security.
5926. Special administrator appointed, when —Purpose.
5927. Idem—Appointment, how made—Letters, how issued.
5928. Idem—Who to have preference—No appeal from appointment.
5929. Idem—Powers, duties and liabilities— Not to pay claims.
5930. Idem—Powers cease on appointment of administrator—Duties.
5931. Idem—Duty to render account.
5932. Special administrator appointed to succeed executor.
5933. Remaining executor or administrator to proceed without filling vacancy.
5934. New letters to issue in case of vacancy for any cause—Bond—Powers.
5935. Letters of administration revoked upon proof of will—Account to render.
5936. Idem—Powers of new administration.
5937. Resignation, how made—Account.
5938. Acts done before revocation—Validity of.
5939. Transcript of record same force as letters.
5940. Judge, when disqualified to act.
5941. Idem—Duty to call other judge to act —Retains jurisdiction.
5942. Inventory, return of.
5943. Appraisement, how made—Compensation of appraisers—Inventory, what to include.
5944. Appraisers to take oath—Appraisement, how made—Inventory, what to contain—Separate and community property.
5945. Executor's debt to decedent not discharged—Included in inventory.
5946. Discharge of debt in will not valid against creditors—How construed.
5947. Executor or administrator to make oath to inventory—Contents of.
5948. Nonreturn of inventory—Cause for revocation of letters—Liability.
5949. Supplemental inventory — Appraisement—Enforcement.
5950. Right of possession—Duties in relation to property.
5951. Personal estate—First chargeable for debts and expenses—Real estate may be sold.
5952. Conversion before letters—Liability.
5953. Idem—Proceedings where conversion alleged—Expenses.
5954. Idem—Refusing to answer complaint —Court may commit—May order delivery—Prima facie evidence—Witnesses.
5955. Person entrusted with part of estate may be cited to appear—Procedure.
5956. Widow or children may retain homestead—Provision for support.
5957. Property set apart for use of family—Not subject to administration.
5958. Idem—Further allowance for family—Exempt property insufficient—Time limit in insolvent estate.
5959. Idem — Allowance — Priority of charge.
5960. Property set apart—How apportioned between widow and children.
5961. Estates not exceeding $500, when not administered—How and to whom set apart—Affidavit.
5962. Property set apart to go to minor children, when.
5963. Notice of appointment of executor published, posted and filed—What to specify.
5964. Claims not filed within three months barred—Proviso.
5965. Claim to be supported by affidavit—Form — Defective affidavit, amendment or.
5966. Claim of judge or executor may be filed.
5967. Executor to examine all claims—When deemed rejected—Judge to approve —Allowance after time limitation—Claims founded on written instrument, how prepared.
5968. Rejected claim, notice of—Holder may bring suit—Time of—Barred, when —Nonresident, notice to.
5969. Claim barred by statute not to be allowed.
5970. Action not maintained unless on claim filed.
5971. Vacancy in administration not counted in limitation.
5972. Action pending—Claim to be filed for.
5973. Amount of allowance indorsed on claim—Allowance in part—Action—Costs.
5974. Effect of judgment — Certified copy filed—Execution not to issue.
5975. Judgment before death — Execution not to issue unless levied before death.
5976. Liability for costs.
5977. Claim of executor, judge to pass upon.
5978. Failure to give notice to creditors—Cause for revocation.
5979. Statement of claims to be filed, what set forth.
5980. Sale of property, when not vaild—Options, leases and bonds on mining property — Copies filed with clerk—Deeds.
5981. Application for order of sale on petition—Objections—Hearing.
5982. Sale of perishable property—Personal property — Procedure — Orders — Property bequeathed.
5983. Sale of personal property, how made—Notice, time and place.
5984. Idem—Notice, how given.
5985. Real estate may be sold, when.

5986. Idem—Petition for order to sell—What to show.
5987. Idem—Order to show cause to all interested parties—Time of hearing.
5988. Idem—Notice, how served — Parties may assent.
5989. Idem—Proof of notice—Hearing of application.
5990. Idem—Service on guardian of minor—Attorney may be appointed for minor, creditors or heirs.
5991. Idem — Witness examined — Process for.
5992. Idem—Order of sale of whole or part.
5993. Idem—Order to specify, what—Sale, how made — Credit allowed — Devised portion—Sale may be compelled.
5994. Idem—Person other than executor may apply for order of sale—Procedure.
5995. Idem—Certified copy of order furnished administrator.
5996. Idem—Notice of time and place of sale, how given.
5997. Idem—Sale to be made, where, when and how—Private sale, restrictions—Reappraisement, when.
5998. Idem—Confirmation of sale—Notice of, vacated, when—New sale.
5999. Idem—Order confirming sale—Conveyance—Delinquent purchaser — Liability—New sale.
6000. Idem — Conveyances — What deemed passed—After acquired title.
6001. Idem—Before confirmation—Proof of notice—Order to recite.
6002. Idem—Postponement of sale—Sixty-day limit.
6003. Idem—Adjournment, notice of, how given.
6004. Idem—Sale to pay legacies.
6005. Idem—Payment according to will.
6006. Idem—Order not required when sale authorized by will—Notice—Confirmation.
6007. Idem—When property designated in will insufficient — Other may be appropriated.
6008. Idem—Devises and legacies liable for debts—When may be exempted.
6009. Idem—Sale of devised property—Contribution by other devisees and legatees—Court to decree.
6010. Contract for purchase of lands may be sold—Procedure.
6011. Idem — Sale subject to payments—Confirmation subject to indemnity bond.
6012. Idem—Bond, how conditioned—Bond not required, when.
6013. Idem — Assignment of contract — Rights of purchaser.
6014. Sale of land subject to lien—Purchase money, how applied—Liens not affected by statute of limitations pending settlement of estate.
6015. Expenses of sale, primary charge.
6016. Misconduct in sale, administrator liable on bond.
6017. Fraudulent sale, administrator liable on bond—Double damages.
6018. Limitation for action to recover estate sold by executor or administrator—Three years—Disability, effect of.
6019. Account of sale to be made, when—Penalty for neglect—Contempt—Revocation—Attachment for appearance.
6020. Executor or administrator not to purchase.
6021. Executor or administrator to take possession of all property—Deemed in possession for certain suits—Possession of heirs or devisees.
6022. Executors or administrators may sue and be sued—For what.
6023. Idem—May sue for trespass, waste or conversion.
6024. Executor or administrator may be sued for waste, trespass or conversion committed by decedent.
6025. Surviving partner may continue in possession of partnership property—Duty to settle and account—May be compelled by attachment—May be sued—Inventory and appraisement.
6026. Action on bond of former executor or administrator.
6027. Joinder of parties — Executors not qualifying.
6028. Debts and cases compromised, how.
6029. Fraudulent conveyance by decedent—Duty of executor or administrator as to—Rights of creditors.
6030. Idem—Creditors to apply for—Costs secured.
6031. Idem—Disposition of, when recovered.
6032. Specific performance of contracts of decedents — All interested parties to be made defendants.
6033. Idem—Effect of conveyance.
6034. Executor or administrator not liable out of own estate for damages or debts of decedents, except upon promise in writing — Statute of frauds.
6035. Executor or administrator, with what chargeable in account.
6036. Not to profit or lose unless in fault.
6037. Idem — Debts uncollected without fault.
6038. Expenses and compensation—Provision in will—May renunciate.
6039. Not to purchase claims — Charge amounts actually paid.
6040. Commissions — Additional allowance, when.
6041. First account rendered—What to contain.
6042. Full account and report to be rendered, when.
6043. Citation to appear on failure to render account — Attachment — Revocation of letters.
6044. Clerk to give notice of account by posting.

6045. Account, who may contest—Hearing —Examination.
6046. Vouchers to be produced—Lost, how proved — May be withdrawn — Examination of account.
6047. Minors, guardians for, attorney appointed for, when—For absent heirs, devisees or legatees—Contests.
6048. Settlement conclusive—Except as to persons under disability—Two-year limitation—Presumption of correctness.
6049. Proof of notice—Hearing on account —Order must show—Conclusive.
6050. Account may be required after authority ceases.
6051. Failure to account, cause for revocation of letters—Absence or concealment.
6052. Debts, order of payment.
6053. Preference to mortgages extends only to proceeds.
6054. Estate insufficient to pay debts in full —Dividends—Preference.
6055. Funeral, last sickness and family expenses, when payable.
6056. Order for payment to creditors — Dividends—When account final — Discharge.
6057. Claims contingent, disputed or not due —Payment into court—Consent.
6058. Liability of executor or administrator to debtors after settlement of account—Execution may issue.
6059. Payment of legacies and distribution.
6060. Final account, when to be rendered.
6061. Neglect to render final account—Proceedings.
6062. Distribution, when made.
6063. Accounts confirmed, when.
6064. Heirs, devisees or legatees may receive their portion of estate on giving bond, when.
6065. Idem—Notice of petition.
6066. Idem—Who may resist.
6067. Idem—Decree of distribution—Bond.
6068. Idem—Decree, what may direct.
6069. Idem—Partition.
6070. Idem—Cost of proceedings, how paid.
6071. Idem—Contribution to pay debts—Citation—Order—Action on bond.
6072. Petition for distribution may accompany final account—When otherwise — Supplementary account — Decree.
6073. Form of decree.
6074. Petition for distribution—Notice of—Service — Publication of — Further notice.
6075. Estates in common—Partition.
6076. Idem—Petition, who may file—Citation—Hearing—Decree.
6077. Idem—Petition may be filed, when—Partition, when ordered.
6078. Idem — Commissioners appointed — Number of—Qualifications and proceedings—Surveyor.
6079. Idem—When real estate is in different counties.
6080. Idem—When interest parted with.
6081. Idem—Shares, how set out—Description—In common, when.
6082. When partition cannot be made—May be assigned to one—Compensation to others — How determined — Minors.
6083. Idem—Value of property greater than either party's share—Commissioners to set off—Compensation to others.
6084. Idem—When cannot be fairly divided — Sale conducted, how — Proceeds divided.
6085. Idem—Estates in common with other persons, how partitioned — Suit authorized.
6086. Idem—Shares of equal cash value—Quality and quantity considered.
6087. Idem — Guardians and attorneys appointed—Minors or absent heirs —Commissioners to give notice—May take testimony.
6088. Idem — Report of commissioners — Exceptions to — Hearing — Court may recommit partition—New commissioners—Confirmation and conveyance.
6089. Advancements, questions of, heard by court—Right of appeal.
6090. Court may appoint agent for absentees.
6091. Idem—Bond of agent.
6092. Idem—Unclaimed estates—Sale—Proceeds paid to state treasurer—Receipt for.
6093. Idem—Liability of agent.
6094. Idem—Amount recovered by claimant —Proceedings.
6095. Decree of discharge of executor or administrator.
6096. Subsequent letters may issue for cause.
6097. Powers suspended by order of court pending investigation for cause.
6098. Idem—Special administrator may be appointed—Bond—Account.
6099. Idem — Proceedings on suspension — Revocation—New letters.
6100. Idem—Who may appear and participate in hearing.
6101. Executor absconding, concealed or out of state—Citation, how served.
6102. Process to compel attendance — Required to answer—Commitment—Revocation of letters.
6103. General provisions—Minutes of proceedings—Probate register—Publications, how made—Times may be shortened.
6104. Personal notice, how given—Citation.
6105. Citation, how served.
6106. Proofs of service of papers—Publication—Affidavit—Evidence.
6107. Citation—Time of service.
6108. Testimony in other places, how taken.
6109. Issue of fact, how tried—Costs determined by court—Execution.
6110. Attorney for minors.
6111. Decree setting aside homestead—Copy recorded.

6112. Appeal—What decisions and orders may be appealed from to supreme court—How governed.
6113. Power of appellate court—Costs, execution may issue for.
6114. Undertaking on appeal not required by executor or administrator.
6115. Reversal of order appointing executor or administrator—Prior acts valid—Successor—Certain proof not again required.
6116. Estate of intestate, descent and distribution—When to escheat to state for support of common schools.
6117. Illegitimate child, inheritance of—Acknowledgment by father—Issue of null or dissolved marriage deemed legitimate.
6118. Heirs of illegitimate child.
6119. Degrees of kindred computed—Rules of civil law—Kindred of half blood—Inheritance.
6120. Advancement considered a part of estate for purposes of distribution.
6121. When advancement exceeds share—When not.
6122. Gifts and grants not deemed advancement, when.
6123. Value of advancement, how determined.
6124. In case of prior death of recipient, how advancement affects heirs.
6125. Husband and wife, separate property only affected.
6126. Act to be liberally construed—Proceedings of record—Attorneys of record, powers of—Compensation.
6127. Summary administration may be ordered, when—When value of estate not in excess of $2,000—Procedure—Costs limited.
6128. Form of notice to creditors.
6129. "Right of representation" defined—Posthumous children, rights of.
6130. Estates, when escheat to state.
6131. Idem—Duty of attorney-general—Information to be filed—Citation to issue.
6132. Idem—Contesting escheats—Procedure—Judgment and costs, sale, of real property—Proceeds from escheats paid into state treasury.
6133. Idem—Appeal may be taken.
6134. Idem—Controller to keep account of—Proceedings to recover from state, when and how taken—Costs—Limitations—Persons under disability—Legislature may cause sale of lands.
6135. Idem—Receiver may be appointed pending determination of title—To give bond.
6136. Idem—Information to attorney-general—Percentage to informer—Proviso.
6137. Idem—Disposition of money.
6138. Civil practice act applicable.
6139. Acts repealed.
6140. When estate of widow descends to heirs of deceased husband.
6141. When estate of widower descends to heirs of deceased wife.
6142. Act, how applicable.
6143. Notices to be given by clerk without order from judge.
6144. Objections filed with clerk—Time of hearing.

5857. District court—Jurisdiction—Residence of decedent controls—Nonresident decedent.

SECTION 1. Wills may be proved and letters testamentary or of administration granted in the county of which deceased was a resident at the time of death, whether death occurred in such county or elsewhere, and the district court of such county shall have exclusive jurisdiction of the settlement of such estates, whether such estate is in one or more counties. The estate of a nonresident decedent may be settled by the district court of any county wherein any part of such estate may be. The district court to which application shall first be made shall have exclusive jurisdiction of the settlement of such estates.

Kerr, C. C. P., 1294.

Although the same court has jurisdiction under our system of cases at law, in equity and in letters of probate, yet the several classes of cases must be kept separate, and a petition to the court of probate cannot be compounded with an action at law or a suit in chancery. Lucich v. Medin, 3 Nev. 93 (93 A. D. 376).

This act is copied mainly from the code of civil procedure of California, title 2. The California law does not contain the statutory rule of construction found in section 269 of this act. After comparing sections 124 and 157 of this act with the corresponding sections in California, it was held that the difference between the two statutes was such that the construction placed on the above section by the courts of California is inapplicable in Nevada. Kirman v. Powning, 25 Nev. 379 (60 P. 834).

The probate court, in the absence of statute, has no jurisdiction to adjudicate disputed rights to an estate. Estate of Singleton, 26 Nev. 106 (64 P. 513).

The appointment as an administrator of a nonresident by the district court of the county other than that in which decedent died or left property is unauthorized. In re Bailey's Estate, 31 Nev. 378, 383, 384 (103 P. 232).

5858. Wills delivered to court or executor.

SEC. 2. Any person having any will in his possession shall within ten days after knowledge of the death of the person who executed such will deliver it into the district court that has jurisdiction of the case, or to the person named in such will to execute it.

Kerr, C. C. P., 1298.

5859. Person named as executor—Duty to present will.

SEC. 3. Any person named as executor or executrix in any will shall within fifteen days after the death of the testator or testatrix, or within fifteen days after knowledge of such naming, present the will, if in possession of it, to the district court.

Kerr, C. C. P., 1298.

5860. Renunciation of trust—Petition for probate—Averments—Defects, how cured.

SEC. 4. Any person so named may decline the trust by filing a renunciation in writing. If such person intends to accept the trust, there shall be presented a petition for the probating of such will, setting forth in such petition the facts necessary to give the court jurisdiction, and, when the same are known, the names, ages and residence of the heirs and devisees of the deceased, also the character and probable value of the estate and praying that the will be admitted to probate, and that letters testamentary be issued thereon to the party entitled thereto. If the jurisdictional facts existed, but are not fully set forth in the petition and the same shall be afterwards proved in the course of the administration, the probate of the will and the subsequent proceedings shall not on account of such want of jurisdictional averments be held void.

Kerr, C. C. P., 1301.

5861. Liability for neglect.

SEC. 5. Every person who shall neglect to perform any of the duties required in the preceding sections without reasonable cause, shall be liable to every person interested in the will for the damages such interested person may sustain by reason of such neglect.

5862. Who may petition for probate.

SEC. 6. Any person named in a will to execute it, though not in possession of such will, may present a petition to the district court having jurisdiction, praying that the person in possession of the will may be required to produce it, that it may be admitted to probate, and that letters testamentary be issued.

Kerr, C. C. P., 1303.

5863. Idem—By any interested person.

SEC. 7. Any person having an interest in a will may, in like manner, present a petition, praying that it may be required to be produced and admitted to probate.

Kerr, C. C. P., 1303.

5864. Order for production of will.

SEC. 8. If it be alleged in any petition that any will of a deceased person is in the possession of a third person, and the court shall be satisfied that the allegation is correct, an order shall be issued and served upon the person having possession of the will, requiring such person to produce it at a time to be named in the order.

Kerr, C. C. P., 1302.

5865. Idem—Penalty for refusal—Contempt.

SEC. 9. Any person having the possession of a will and neglects or refuses

to produce it in obedience to such order, such person may, by warrant from the court, be committed to the jail of the county, and be kept in close confinement until such person produces the will.

Kerr, C. C. P., 1302.

5866. Petition signed and filed—Notice of hearing, how given.

SEC. 10. All petitions for the probate of a will, and for the issuance of letters, shall be signed by the party petitioning, or the attorney for such petitioners, and filed with the clerk of the court who shall publish a notice in some newspaper, if there is one printed in the county, if not, then by posting such notice in three public places in the county, stating in such notice the filing of such petition, the object, and designating a time for proving such will, which shall not be less than ten nor more than twenty days.

Kerr, C. C. P., 1303.

5867. Idem—Powers of judge to enforce orders.

SEC. 11. The judge may make all necessary orders to enforce the production of any will at chambers.

Kerr, C. C. P., 1305.

5868. Citation to heirs, service of.

SEC. 12. If the heirs of the deceased reside in the county, the party petitioning for the probate of a will shall obtain from the clerk a citation and cause it to be served upon such heirs, requiring them to appear and contest the probate of the will at the time appointed by the clerk, if they so desire. Such citation shall be served at least three days before the time so appointed.

Kerr, C. C. P., 1303.

5869. Citation to persons named to execute will.

SEC. 13. If a petition for probate is presented by any person other than the one named in the will to execute it, or if it is presented by one of several of such persons named in the will, citation shall in like manner issue and be served upon such not joining in the petition, if resident within the county.

Kerr, C. C. P., 1303.

5870. Subpenas to subscribing witnesses:

SEC. 14. The clerk shall also issue subpenas to the subscribing witnesses to a will, if they reside in the county.

Kerr, C. C. P., 1305.

5871. Hearing of proof—Oral testimony.

SEC. 15. At the time appointed, or at any other time to which the hearing may be continued, upon proof being made by affidavit or otherwise, to the satisfaction of the court, that notice has been given as required by the preceding sections, the court shall proceed to hear the testimony in proof of the will. All witnesses who appear and are sworn shall testify orally.

Kerr, C. C. P., 1306.

5872. Who may contest—Court to appoint attorney for minor or absent heirs.

SEC. 16. Any person interested may appear and contest the probate of a will. If it appears that there are minors or other persons who are interested in the estate, but reside out of the county, and are unrepresented, the court shall appoint some attorney to represent them.

Kerr, C. C. P., 1307.

5873. One witness sufficient if no contest—Ex parte affidavit, when accepted.

SEC. 17. If no person shall appear to contest the probate of a will, the

court may admit it to probate on the testimony of one of the subscribing witnesses, only, if such testimony shall show that the will was executed in all particulars as required by law, and that the testator or testatrix was of sound mind at the time of its execution; *provided, however*, in all cases where the witness resides at a distance of more than twenty-five (25) miles from the place where said court is held, the ex parte affidavit of said witness, showing that the will was executed in all particulars as required by law, and that the testator or testatrix was of sound mind at the time of its execution, shall be received in evidence and have the same force and effect as if the witness was present and testified orally. *As amended Stats. 1903, 30.*

Kerr, C. C. P., 1308.

5874. Contest and proceedings—Issues of fact, how tried.

SEC. 18. If any person appears to contest the probate of a will, such person shall file a statement in writing, setting out the grounds of contest, and file the same with the clerk, which shall constitute a joinder of such issues of fact as may be alleged in opposition to the will, such as respects the competency of the deceased to make a last will and testament, or respecting the execution by the deceased of such last will and testament, under restraint, or undue influence, or fraudulent representations, or for any other cause affecting the validity of such will. And any and all issues of fact shall be tried as issues of facts are tried in other cases in the district court.

Kerr, C. C. P., 1312.

It is the manifest intention of the legislature that formal and technical pleading should not be required in the presentation of claims. Kirman v. Powning, 25 Nev. 393 (60 P. 834).

Cited, Abel v. Hitt, 30 Nev. 105 (93 P. 227).

5875. Idem—Subscribing witnesses examined—Exception.

SEC. 19. When the probate of a will is contested all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined, and the death, absence or insanity of any of them shall be satisfactorily shown to the court.

Kerr, C. C. P., 1315.

5876. Decree admitting to probate—Record.

SEC. 20. If the court shall be satisfied upon the proof taken when heard by the court, or by the verdict of a jury, in case a jury trial is had, that the will was duly executed by a person at the time of sound and disposing mind, and not under restraint, undue influence or fraudulent representation, the court, by decree in writing, shall admit the will to probate, whereupon the will and the decree admitting it to probate shall be recorded together by the clerk in a book to be provided for that purpose.

Kerr, C. C. P., 1317, 1318.

Cited, Abel v. Hitt, 30 Nev. 105, 106 (93 P. 227).

May appoint guardian of minor named in will, sec. 6150.

5877. Exemplified copy of record—Evidence.

SEC. 21. A copy of the record of the will and decree admitting it to probate, exemplified by the clerk in whose custody it may be, shall be received in evidence and be as effectual in all cases as the original would be if proved.

5878. Foreign wills admitted to probate, when.

SEC. 22. All wills which shall have been duly proved and allowed in any other of the United States, or any territory thereof, or in any foreign country or state, may be admitted to probate by the district court of any county in which the deceased shall have left any estate; *provided*, it has been executed in conformity with the laws of the place where made.

Kerr, C. C. P., 1322.

5879. Idem—Procedure as in case of original will.

SEC. 23. When a copy of a will, as mentioned in the preceding sections, and the probate thereof, duly authenticated, shall be filed in the clerk's office, with a petition for letters, notice shall be given for the hearing thereof, and such proceedings shall be had as in case of an original will for probate, and with like force and effect.

Kerr, C. C. P., 1323.

5880. Lost or destroyed will, how proven.

SEC. 24. Whenever any will shall be lost by accident, or destroyed by fraud, the district court shall have power to take proof of the execution and validity of such will, and to establish the same, notice to all persons interested having been first given, as prescribed in regard to proofs of wills in other cases.

Kerr, C. C. P., 1338.

5881. Idem—What to be proved—Amount of proof.

SEC. 25. No will shall be allowed to be proved as a lost or destroyed will unless the same shall be proved to have been in existence at the time of the death of the person whose will it is claimed to be, or be shown to have been fraudulently destroyed in the lifetime of such person, nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses.

Kerr, C. C. P., 1339.

5882. Idem—Pending proof may restrain administration.

SEC. 26. If before or during the pendency of an application to prove a lost or destroyed will letters of administration shall have been granted upon the estate of the deceased, or letters testamentary of any previous will of such deceased, the court shall have authority to restrain such administration if necessary to protect the interests of legatees or devisees claiming under the lost or destroyed will.

Kerr, C. C. P., 1339.

5883. Letters testamentary to be issued, when.

SEC. 27. When any will shall have been admitted to probate the district court shall direct letters thereon to issue to the person or persons named in the will to execute the same, who may be competent to discharge the trust, and who shall appear and qualify.

Kerr, C. C. P., 1349.

5884. Executors, who competent—Letters with will annexed.

SEC. 28. No person shall be deemed competent to serve as executor or executrix who at the time the will is probated shall be: First—Under the age of majority; or, second, who shall have been convicted of an infamous crime; or, third, who, upon proof, shall be adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding. If any such person be named as the sole executor or executrix in any will, or if all persons so named are incompetent, or shall renounce the trust, or fail to appear and qualify, letters of administration with the will annexed shall issue.

Kerr, C. C. P., 1350.

5885. Objections to executors—Hearing—Petition for letters with will annexed.

SEC. 29. Any person interested in a will may file objections in writing to the granting of letters testamentary to the persons named as executors or executrixes, or any of them, and such objections shall be heard and determined by the court. A petition may also be filed for the issuance of letters of administration, with the will annexed, in all proper cases.

Kerr, C. C. P., 1351.

5886. Marriage of unmarried woman extinguishes authority—Married woman named as executrix may act.

SEC. 30. When an unmarried woman who shall have been appointed executrix shall marry, her marriage shall extinguish her authority. When a married woman is nominated as executrix she may be appointed and serve, in all respects, as if she were a femme sole.

Kerr, C. C. P., 1352.

5887. Executor of executor cannot act—Letters with will annexed.

SEC. 31. No executor of an executor shall as such be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor or executrix of any last will, letters of administration, with the will annexed of the estate of the first testator or testatrix left unadministered, shall be issued.

Kerr, C. C. P., 1353.

5888. Letters testamentary to minors, when may issue—Joint executors.

SEC. 32. When any person under the age of twenty-one years shall be named executor, or under the age of eighteen years executrix, letters of administration with the will annexed shall be granted, during the minority of such person, unless there is another executor or executrix, who shall accept the trust and qualify, in which case letters testamentary shall issue to such, who shall administer the estate, until the minor shall arrive at legal age, when such may be admitted as joint executor or executrix.

Kerr, C. C. P., 1354.

5889. Power of one or more of several executors—Absence or disability—Majority to control.

SEC. 33. When all the persons named as executors or executrixes shall not be appointed by the court, such as shall be appointed shall have the same authority to perform every act and discharge every trust required by the will, and their acts shall be effectual for every purpose as if all had been appointed, and should act together. When there are two executors or administrators the acts of one alone shall be valid if the other is absent from the state, or for any cause is laboring under any legal disability, and when there are more than two, the act of a majority shall be sufficient.

Kerr, C. C. P., 1355.

5890. Power of administrators with will annexed.

SEC. 34. Administrators with the will annexed shall have the same authority as the executor named in the will would have had if he should have qualified, and their acts shall be as effectual for every purpose.

Kerr, C. C. P., 1356.

5891. Letters signed and sealed by clerk.

SEC. 35. Letters testamentary and of administration with the will annexed shall be signed by the clerk and be under the seal of the court.

Kerr, C. C. P., 1356.

5892. Form of letters testamentary.

SEC. 36. Letters testamentary may be in substantially the following form, to wit (after properly entitling court and cause): "The last will of_____, deceased, having been duly admitted to probate in our said court, _____, who is named therein, was by our said court on the____day of_____, 189__, duly appointed executor, who having qualified as such (*is*) hereby authorized to act by virtue thereof. In testimony whereof, I have officially signed these letters and affixed hereto the seal of said court, this____day of_____, 189__."

Kerr, C. C. P., 1360.

5893. Form of, with will annexed.

SEC. 37. Letters of administration with the will annexed may be substantially in the following form, to wit (after properly entitling the court and cause): "The last will of_____, deceased, having been duly admitted to probate in our said court, and there being no executor named in said will (or as the case may be),_____was by our said court, on the____day of_____, 189__, duly appointed as administrator with the will annexed, and who, having duly qualified as such, is hereby authorized to act by virtue thereof. In testimony whereof, I have officially signed these letters and affixed hereto the seal of said court, this____day of_____, 189__."

Kerr, C. C. P., 1361.

5894. Who entitled to letters of administration—Precedence.

SEC. 38. Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order: First—The surviving husband or wife, or such person, as he or she may request to have appointed. Second—The children. Third—The father, or mother. Fourth—The brother. Fifth—The sister. Sixth—The grandchildren. Seventh—Any other of the kindred entitled to share in the distribution of the estate. Eighth—The creditors. Ninth—The public administrator. Tenth—Any of the kindred, not above enumerated, within the fourth degree of consanguinity. Eleventh—Any person or persons legally competent.

Kerr, C. C. P., 1365.

Act in relation to public administrator, see secs. 1615–1627.

Letters of administration may be granted to a nonresident. In re Bailey's Estate, 31 Nev. 377, 380 (103 P. 232).

Where all parties applying for letters of administration are equally qualified and competent, the court has no discretion, but must appoint the applicant that, under the statute, has the prior right. In re Nickals, 21 Nev. 462, 464 (34 P. 250).

5895. Idem—Males preferred to females—Whole blood to half blood.

SEC. 39. When there shall be several persons claiming and equally entitled to the administration, males shall be preferred to females, and relatives of the whole blood to those of the half blood.

Kerr, C. C. P., 1366.

5896. Persons equally entitled—Court may grant to one or more.

SEC. 40. When there are several persons equally entitled to the administration the court may, in its discretion, grant letters to one or more of them.

Kerr, C. C. P., 1367.

5897. Who not entitled to letters.

SEC. 41. No person shall be entitled to letters of administration who shall be: First—Under the age of majority; or, second, who shall have been convicted of an infamous crime; or, third, who upon proof shall be adjudged by the court incompetent to execute the duties of the trust, by reason of drunkenness, improvidence or want of integrity or understanding.

Kerr, C. C. P., 1369.

Cited, In re Bailey's Estate, 31 Nev. 377, 381 (103 P. 232).

See In re Nickals, under sec. 38 of this act.

5898. Marriage of unmarried woman extinguishes authority.

SEC. 42. When any unmarried woman who shall have been appointed administratrix shall marry, her marriage shall extinguish her authority.

Kerr, C. C. P., 1370.

Defendant, prior to the trial, married. It was held that this marriage extinguished her authority as administratrix of the estate, but did not deprive her of the right to retain possession of the property of the estate until the appointment of her successor, or until otherwise ordered by the court. Buckley v. Buckley, 16 Nev. 180.

5899. Application for letters by petition—What to state—Defects, how cured—Notice, how given.

SEC. 43. Application for letters of administration shall be made by petition in writing, signed by the applicant or his attorney, and filed in the office of the clerk of the court. The petition must state the facts essential to give the court jurisdiction of the case, and when known the names, ages and residence of the heirs of the deceased; also the character and value of the property. When filed the clerk shall give notice thereof by causing notices to be posted up in at least three public places in the county, one of which shall be at the place where the court is held. The notice shall state the name of the deceased, the name of the applicant, and designate a day on which the application will be heard, which shall be at least ten days after posting the notices. If the jurisdictional facts existed, but are not fully set forth in the petition, and the same shall afterwards be proved in the course of the administration, the administration shall not be void on account of a want of such jurisdictional averments.

Kerr, C. C. P., 1371, 1373.

The community property, after the husband's death, is vested in the widow, subject to the payment of the debts, and if she pays all the indebtedness legally due from the estate, then the community property is not subject to administration. Wright v. Smith, 19 Nev. 143 (7 P. 365).

There is no legal presumption either for or against the existence of debts, and the court has no right to appoint an administrator without satisfactory proof that the property was subject to administration and that the appointment would accomplish some useful end. Idem.

See, In re Cook's Estate, 34 Nev. — (117 Pac. —).

In settling the final account of an administrator an attorney's fee for procuring letters of administration cannot be allowed. Bowman v. Bowman, 27 Nev. 413 (76 P. 634).

Sec. 57 of the act of 1861, 194, provided: "If any person entitled to administration shall be a minor, administration shall be granted to his or her guardian." It was held that said section referred to a guardian appointed in this state and not to one appointed in some other state. In re Estate of Nickals, 21 Nev. 462, 464, 465 (34 P. 250).

Except as a matter of comity, in exceptional cases, a guardian of a minor appointed in one state is not recognized as such in another state. Idem.

5900. Who may contest—May pray for letters.

SEC. 44. Any person interested may contest the application by filing a written opposition thereto, on the ground of the incompetency of the applicant, or may assert his own right to the administration, and pray that letters be issued to himself.

Kerr, C. C. P., 1374.

5901. Hearing of application—Order for letters.

SEC. 45. On the hearing, it being first proved that proper notice has been given, the court shall proceed to hear the allegations and proof of the parties, and to order the issuance of letters of administration, as the case may require.

Kerr, C. C. P., 1375.

5902. Minute entry of proof of notice conclusive evidence.

SEC. 46. An entry in the minutes of the court that proof was made that notice had been given according to law, shall be conclusive evidence of the fact of such notice.

Kerr, C. C. P., 1376.

5903. Letters may be granted to persons of lesser right, when.

SEC. 47. Letters of administration may be granted to any applicant, though it appear that there are other persons having better rights to the administration, when such fail to appear and claim the issuance of letters to themselves.

Kerr, C. C. P., 1377.

5904. Proof of death and of intestacy—Value of property—Witnesses.

SEC. 48. Before letters of administration shall be granted on the estate of any person who is represented to have died intestate, the fact of his having died intestate shall be proved by the testimony of the applicant and any other testimony that may be produced. Proof must also be made concerning the time, place and manner of death, the place of his residence at the time of his death, the location, character and value of his property, and whether the deceased left a will. Any person may be compelled to attend as a witness for such purpose.

Kerr, C. C. P., 1378.

5905. Granted to one not entitled at request of others entitled—How request made.

SEC. 49. Administration may be granted to one or more competent persons, although not entitled to the same, at the request of the person entitled to be joined with such persons. The request shall be in writing and filed in the court. When the person entitled is a nonresident of the state his request, acknowledged before a notary public or other officer having a seal, and authorized by the laws of the state or territory to take acknowledgments, may be received as prima facie evidence of the identity of the party, upon which the letters shall be ordered issued as requested, if the person is competent.

Kerr, C. C. P., 1379.

This section implies that nonresidents may, under certain circumstances, become entitled to letters. In re Bailey's Estate, 31 Nev. 377, 381 (103 P. 232).

5906. Certain persons entitled to preference may obtain revocation of letters to others.

SEC. 50. When letters of administration have been granted to any other person than the surviving husband or wife, the child, the father, mother, brother or sister of the intestate, any one of them may obtain the revocation of the letters by presenting to the district court a petition praying the revocation, and that letters of administration be issued to him or her.

Kerr, C. C. P., 1383.

See In re Nickals, under sec. 38 of this act.

5907. Idem—Procedure—Hearing—Order.

SEC. 51. When any such petition shall be filed, a copy must be served upon the administrator, when the matter shall be deemed at issue, and may be brought on for hearing at any time thereafter, by consent of parties or by either party, on giving the other party two days' previous notice that he will move the court to set the matter for a day certain. Upon the hearing, the court, being satisfied that a copy of the petition has been duly served upon the administrator, shall proceed to hear the allegations and proofs of the parties, and if the right of the applicant is established, and he or she be competent, letters of administration shall be granted to the applicant and the letters of the former administrator revoked.

Kerr, C. C. P., 1384, 1385.

5908. Idem—Surviving husband or wife—May assert prior right—Revocation.

SEC. 52. The surviving husband or wife, when letters of administration have been granted to a child, the father or mother, brother or sister of the intestate, or any other person, may assert his or her prior right, and obtain letters of administration and have the letters before granted revoked in the manner prescribed in the two preceding sections.

Kerr, C. C. P., 1386.

5909. Form of letters of administration.

SEC. 53. Letters of administration shall be signed by the clerk, and be under the seal of the court, and may be in the following form, to wit (after properly entitling court and cause): "This is to certify that, by order of the above-named court made and entered on the ____ day of _____, 189__, _____ was appointed administrat__ of the estate of _____, deceased, by virtue of which these letters are issued this ____ day of _____, 189__, he having duly qualified. Witness my official signature, with the seal of the court affixed."

Kerr, C. C. P., 1362.

5910. Executor or administrator to take oath—Form of—Filed and recorded—Certified copies of records and papers have force of originals.

SEC. 54. Before letters testamentary or of administration shall be issued to the executor or administrator he shall take and subscribe an oath or affirmation before the clerk that he will perform, according to law, the duties of executor or administrator; said oath shall be filed and recorded by the clerk. All duly certified copies of any record or paper in matters of estates shall have the same force and effect in all cases whatsoever as the original papers would have.

Kerr, C. C. P., 1387.

The authority of an administrator cannot be attacked, in a collateral proceeding, because the oath provided by statute was not taken until after the letters were issued, and was then taken before a notary public. Since the letters, having been regularly issued, are valid until revoked, the irregularities complained of were cured by taking the oath before the proper officer before the trial of the case. Gallagher v. Holland, 20 Nev. 164, 167 (18 P. 834).

5911. Bond to be given—Form of—Judge to approve—Additional bond, when.

SEC. 55. Every person to whom letters testamentary (unless the will otherwise provides) or of administration shall have been directed to issue shall, before receiving the letters, execute a bond to the State of Nevada, with two or more sureties to be approved by the district judge. In form the bond shall be joint and several, and the penalty shall not be less than the value of the personal property, including rents and profits belonging to the estate, which value shall be ascertained by the court by the examination on oath of the party applying, and of any other persons the judge may think proper to examine. The district judge shall require an additional bond whenever the sale of any real estate belonging to an estate is ordered by him to be sold. The bond shall be conditioned that the executor or administrator will faithfully execute the duties of the trust according to law, and shall be recorded by the clerk. *As amended, Stats. 1903, 209.*

Kerr, C. C. P., 1388, 1390.

See McNabb v. Wixom, 7 Nev. 164.

An order issuing letters on the estate of an intestate is void, where no bond was required or given. In re Bailey's Estate, 31 Nev. 377, 382, 383 (103 P. 232).

That the estate of a deceased was insignificant in value, the principal asset being a claim alleged to be due for the wrongful death of deceased, was not ground for exempting an administrator from doing wrong. Idem.

5912. Bond in force until penalty exhausted.

SEC. 56. The bond shall not be void upon the first recovery, but may be sued upon from time to time by any person aggrieved in his or her own name until the whole penalty is exhausted.

Kerr, C. C. P., 1392.

5913. Sureties to justify, before whom—When penalty exceeds $2,000 sureties may qualify for $500 or more.

SEC. 57. In all cases when bonds are required by this act, the sureties

must justify on oath before the judge or clerk of a court having a seal, or before a notary public, or a justice of the peace of the county, to the effect that they are householders, or freeholders, within this state and worth the amount for which they become surety, over and above all just debts and liabilities, exclusive of property exempt from execution, and such justification must be signed by the sureties and certified by the officer taking the same and endorsed on or attached to and filed with the bond. When the whole penal sum of such bond exceeds two thousand dollars, sureties may go thereon for any sum not less than five hundred dollars, so that the whole be equal to two sufficient sureties for the whole penal sum.

Kerr, C. C. P., 1393.
Cited, In re Bailey's Estate, 31 Nev. 383 (103 P. 232).

5914. Doubtful sureties—Reexamination may be required—Citation—Additional surety.

SEC. 58. Before the district judge approves any bond required by this act, he may, of his own motion, or at any time after the approval of such bond, upon motion of any person interested in said estate supported by affidavit that any one or all of such sureties is or are not worth as much as justified to, order a citation to issue, requiring such surety or sureties to appear before him at a particular time and place, to testify touching his or their property, and its value; and the judge shall at the time such citation is issued cause a notice or subpena to issue to the executor or administrator, requiring his appearance at the return of the citation. Upon the return of the citation the judge may swear the surety and such witnesses as may be produced touching the property and its value of such surety or sureties; and if upon such investigation the judge is satisfied that the bond is insufficient, he may require sufficient additional surety within such time as may be reasonable.

Kerr, C. C. P., 1394.
Cited, In re Bailey's Estate, 31 Nev. 383 (103 P. 232).

5915. Idem—Failure to give surety—Rights cease—New appointee.

SEC. 59. If sufficient surety is not given within the time fixed by the judge's order, or such further time as the judge may give, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, shall be appointed to the administration.

Kerr, C. C. P., 1395.
Cited, In re Bailey's Estate, 31 Nev. 383 (103 P. 232).

5916. Letters testamentary without bond when will so provides—May be required for cause.

SEC. 60. When it is expressly provided in the will of a deceased that no bond shall be required of the executor or executrix, letters testamentary may issue without any bonds having been given; but an executor or executrix to whom letters have been issued without bonds may, at any time afterwards, whenever it shall be shown for any cause to be necessary or proper, be required to approve and file a bond as in other cases.

Kerr, C. C. P., 1396.

5917. Persons interested may apply for additional security.

SEC. 61. Whenever any person interested in an estate shall discover that the sureties of any executor or administrator have become or are becoming insolvent, or that they or any one have or has removed from or are or is about to remove from the state, or that from any other cause the bond is insufficient, such person may apply by petition to the district judge praying that further security be given.

Kerr, C. C. P., 1397.
Cited, In re Bailey's Estate, 31 Nev. 383 (103 P. 232).

5918. Idem—Investigation—Citation to issue—How served.

SEC. 62. If the district judge shall be satisfied that the matter requires investigation he shall direct the clerk to issue a citation to the party complained of requiring him to appear at a time and place, to be therein specified, to show cause why he or she should not give further surety. The citation shall be served personally on the executor or administrator, executrix or administratrix, at least five days before the return day. If he or she shall have absconded or cannot be found, it may be served by leaving a copy of it at his or her last place of abode.

Kerr, C. C. P., 1398.

5919. Idem — Hearing of application — Additional security may be required.

SEC. 63. On the return of the citation, or at such other time as the judge may appoint, he shall proceed to hear the allegations and proof of the parties. If it shall satisfactorily appear that the security is from any cause insufficient he may make an order requiring the executor or administrator to give additional security, or to file a new bond in the usual form within such reasonable time as the judge may fix.

Kerr, C. C. P., 1399.

5920. Idem—Letters revoked for failure to comply.

SEC. 64. If the executor or administrator neglect to comply with the order within the time prescribed, the judge shall, by order, revoke his letters, and his authority shall thereupon cease.

Kerr, C. C. P., 1400.

5921. Idem—Pending application court may suspend authority.

SEC. 65. When a petition is presented praying that an executor or administrator be required to give further security, and when it also shall be alleged on oath or affirmation that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined.

Kerr, C. C. P., 1401.

5922. Court may require further security upon own motion.

SEC. 66. When it shall come to his knowledge that the bond of any executor or administrator is from any cause insufficient, it shall be the duty of the district judge, without any application, to cause him to be cited to appear and show cause why he should not give further security, and to proceed thereon as upon the petition of any person interested.

Kerr, C. C. P., 1402.

5923. Sureties released, how—Citation and hearing.

SEC. 67. When any one or all of the sureties of any executor or administrator shall desire to be released from any further liability as such surety, he or they may file a petition with the clerk praying for relief, whereupon the clerk shall issue a citation to the executor or administrator requiring him to appear before the court, at a time to be therein stated, to show cause why the prayer of said petition should not be granted and he give further security. Such citation shall be served personally, and made returnable not later than ten days from its date.

Kerr, C. C. P., 1403.

5924. Idem—Released sureties not liable for subsequent acts.

SEC. 68. If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the surety or sureties who applied for relief shall not be liable for any subsequent act, default or misconduct of the executor or administrator.

Kerr, C. C. P., 1404.

5925. Letters revoked upon failure to furnish required security.

SEC. 69. If the executor or administrator neglect or refuse to give new sureties to the satisfaction of the judge, on the return of the citation, the court or judge being satisfied the citation has been personally served, or within such reasonable time as the judge shall allow, not exceeding five days, unless the surety or sureties petitioning shall consent to a longer extension of time, the court or judge shall revoke the letters granted.

Kerr, C. C. P., 1405.

5926. Special administrator appointed, when—Purpose.

SEC. 70. When there shall be a delay in granting letters testamentary or administration, from any cause, or when such letters shall have been granted irregularly or no sufficient bond shall have been filed as required by law, or when no petition shall be filed for such letters, and in any other proper case, the district judge shall appoint a special administrator to collect and take charge of the estate of the deceased, in whatever county or counties the same may be found, and to exercise such other powers as may be necessary to preserve the estate.

Kerr, C. C. P., 1411.

5927. Idem—Appointment, how made—Letters, how issued.

SEC. 71. The appointment may be made at chambers, and without notice, and shall be made by entry upon the minutes of the court, which shall specify the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bonds, as fixed by the judge, the clerk shall issue letters of administration, with a certified copy of the order attached, to such person.

Kerr, C. C. P., 1412.

5928. Idem—Who to have preference—No appeal from appointment.

SEC. 72. In making the appointment of a special administrator, the district judge shall give preference to the person or persons entitled to letters testamentary or of administration, but no appeal shall be allowed from the appointment.

Kerr, C. C. P., 1413.

5929. Idem—Powers, duties and liabilities—Not to pay claims.

SEC. 73. The special administrator shall collect and preserve for the executor or administrator when appointed, all the goods, chattels and debts of the deceased, all incomes, rents, issues and profits, claims and demands of the estate, shall take charge and management of, enter upon and preserve from damage, waste and injury the real estate, and for any such and all necessary purposes, may commence, maintain or defend suits and other legal proceedings as an administrator. He may sell such perishable estate as the district court may order to be sold, and may exercise such other powers as may have been conferred upon him by his appointment; but in no case shall he be liable to an action by any creditor, on any claim against the estate, nor pay any claim against the deceased.

Kerr, C. C. P., 1415.

5930. Idem—Powers cease on appointment of administrator—Duties.

SEC. 74. When letters testamentary or of administration shall be granted on the estate of the deceased, the powers of the special administrator shall cease, and he shall forthwith deliver to the executor or administrator all the property and effects of the deceased in his hands, and the executor or administrator may be permitted to prosecute to final judgment any suit commenced by the special administrator.

Kerr, C. C. P., 1416.

5931. Idem—Duty to render account.

SEC. 75. The special administrator shall also render an account, under oath, of his proceedings in like manner as other administrators are required to do.

Kerr, C. C. P., 1417.

5932. Special administrator appointed to succeed executor.

SEC. 76. Whenever an executor or administrator shall die or his letters be revoked, and the circumstances require the immediate appointment of an administrator, the district judge may appoint a special administrator, as provided in the preceding sections.

Kerr, C. C. P., 1411.

5933. Remaining executor or administrator to proceed without filling vacancy.

SEC. 77. In case any one of several executors or administrators of the same estate to whom letters shall have been granted shall die, become lunatic, be convicted of an infamous crime, or otherwise become incapable of executing the trust, or, in case the letters testamentary or of administration shall be revoked or annulled according to law with respect to any one executor or administrator, the remaining executor or administrator shall proceed and complete the execution of the will or administration.

Kerr, C. C. P., 1425.

5934. New letters to issue in case of vacancy for any cause—Bond—Powers.

SEC. 78. If all such executors or administrators shall die or from any cause become incapable of executing the trust, or the power and authority of all of them shall be revoked or annulled according to law, the district court shall direct letters of administration with the will annexed or otherwise to be issued to the widow, next of kin or others, in the same manner as directed in relation to original letters of administration. The administrator so appointed shall give bond in like penalty with like sureties and conditions as hereinbefore required of administrators and shall have the like power and authority.

Kerr, C. C. P., 1411.

5935. Letters of administration revoked upon proof of will—Account to render.

SEC. 79. If after granting letters of administration on the ground of intestacy, a will of the deceased shall be duly proved and allowed by the court, the letters of administration shall be revoked and the power of the administrator shall cease, and he shall render an account of his administration within such time as the court shall direct.

Kerr, C. C. P., 1423.

5936. Idem—Powers of new administration.

SEC. 80. In such case, the executor of the will or the administrator with the will annexed shall be entitled to demand, sue for and collect all the goods, chattels and effects of the deceased remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters.

Kerr, C. C. P., 1424.

5937. Resignation, how made—Account.

SEC. 81. Any executor or administrator may at any time, by writing filed in the district court, resign his appointment; *provided*, he shall first settle his accounts and deliver up all the estate to such person as may be appointed by the court.

Kerr, C. C. P., 1427.

5938. Acts done before revocation, validity of.

SEC. 82. All acts of an executor or administrator as such, before the revocation of his letters testamentary or of administration, shall be as valid to all intents and purposes as if such executor or administrator had continued to execute lawfully the duties of his trust.

Kerr, C. C. P., 1428.

5939. Transcript of record same force as letters.

SEC. 83. A transcript from the minutes of court, showing the appointment of any person as executor or administrator, together with the certificate of the clerk, under his hand and the seal of the court that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him, and have not been revoked, shall have the same effect in evidence as the letters themselves.

Kerr, C. C. P., 1429.

5940. Judge, when disqualified to act.

SEC. 84. No district judge shall admit to probate any will, or grant letters testamentary, or of administration, in any case where he shall be interested as next of kin to the deceased or as a legatee or devisee under the will, or where he shall be named as executor or trustee in the will, or shall be a witness thereto.

Kerr, C. C. P., 1430.

A judge who was a stockholder of a corporation presenting a claim against an estate was disqualified from passing thereon, and should call in another judge to act. State ex rel. Bullion & Exchange Bank v. Mack, 26 Nev. 430, 443 (69 P. 862).

No formal application for the calling of a qualified judge to pass upon a claim against an estate was necessary where the record disclosed that the acting judge was disqualified. Idem.

5941. Idem—Duty to call other judge to act—Retains jurisdiction.

SEC. 85. When any district judge who would otherwise be authorized to act shall be precluded from acting from the causes mentioned in the preceding section, or when he shall in any manner be interested, he shall call a district judge of another district to hold the court of his county; and such judge shall hold such court, and be vested with all the powers of the court and judge so disqualified, and shall retain jurisdiction as to all subsequent proceedings in regard to the estate.

Kerr, C. C. P., 1431.

See State ex rel. Bullion & Exchange Bank v. Mack, under sec. 84 of this act.

See sec. 4922.

5942. Inventory, return of.

SEC. 86. Every executor or administrator shall make and return to the court, within twenty days after his appointment, unless the court shall extend the time, a true inventory and appraisement of all the estate of the deceased which shall have come to his possession or knowledge.

Kerr, C. C. P., 1443.

See secs. 5943–5945, 6025.

5943. Appraisement, how made—Compensation of appraisers—Inventory, what to include.

SEC. 87. For the purpose of making the appraisement, the court or judge shall appoint three disinterested persons, any two of whom may act, and who shall be entitled to a reasonable compensation for their services, to be allowed by the court. This compensation as allowed shall be in the form of a bill of items for their services, including all necessary disbursements, which shall be sworn to by them, and filed at the same time as the inventory. The compensation shall not exceed five dollars per day each, and may be paid out of

the estate at any time. The inventory shall include all the estate of the deceased, wherever situated.

Kerr, C. C. P., 1444.

See sec. 6025.

That the appraisers of an estate were not disinterested parties, is no reason why the just accounts of the executor should not be settled and allowed. Estate of Millenovich, 5 Nev. 162, 178.

5944. Appraisers to take oath—Appraisement, how made—Inventory, what to contain—Separate and community property.

SEC. 88. Before proceeding to the execution of their duty, the appraisers, before any officer authorized to administer oaths, shall take and subscribe an oath to be attached to the inventory, that they will truly, honestly and impartially appraise the property which shall be exhibited to them or called to their attention, according to the best of their knowledge and ability. They shall then proceed to appraise the property of the estate, each article or parcel shall be set down separately with the value thereof in dollars and cents, in figures opposite to each article or parcel respectively. The inventory shall contain all the estate of the deceased, real and personal; a statement of all debts, partnerships, and other interests, bonds, mortgages, notes, and other securities for the payment of money, belonging to deceased, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon if any, with their dates, and the sum which in the judgment of the appraisers may be collectible on each debt, interest or security. The inventory shall also show, so far as can be ascertained, what portion of the estate is community property, and what portion is the separate property of the deceased; also an account of all moneys belonging to the deceased which shall have come to the hands of the executor or administrator.

Kerr, C. C. P., 1445.

See sec. 6025.

5945. Executors debt to decedent not discharged—Included in inventory.

SEC. 89. The naming of any person as executor in a will shall not operate as a discharge of any just claim which the testator had against such person, but the claim shall be included in the inventory, and the person named as executor shall be liable for the same, or for so much money in his hands at the time the debt or demand becomes due, if he be the executor.

Kerr, C. C. P., 1447.

5946. Discharge of debt in will not valid against creditors—How construed.

SEC. 90. The discharge or bequest in a will of any debt or demand of the testator against any person named as executor in his will, or against any other person, shall not be valid against the creditors of the deceased, but shall be construed as a specific bequest only of such debt or demand; and the amount thereof shall be included in the inventory and shall, if necessary, be applied in payment of his debts. If not necessary for that purpose, it shall be disposed of in the same manner as other specific legacies or bequests.

Kerr, C. C. P., 1448.

5947. Executor or administrator to make oath to inventory—Contents of.

SEC. 91. The inventory shall be signed by the appraisers, and the executor or administrator shall take and subscribe an oath, before any officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the deceased which has come to his possession or of which he has knowledge, and particularly of all moneys belonging to the deceased, and of all just claims of the deceased against the executor or administrator. The oath shall be indorsed upon or annexed to the inventory.

Kerr, C. C. P., 1449.

See sec. 6025.

5948. Nonreturn of inventory—Cause for revocation of letters—Liability.

SEC. 92. If an executor or administrator shall neglect or refuse to return the inventory, within the time prescribed, or within such further time as the court or judge shall, for good cause, allow, the court may, with or without further notice, revoke the letters testamentary or of administration, and the executor or administrator shall be liable on his bond for any injury sustained by the estate through his neglect.

Kerr, C. C. P., 1450.

5949. Supplemental inventory—Appraisement—Enforcement.

SEC. 93. Whenever any property not mentioned in any inventory that shall have been made shall come to the possession or knowledge of the executor or administrator, he shall return a supplementary inventory of such property within twenty days after the discovery thereof in the same manner as an original inventory. If the first appraisers are not in the county others may be appointed. The court may enforce the making of a supplementary inventory as an original.

Kerr, C. C. P., 1451.
Cited, Lucich v. Medin, 3 Nev. 101 (93 A. D. 376).

5950. Right of possession—Duties in relation to property.

SEC. 94. The executor or administrator shall have a right to the possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled, or until delivered over by order of the district court to the heirs or devisees, and shall keep in good tenantable repair all houses, buildings and fences thereon which are under his control.

Kerr, C. C. P., 1452, 1453.
See sec. 6021.

Where there are no creditors to be affected, no debts outstanding against the estate, no equity in favor of the administrator, the heirs of the estate have the right of possession and may bring an action in ejectment in their own name to recover any property belonging to the estate. Gossage v. Crown Point G. & S. M. Co., 14 Nev. 153, 156, 160.
Cited, Price v. Ward, 25 Nev. 215 (46 L. R. A. 459, 58 P. 849).

5951. Personal estate first chargeable for debts and expenses—Real estate may be sold.

SEC. 95. The personal estate of the deceased which shall come into the hands of the executor or administrator shall be first chargeable with the payment of the debts and expenses, and if the goods, chattels, rights and credits in the hands of the executor or administrator shall not be sufficient to pay the debts, expenses of administration and the allowances to the family of the deceased the whole, or such part as may be necessary for that purpose, of the real estate may be sold in the manner prescribed in this act.

Kerr, C. C. P., 1516.

5952. Conversion before letters—Liability.

SEC. 96. If any person, before the granting of letters testamentary or of administration, shall convert to his or her own use, take or alienate any of the moneys, goods, chattels or effects of any deceased person, he shall stand chargeable and be liable to an action by the executor or administrator of the estate for double the value of the property so converted, taken or alienated, to be recovered for the benefit of the estate.

Kerr, C. C. P., 1458.

5953. Idem—Proceedings where conversion alleged—Expenses.

SEC. 97. If any executor or administrator, heir, devisee, legatee, creditor or other person interested in the estate of any deceased person shall complain, on oath, to the district judge that any person has, or is suspected to

have, concealed, converted to his or her own use, conveyed away or otherwise disposed of any moneys, goods, chattels or effects of the deceased, or that he has in his possession or knowledge, any deeds, conveyances, bonds, contracts or other writings which contain evidence of, or tend to disclose the right, title or interest of the deceased in or to any real or personal estate, or any claim or demand, or any last will of the deceased, the said judge may cause such person to be cited to appear before the district court to answer, upon oath, upon the matter of such complaint. If such person be not in the county when letters have been granted, he or she may be cited and examined either before the district court of the county where he may be found, or before the court issuing the citation. But if in the latter case such person appears and shall be found innocent, his or her necessary expenses shall be allowed out of the estate.

Kerr, C. C. P., 1459.

5954. Idem — Refusing to answer complaint—Court may commit—May order delivery—Prima facie evidence—Witnesses.

SEC. 98. If the person so cited should refuse to appear and submit to such examination, or to testify touching the matter of such complaint, the court may commit such person to the county jail, there to remain confined until he or she shall obey the order of the court, or be discharged according to law, and if upon such examination it shall appear that such person has concealed, converted to his or her own use, smuggled, conveyed away, or in any manner disposed of any moneys, goods or chattels of the deceased, or that he has in his possession or under his control any deeds, conveyances, bonds, contracts or other writings, which contain evidence of, or tend to disclose, the right, title, interest or claim of the deceased to any real or personal estate, claim or demand, or any last will of the deceased, the district court may make an order requiring such person to deliver any such property or effects to the executor or administrator, at such time as the court may fix, and should such person fail to comply with such order, the court may commit he or she to the county jail till such order shall be complied with, or the person discharged according to law. The order of the court for the delivery of such property shall be prima facie evidence of the right of the executor or administrator to such property in any action that may be brought for the recovery thereof; and any judgment recovered therein shall be for double the value of the property, and damages in addition thereto equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side.

Kerr, C. C. P., 1460.

5955. Person entrusted with part of estate may be cited to appear—Procedure.

SEC. 99. The district judge, upon the complaint on oath of any executor or administrator, may cause any person who shall have been intrusted by such executor or administrator with any part of the estate of the decedent to be cited to appear before such court and render on oath a full account of any money, goods, chattels, bonds, accounts, or other papers or effects belonging to the estate which shall have come into his possession in trust for the executor or administrator, and if the person so cited shall fail or refuse to appear and render such account, he or she may be proceeded against as provided in the preceding section.

Kerr, C. C. P., 1461.

5956. Widow or children may retain homestead—Provision for support.

SEC. 100. When any person shall die leaving a widow or a minor child or children, the widow, child or children shall be entitled to remain in possession of the homestead and of all the wearing apparel and provisions on hand of

the family, and all of the household furniture, and shall also be entitled to a reasonable provision for their support, to be allowed by the district judge at chambers or in court.

Kerr, C. C. P., 1464.

The issue as to whether property sought to be set aside to a widow of a homestead is separate or community property, is raised by a petition showing that the husband was in possession when he died, the presumption being in favor of the community in such case. State ex rel. Cook v. Langan, 32 Nev. 176 (105 P. 568).

5957. Property set apart for use of family not subject to administration.

SEC. 101. Upon the return of the inventory or at any time thereafter during the administration, the court or judge, of his own motion, or on application, may set apart for the use of the family of the deceased all personal property which is exempt by law from execution, and the homestead as designated by the general homestead law now in force, whether such homestead has theretofore been selected as required by said law or not, and the property thus directed to be set apart shall not be subject to administration.

Kerr, C. C. P., 1465.

"The homestead as designated by the general homestead law," which the judge is commanded to set aside, is not a homestead that has already been secured by that law, but a homestead of the character and value prescribed by that law. Estate of Walley, 11 Nev. 260, 262, 263, 267.

The expression "may set apart for the use of the family of deceased" must be considered as imperative and mandatory as if it had read "shall set apart." Idem.

A childless widow is embraced within the meaning of the words "family of the deceased." Idem.

Under the probate act the homestead is exempted in favor of the widow or minor child or children of a deceased person from the payment of the general debts contracted by him in his lifetime, and from the debts accruing in the course of administration. Idem.

When no declaration has been filed on the homestead property, no joint tenancy is created; in such case, if it was common property, one-half vested in the wife upon the death of the husband, and the other half vested in the minor children of said deceased and his wife. Smith v. Shrieves, 13 Nev. 303, 325.

See In re Cook, under sec. 2142, ante.

5958. Idem—Further allowance for family—Exempt property insufficient—Time limit in insolvent estate.

SEC. 102. If the whole property exempt by law be set apart, and should not be sufficient for the support of the widow, child or children, the district court or judge shall make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate, which in case of an insolvent estate shall not be longer than one year after granting letters of administration.

Kerr, C. C. P., 1466.

The legislature intended to embrace within the meaning of the words "family of the deceased" a childless widow. Estate of Walley, 11 Nev. 260, 263, 267.

5959. Idem—Allowance, priority of charge.

SEC. 103. Any allowance made by the court or judge in accordance with the provisions of this act shall be paid by the executor or administrator in preference to all other charges, except funeral charges.

Kerr, C. C. P., 1467.

5960. Property set apart, how apportioned between widow and children.

SEC. 104. When property shall have been set apart for the use of the family, in accordance with the provisions of this act, if the deceased shall have left a widow and no minor child, such property shall be the property of the widow. If he shall have left a minor child, or children also, the one-half of such property shall belong to the widow, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow, the whole shall belong to the child or children.

Kerr, C. C. P., 1468.

See sec. 2165.

5961. Estates not exceeding $500, when not administered—How and to whom set apart—Affidavit.

SEC. 105. When a person shall die, leaving an estate the whole value of which does not exceed five hundred dollars, and there be a surviving husband or wife, or a minor child or children, such estate shall not be administered upon, but the whole thereof shall be by the court or judge, by an order for that purpose, assigned and set apart for the support of the surviving husband or wife, or minor children of deceased, or for the support of the minor child or children if there be no surviving husband or wife; *provided*, that the whole of such estate even though there be a surviving husband or wife, may in the discretion of the court be set aside to the minor child or children of the deceased according to the subserviency of the best interests of such minor child or children. Such order may be made by the court or judge on motion made by or on behalf of the surviving husband or wife, or next friend of any minor child or children upon an affidavit setting forth the necessary facts, and the court or judge being satisfied that the value of the whole of such estate does not exceed five hundred dollars. *As amended, Stats. 1911, 28.*

Kerr, C. C. P., 1469.

5962. Property set apart to go to minor children, when.

SEC. 106. If the widow has a maintenance derived from her own property equal to the portion set apart to her under the provisions of this act, the whole property so set apart shall go to the minor children.

Kerr, C. C. P., 1470.

5963. Notice of appointment of executor published—What to specify—Posted and filed.

SEC. 107. Every executor or administrator shall, immediately after his appointment, cause to be published in some newspaper published in the county, if there be one, if not, then in such newspaper as may be designated by the court or judge, and post copies thereof in three public places of the county, a notice of his appointment as such executor or administrator. Such notice shall be properly entitled of court and cause, specifying the date of appointment, the name of deceased, and shall be dated and officially signed by the executor or administrator, and shall direct that all persons having claims against the estate are required to file the same, with the proper vouchers and statutory affidavits attached, with the clerk of the court within three months from the date of the first publication of the notice. Such notice shall be published for at least once a week for four weeks. After the notice shall have been given as above required, a copy thereof, with the affidavit of publication and posting, shall be filed. *As amended, Stats. 1899, 110.*

Kerr, C. C. P., 1490.

It is unnecessary that the notice to be given by an executor or administrator to the creditors of an estate should specify whether the place where the claims are to be presented is his place of residence or his place of business. Douglass v. Folsom, 21 Nev. 441, 443–446 (33 P. 660).

Claims against an estate may be legally presented at the place where the notice directs them to be presented, without regard to whether the executor or administrator is there to receive them. His absence from the state makes no difference in this rule. Idem.

Under the statutes of Nevada it is not a sufficient presentation of such a claim to hand it to the "attorney for the estate"; at least not without showing that it actually reached the administratrix within the proper time for the presentation of claims. Idem.

There is no such officer as an attorney of record or attorney generally for an estate. An attorney's employment with reference to an estate must always be in a particular matter, and with that matter his legal connection with the estate ends. Idem.

A claim against an estate of a decedent may be filed after the expiration of the statutory time for the publication of the notice to creditors barring unpresented claims, where it appears by affidavit of the claimant that he had no notice, as the publication of such notice is not summons. Pacific S. L. & B. Co. v. Fox, 25 Nev. 229, 234, 235 (59 P. 4).

5964. Claims not filed within three months barred—Proviso.

SEC. 108. All persons having claims against the deceased must, within three months after the first publication of the notice specified in the preceding section, file the same with the necessary vouchers with the clerk of the court, who shall file and register each claim. If a claim be not filed with the clerk within three months after the first publication of said notice, it shall be forever barred; *provided*, that when it shall be made to appear by the affidavit of the claimant, or by other proof that he had no notice as provided in this act, to the satisfaction of the court or judge, it may be filed at any time before the filing of the final account. *As amended, Stats. 1899, 111.*

Kerr, C. C. P., 1493.

A joint action at law cannot be maintained against survivor and administrator of deceased maker of a promissory note. Maples v. Geller, 1 Nev. 233, 235.

In a suit in equity against the representative of a deceased person, to recover the amount of the unpaid subscription, of deceased, to a bank corporation, it is not necessary that the claim should be presented for allowance, as ordinary claims are required to be presented, for the reason that such unpaid subscription is a trust fund for the benefit of the creditors of the bank, and constitutes no part of the estate of deceased persons. Thompson v. Reno Savings Bank, 19 Nev. 242, 244 (3 A. S. 883, 9 P. 121).

Cited, Douglass v. Folsom, 21 Nev. 444 (33 P. 660).

A claim against an estate was not presented to the executrix, nor was it presented at the place designated in the notice to creditors as the executrix's place of residence or of business, but was presented to an attorney who was acting as attorney for the estate. The court found that the attorney was authorized by the executrix to receive the presentation of claims, and that he had actually presented a claim in question to the executrix. Evidence examined, and held, that these findings are not sustained. Douglass v. Folsom, 22 Nev. 217, 219 (38 P. 111).

See Pacific States S. L. & B. Co. v. Fox, 25 Nev. 229, 234, 235 (59 P. 4).

A mortgage upon the lands of a decedent may be foreclosed whether a claim thereon has been filed against the estate or not, the only effect of a failure to file such claim being the prevention of the mortgagee from making any deficiency that might remain after exhausting the mortgaged property out of the remainder of the estate. Kirman v. Powning, 25 Nev. 378, 390 (60 P. 834).

A mortgage is something more than "a claim against the deceased." It is a lien upon the specific property described therein, carrying with it the right, in case of default, of action to foreclose, and by such proceedings have applied to its discharge the proceeds arising from the sale of the specific property. Idem.

The district judge acting in probate matters has no power or authority to determine the question of the validity or invalidity of the mortgage, or to make any decree or order for the sale of the mortgaged premises upon the presentation of the claim as defined in the statute. His allowance or rejection of the claim does not determine the validity of the lien created by the mortgage. Idem.

5965. Claim to be supported by affidavit—Form of—Defective affidavit, amendment of.

SEC. 109. Every claim filed with the clerk shall be supported by the affidavits of the claimant that the amount is justly due (or if the claim is not yet due, that the amount is a just demand and will be due on the____day of _____), that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of the claimant or other affiant; *provided*, that when the affidavit is made by any other person than the claimant the reasons why it is not made by the claimant shall be set forth in the affidavit. The oath may be taken before any officer authorized to administer oaths. The amount of interest shall be computed and included in the statement of the claim and the rate of interest determined. The court may in its discretion for good cause shown allow a defective affidavit to be corrected or amended on application made at any time before the filing of the final account. *As amended, Stats. 1899, 111.*

Kerr, C. C. P., 1494.

Where an administratrix of an estate, upon a full knowledge of all the facts, without any fraud or deceit, voluntarily pays a debt legally due from the estate which was never presented for allowance, she cannot, thereafter, recover back the amount thus paid. Adams v. Smith, 19 Nev. 259, 278 (3 A. S. 888, 9 P. 337).

Cited, Douglass v. Folsom, 21 Nev. 444 (33 P. 660).

See Kirman v. Powning, under sec. 108 of this act.

Cited, Maples v. Geller, 1 Nev. 235.

In an action by a claimant on a rejected claim, an appeal will not lie from an order refusing permission to amend a defective affidavit, since the claimant may, in making his proofs in the action upon the rejected claim, reserve any question growing out of the abuse of the court of its discretion in such matter. Lonkey v. Powning, 25 Nev. 428, 430 (62 P. 235).

5966. Claim of judge or executor may be filed.

SEC. 110. Any district judge may file a claim against the estate of any deceased person, and have the same rights and remedies in reference thereto as any other creditor filing a claim. Any executor or administrator may file a claim against the estate of any deceased person.

Kerr, C. C. P., 1495.

Cited, Douglass v. Folsom, 21 Nev. 444 (33 P. 660).

See Kirman v. Powning, under sec. 108 of this act.

5967. Executor to examine all claims—When deemed rejected—Judge to approve—Allowance after time limitation—Claims founded on written instrument, how prepared.

SEC. 111. Within fifteen days after the time for filing claims has expired, as hereinbefore provided, the executor or administrator shall examine all claims filed, and endorse on each claim his allowance or rejection with the day and the year thereof, and within five days after the fifteen days in this section first specified, the executor or administrator shall present all claims allowed by him to the district judge for his approval or rejection. If an executor or administrator refuse or neglect to endorse on a claim his allowance or rejection within fifteen days, as above specified, the claim shall be deemed rejected, but the executor or administrator may nevertheless allow said claim at any time before the filing of the final account. All claims, when approved by the judge, shall be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim be founded upon a bond, bill, note or other instrument the original instrument need not be filed, but a copy with all endorsements may be attached to the statement of the claim and filed therewith, and if the claim be secured by mortgage or other evidence of lien, it shall, or a certified copy from a record, be attached to the claim and filed therewith. *As amended, Stats. 1899, 111.*

Kerr, C. C. P., 1496.

An action of foreclosure cannot be maintained against the estate of a deceased mortgageor after the note or mortgage has been allowed as a valid claim against the estate and before the final settlement, where there are no parties affected except the claimant and the administrator. Corbett v. Rice, 2 Nev. 330, 333, 336, 337.

The word "claim" includes secured as well as unsecured claims. Idem.

Cited, Douglass v. Folsom, 21 Nev. 444 (33 P. 660).

The only distinction which the law seems to make between secured and unsecured debts is that the former shall have the proceeds of the security applied to its payment, if the security is sold. Idem.

The words "may" and "shall" in the last clause of this section are directory. Kirman v. Powning, 25 Nev. 378 (60 P. 834).

The rejection of a claim for any reason is not a final determination of the rights of a claimant. He may institute a suit thereon and reserve all questions affecting his right for review in the appellate court. Lonkey v. Powning, 25 Nev. 428 (62 P. 235).

Cited, State ex rel. Bullion and Exchange Bank v. Mack, 26 Nev. 442 (59 P. 862).

5968. Rejected claim, notice of—Holder may bring suit—Time of—Barred, when—Nonresident, notice to.

SEC. 112. When a claim is rejected by the executor or administrator, or the district judge, the holder shall be immediately notified by the executor or administrator, and such holder must bring suit in the proper court against the executor or administrator within thirty days after such notice, whether the claim is due or not, otherwise the claim shall be forever barred. If the holder of a claim resides out of the state he may be informed of the rejection

of his claim by written notice forwarded to his postoffice address by registered mail. *As amended, Stats. 1899, 112.*

Kerr, C. C. P., 1498.

Cited, Douglass v. Folsom, 21 Nev. 444 (33 P. 660); Kennedy v. Adams, 24 Nev. 217, 220 (51 P. 840); Corbett v. Rice, 2 Nev. 336.

Where a party dies owing a debt not barred by the statute of limitations at his death, the holder of the claim has one year after administration granted on the debtor's estate within which to bring his action, although the action would have been barred in less than one year, if the debtor had lived. Wick v. O'Neale, 2 Nev. 303, 304.

The extension of time within which the action may be brought is subject only to this qualification, that if the claim is presented to the administrator and rejected, suit must be brought thereon within three months after rejection. Idem.

This twelve months' extension applies to all classes of cases, as well those debts contracted out of the state, and which are otherwise barred by six months' limitation, as others. Idem.

Where, in a suit to declare a deed a mortgage and to foreclose it, no judgment for any deficiency was demanded or granted by the judgment directed only against the premises, the fact that the suit was not begun within the time required by the probate act, after the rejection of a demand by the executrix of the deceased grantor was immaterial, though the executrix was made party defendant. Fox v. Bernard, 29 Nev. 127 (85 P. 351).

5969. Claim barred by statute not to be allowed.

SEC. 113. No claim shall be allowed by the executor or administrator or the district judge which is barred by the statute of limitations at the time of the death of the person whose estate is being administered.

Kerr, C. C. P., 1499.

A waiver of a statute by an administrator, and his allowance of a claim barred thereby, are invalid. Jones v. Powning, 25 Nev. 399, 403 (60 P. 833).

5970. Action not maintained unless on claim filed.

SEC. 114. No holder of any claim against an estate shall maintain any action thereon unless it shall have been first filed, and under the conditions hereinbefore specified.

Kerr, C. C. P., 1500.

See Thompson v. Reno Savings Bank, under sec. 108 of this act.

See Corbett v. Rice, under sec. 117 of this act.

Cited, Douglass v. Folsom, 21 Nev. 444 (33 P. 660); Douglass v. Folsom, 22 Nev. 219 (38 P. 111); Kirman v. Powning, 25 Nev. 393 (60 P. 834).

5971. Vacancy in administration not counted in limitation.

SEC. 115. The time during which there shall be a vacancy in the administration shall not be included in any limitations herein prescribed.

Kerr, C. C. P., 1501.

Cited, Douglass v. Folsom, 21 Nev. 444 (33 P. 660).

5972. Action pending—Claim to be filed for.

SEC. 116. If an action be pending against the deceased at the time of his or her death, the plaintiff, in like manner, shall file his claim with the clerk, and no recovery shall be had in the action unless proof be made of such filing.

Kerr, C. C. P., 1502.

5973. Amount of allowance indorsed on claim—Allowance in part—Action—Costs.

SEC. 117. Whenever the executor or administrator or the district judge shall act upon any claim that may be filed, he shall indorse on the claim the amount he is willing to allow, and should the creditor refuse to accept the amount allowed in satisfaction of his claim he shall recover no costs in any action which he may bring on such claim against the executor or administrator, unless he shall recover a greater amount than that offered to be allowed.

Kerr, C. C. P., 1503.

The statute does not prohibit bringing suit on an allowed claim, but simply denies the plaintiff costs if he recovers no more than the administrator was willing to allow. Corbett v. Rice, 2 Nev. 330, 336, 337.

5974. Effect of judgment—Certified copy filed—Execution not to issue.

SEC. 118. The effect of any judgment rendered against any executor or administrator upon any claim for money against the estate of his testator or intestate, shall only be to establish the claim in the same manner as if it had been allowed by the executor or administrator and the district judge, and the judgment shall be that the executor or administrator pay in due course of administration the amount ascertained to be due. A certified copy of the judgment shall be filed in the estate proceedings. No execution shall issue upon such judgment nor shall it create any lien upon the property of the estate or give the judgment creditor any priority of payment.

Kerr, C. C. P., 1504.
Cited, Corbett v. Rice, 2 Nev. 233.

5975. Judgment before death—Execution not to issue unless levied before death.

SEC. 119. When any judgment has been rendered against the deceased in his or her lifetime no execution shall issue thereon after his or her death; but a certified copy of such judgment shall be attached to the statement of claim filed with the clerk and shall be acted on as any other claim; *provided, however*, that if an execution has been actually levied upon any property of the deceased the same may be sold for the satisfaction thereof and the officer making the sale shall account to the executor or administrator for any surplus in his hands.

Kerr, C. C. P., 1505.

5976. Liability for costs.

SEC. 120. When a judgment has been recovered with costs against any executor or administrator the executor or administrator shall be personally liable for the costs, but they shall be allowed him in his administration accounts unless it shall appear that the suit or proceeding in which the costs were taxed shall have been prosecuted or resisted without just cause.

Kerr, C. C. P., 1509.

5977. Claim of executor, judge to pass upon.

SEC. 121. If an executor or administrator is himself a creditor of the deceased, he shall as any other creditor file his claim with the clerk, and the district judge shall allow or reject it, and its allowance by the judge shall be sufficient evidence of its correctness.

Kerr, C. C. P., 1510.

5978. Failure to give notice to creditors cause for revocation.

SEC. 122. If any executor or administrator shall neglect for fifteen days after his appointment to give notice of his appointment, as hereinbefore prescribed, it shall be the duty of the court to revoke his letters.

Kerr, C. C. P., 1511.

5979. Statement of claims to be filed, what set forth.

SEC. 123. Within ten days after the expiration of the time for the judge to approve or reject claims, the executor or administrator shall file a statement of all claims filed against the estate, and at any other time the court may order. In all such statements he shall designate the names of the creditors, the character of each claim, when it became or will become due, and whether allowed or rejected.

Kerr, C. C. P., 1512.
See In re Cook, 33 Nev.— (117 P. 27), under sec. 2142, ante.

5980. Sale of property—When not valid—Options, leases and bonds on mining property—Copies filed with clerk—Deeds.

SEC. 124. No sale of any property of an estate of a deceased person shall

be valid unless made under an order of the district court, except as otherwise provided in this act or other acts; *provided*, that when the personal property of an estate is insufficient to pay the debts and expenses of administration, the administrator or executor of such estate may, with the approval of the district judge written thereon, give options and execute written bonds and working leases and other writings for the working or sale of mines, mining claims and mining property; and upon the performance of said written and approved contracts, may execute deeds of conveyance of the property so contracted to be sold, and said deeds shall convey to the grantees therein all the right, title, estate and claim of the deceased at the time of his death, or which his estate may have acquired since his death, by operation of law or otherwise, to the mines, mining claims and mining properties described therein and in said written and approved contracts. (SEC. 2.) A copy of all such approved contracts or writings shall be filed with the clerk of the court having jurisdiction of the settlement of said estate and be a part of the record of the settlement of said estate. *As amended, Stats. 1905, 69.*

Kerr, C. C. P., 1517.

Cited, Corbett v. Rice, 2 Nev. 232; Kirman v. Powning, 25 Nev. 379, 397 (60 P. 834).

Probate act regulates the proceedings of executors and administrators as such, and, acting in that capacity alone, the validity of their acts depends upon a compliance with its provisions, but the act has no application to a case like the present, where the executrix is owner of the residuary estate. Hunt v. Hunt, 11 Nev. 442, 450.

5981. Application for order of sale on petition—Objections—Hearing.

SEC. 125. All applications for orders of sale shall be by petition in writing, in which shall be set forth the facts showing the sale to be necessary, and, upon the hearing, any person interested in the estate may file written objections, which shall be heard and determined.

Kerr, C. C. P., 1518.

5982. Sale of perishable property — Personal property—Procedure — Orders—Property bequeathed.

SEC. 126. At any time after receiving letters the executor, administrator or special administrator may apply to the court or judge for an order to sell the perishable property of the estate, or so much of other property, if necessary, to pay the allowance made to the family of deceased. If there be a delay in obtaining such order, such property may be sold without an order of sale; *provided*, that the executor, administrator or special administrator shall be held responsible for the property sold by him, unless, after making a sworn return, the court shall confirm the sale. If claims against the estate have been allowed, and a sale of property shall be necessary for their payment, or of the expenses of the administration, the executor or administrator may also apply for an order to sell so much of the personal property as may be necessary. Upon filing his petition, notice of at least five days shall be given of the hearing of the application, either by posting or publishing, as the court or judge may order. A similar application may be made from time to time to the court or judge at chambers as long as any personal property remains in his hands, and a sale thereof is necessary; and if he deem it for the best interest of the estate, he may at any time after the filing of the inventory make a like application, and after giving like notice, for an order to sell the whole of the personal property belonging to the estate; and if on the hearing it shall be made to appear that a sale is necessary, or for the best interest of the estate, the court or judge shall order it to be made. In making such sales the court or judge shall order such articles as are not necessary for the support and subsistence of the family of the deceased, or are not specially bequeathed, to be first sold. Articles so bequeathed shall not be sold until the residue of the personal property has been applied to the payment of the debts and expenses of administration.

Kerr, C. C. P., 1522.

5983. Sale of personal property, how made—Notice, time and place.

SEC. 127. The sale of personal property shall be made at public auction, and after public notice given at least ten days, unless for good reasons shown, the court or judge shall order a private sale or a shorter notice. Public sales of such property shall be made at the court-house door, at the residence of the deceased, or at some other place to be mentioned in the notice, and no sale shall be made of any property which is not present at the time of selling.

Kerr, C. C. P., 1526.

5984. Idem—Notice, how given.

SEC. 128. The notice shall specify the time and place, and shall be given by posting in three public places of the county, or by publication in a newspaper, as the court or judge shall order.

Kerr, C. C. P., 1526.

5985. Real estate may be sold, when.

SEC. 129. When the personal estate of the deceased shall be insufficient to pay the allowance to the family, the debts of the deceased, expenses of last illness and funeral, and the charges and cost of administration, the executor or administrator may petition to have the real estate sold for such purpose.

Kerr, C. C. P., 1536.

Property may be mortgaged, sec. 6146.

5986. Idem—Petition for order to sell—What to show.

SEC. 130. Such petition shall be presented to the district court or the judge at chambers, setting forth the amount of personal estate that has come to the hands of the petitioner, and how much thereof, if any, remains undisposed of; the debts outstanding against the deceased, as far as the same can be ascertained or estimated; the amount due upon the family allowance or that will be due after the same shall have been in force for one year; the sum, if any, due for last sickness and funeral of deceased; the costs and expenses of the administration already accrued and an estimate of what will or may accrue during the administration; a description of all the real estate of which the deceased died seized, or in which he or she had any interest or in which the estate has acquired any interest, and the condition and value of the respective portions and lots, and whether the same be community or separate property; the names, ages and residence of the devisees or legatees, if any, and of the heirs of the deceased, which petition shall be verified by the oath of petitioner. If all of said matter cannot be ascertained it shall be so stated in the petition.

Kerr, C. C. P., 1537.

5987. Idem—Order to show cause to all interested parties—Time of hearing.

SEC. 131. If it shall appear to the court or judge by such petition that it is necessary to sell the whole or some part of the real estate for the purposes therein mentioned, or any one of them, such petition shall be filed, and an order thereupon made directing the clerk to issue a notice to all persons interested in the estate to be and appear before the court at a time and place specified, not less than three weeks nor more than six weeks from the date of such notice, to show cause why an order should not be granted to authorize the executor or administrator to sell so much of the real estate as may be necessary.

Kerr, C. C. P., 1538.

5988. Idem—Notice, how served—Parties may assent.

SEC. 132. A copy of such notice shall be personally served on all persons

in the county interested in the estate at least five days before the time specified in the notice, or shall be published at least two successive weeks in such newspaper as the court or judge shall order; *provided, however*, if all persons interested in the estate signify in writing their assent to such sale, the notice may be dispensed with.

Kerr. C. C. P., 1539.

5989. Idem—Proof of notice—Hearing of application.

SEC. 133. The district court, at the time and place specified in such notice, or at such other time as the hearing may be adjourned to, upon satisfactory proof of the due service or publication of the notice, by affidavit or otherwise, shall proceed to the hearing of the petition and any opposition that may be filed.

Kerr, C. C. P., 1540.

5990. Idem—Service on guardian of minor—Attorney may be appointed for minor, creditors or heirs.

SEC. 134. If any of the legatees, devisees or heirs of the deceased are minors, and have a general guardian in the county, a copy of the notice shall be served upon such guardian. If they have no guardian, the court or judge shall, at the time of filing said petition, or before proceeding to act upon it, appoint some disinterested person their attorney, for the purpose of appearing for them in the proceeding, and taking care of their interests. The court or judge may also, if deemed necessary, appoint such attorney for the heirs, devisees or legatees, if they are unrepresented, whether minors or otherwise, and may likewise appoint an attorney for the creditors if unrepresented.

Kerr, C. C. P., 1540.

5991. Idem—Witness examined—Process for.

SEC. 135. The executor or administrator may be examined and witnesses on the part of any party interested, and process to compel their attendance and testimony may issue in the same manner and with like effect as in other cases.

Kerr, C. C. P., 1541.

5992. Idem—Order of sale of whole or part.

SEC. 136. If it shall appear to the court that it is necessary to sell a part of the estate, real or personal, and that by a sale of such part the residue of the estate, or some specific part or piece thereof would be greatly injured or diminished or subject to expense, or rendered unprofitable, the court may authorize the sale of the whole estate, or such part as may be judged necessary and most beneficial for the interests of all concerned.

Kerr, C. C. P., 1542.

5993. Idem—Order to specify, what—Sale, how made—Credit allowed—Devised portion—Sale may be compelled.

SEC. 137. The order shall specify the lands to be sold and the terms of the sale, which may be either for cash or on a credit not exceeding one year, payable in gross or installments with interest as the court may direct. If sold on a credit the purchaser shall give his promissory note with security for deferred payments, which shall also be a lien upon any real estate sold. The tract or tracts of land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to said estate, unless the court shall otherwise specially direct. If it appears that any part of such real estate has been devised and not charged in such devise with the payment of debts or legacies, the court shall order that part descending to the heirs to be sold before that devised. Every such sale shall be made at public auction unless, in the opinion of the court, it would benefit the estate to sell

the whole or some part of the real estate at private sale, in which case the court may order or direct such real estate, or any part thereof, to be sold at either public or private sale, as may be made to appear most beneficial to the estate. If the executor or administrator shall neglect or refuse to make a sale under the order of sale he may be compelled to proceed to sell by order of the court made on motion after due notice by any party interested.

Kerr, C. C. P., 1544, 1545.

5994. Idem—Person other than executor may apply for order of sale—Procedure.

SEC. 137. If the executor or administrator shall neglect to apply for an order of sale whenever it may be necessary, any person interested in the estate may petition therefor in the same manner as the executor or administrator, and like proceedings shall be had thereon, the notice being also served upon the executor or administrator.

Kerr, C. C. P., 1544, 1545.

5995. Idem—Certified copy of order furnished administrator.

SEC. 138. Upon making an order of sale, under the provisions of the preceding section, a certified copy of such order shall be delivered by the clerk to the executor or administrator, who shall thereupon be authorized and required to sell the real estate as directed.

Kerr, C. C. P., 1545.

5996. Idem—Notice of time and place of sale, how given.

SEC. 139. When a sale is ordered, notice of the time and place of holding the same shall be given by posting a copy in three of the most public places of the county in which the land is situated, and by publishing it in a newspaper published in the county, if there be one; if not, then in such paper as the court may direct, for three weeks successively next before such sale, in which notice the lands and tenements shall be described with common certainty.

Kerr, C. C. P., 1547.

5997. Idem—Sale to be made, where, when and how—Private sale—Restrictions—Reappraisement, when.

SEC. 140. Such sale shall be made in the county where the land is situated, but when the tract of land is situated in two or more counties, it may be sold in any one of such counties. The sale shall be made between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon of the same day, at public auction or private sale, as the court may have ordered, but the same shall not be sold at private sale, unless the real estate to be sold has been appraised within a year previous to the time of such sale; nor shall the same be sold at private sale for less than two-thirds of its appraised value. If such real estate has not been so appraised, the court shall appoint three disinterested real estate holders to appraise the same, who shall return their said appraisement under oath to the court before the sale shall be made.

Kerr, C. C. P., 1548.

5998. Idem—Confirmation of sale, notice of—Vacated, when—New sale.

SEC. 141. The executor or administrator making any sale of any real estate shall within five days thereafter make and file with the clerk a return of his proceedings, whereupon the clerk shall give notice by posting in three public places of the county that the return has been filed and will be heard by the court at a time and place to be designated in said notice, not less than ten days after such posting, and notify all interested to appear and show cause why said sale should not be confirmed. At the time set, or at such other times as the hearing may be continued to, the court shall hear the

matter and if it shall appear that the proceedings were unfair, or that the sum bid is disproportional to the value, and that a sum exceeding such bid at least ten per cent exclusive of the expense of a new sale may be obtained, the court shall vacate such sale and direct a new sale to be made, and the proceedings thereon shall be as upon an original order to sell; *provided*, that if an offer of ten per cent or more exclusive of the expense of a new sale shall be made in writing by a responsible person, to the court or judge, it shall be discretionary with the court to accept such offer and confirm the sale to such person or to order a new sale.

Kerr, C. C. P., 1542.

5999. Idem—Order confirming sale—Conveyance—Delinquent purchaser—Liability—New sale.

SEC. 142. If upon the hearing, when all persons interested who desire have been heard for or against, and any testimony that may be offered, it shall appear to the court that the sale was legally made and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, or if disproportionate that a greater sum as above specified cannot be obtained, or that the advance bid mentioned in section 141 of this act be made and accepted, the court shall confirm the sale and direct proper conveyances to be made and executed, and such sale from that time shall be confirmed and valid; *provided*, that if after such confirmation the purchaser shall neglect or refuse to comply with [the] terms of sale the court may, on motion of the executor or administrator, and after notice to the purchasers, order a new sale of the property, and if the amount realized on such sale does not cover the bid and expenses of the previous sale, such delinquent purchaser shall be liable for the deficiency.

Kerr, C. C. P., 1554.

6000. Idem—Conveyances—What deemed passed after acquired title.

SEC. 143. Proper conveyances shall thereupon be executed to the purchasers by the executor or administrator. The conveyances so made shall be deemed to convey all the right, title, interest and estate of the deceased in the premises at the time of his or her death. When, however, by operation of law or otherwise the estate shave [shall] have acquired any right, title, or interest in the premises other than or in addition to that of the deceased at the time of his or her death, such right, title, or interest shall also be passed by such conveyances.

Kerr, C. C. P., 1555.

6001. Idem—Before confirmation—Proof of notice—Order to recite.

SEC. 144. Before any order is entered confirming the sale it shall be proved to the satisfaction of the court that notice of the sale was given as in this act prescribed, and the order of confirmation shall state that such proof was made.

Kerr, C. C. P., 1556.

6002. Idem—Postponement of sale—Sixty-day limit.

SEC. 145. If at the time appointed for the sale the executor or administrator shall deem it best for the interest of all parties concerned therein that the same should be postponed, he may adjourn the sale from time to time, not exceeding in all sixty days.

Kerr, C. C. P., 1557.

6003. Idem—Adjournment, notice of—How given.

SEC. 146. In case of adjournment notice thereof shall be given by a public declaration at the time and place first appointed for the sale, and if the adjournment be for more than one day, further notice shall be given by post-

ing in three public places in the county where the land is situated, or publishing the same, or both, as time and circumstances will admit.

Kerr, C. C. P., 1558.

6004. Idem—Sale to pay legacies.

SEC. 147. When the testator shall have given any legacy by will that is effectual to pass or charge real estate, and his goods, chattels, rights and credits shall be insufficient to pay a legacy together with his debts and the charges and expenses of administration, the executor or administrator, with the will annexed, may obtain an order to sell his real estate for that purpose, in the same manner and upon the same terms and conditions as hereinbefore provided in case of a sale for the payment of debts.

6005. Payment according to will.

SEC. 148. If a deceased person shall have made provision by will, designating the estate to be appropriated for the payment of debts, expenses of administration, or family expenses, they shall be paid according to the provisions of the will, and out of the estate thus appropriated, so far as the same may be sufficient.

Kerr, C. C. P., 1560.

6006. Order not required, when—Sale authorized by will—Notice—Confirmation.

SEC. 149. When such provision has been made, or any property directed by will be sold for any purpose, the executor or the administrator, with the will annexed, may proceed to sell, as directed by the will, without an order of the district court, but he shall be bound to give notice of the sale, and proceed in all respects as if acting under an order of sale from the court. Such sale shall not be valid until confirmed by the court.

Kerr, C. C. P., 1561.

6007. Idem—When property designated in will insufficient, other may be appropriated.

SEC. 150. If the provisions made by the will, or the estate appropriated be not sufficient to pay the debts, expenses of administration and family expenses, such part of the estate as shall not have been disposed of by the will, if any, shall be appropriated to that purpose as provided in this act.

Kerr, C. C. P., 1562.

6008. Devises and legacies liable for debts—When may be exempted.

SEC. 151. The estate, real and personal, given by will to any devisees or legatees, shall be held liable for the payment of debts, expenses of administration and family expenses in proportion to the value or amount of the several devises or legacies, except that specific devises or legacies may be exempted, if it shall appear to the court necessary to carry into effect the intention of the deceased, if there shall be other sufficient estate.

Kerr, C. C. P., 1563.

6009. Sale of devised property—Contribution by other devisees and legatees—Court to decree.

SEC. 152. When the estate given by any will has been sold for the payment of debts and expenses all the devisees and legatees shall be liable to contribute according to their respective interests, to any devisee or legatee from whom the estate devised or bequeathed to him or her may have been taken for the payment of debts or expenses, and the district court, when distribution is made, shall settle the amount of the several liabilities, and decree how much each person shall contribute.

Kerr, C. C. P., 1564.

6010. Contract for purchase of lands may be sold—Procedure.

SEC. 153. If a deceased person, at the time of death, was possessed of a contract for the purchase of lands, the interest of deceased in such lands, and under such contract, may be sold in the same manner as if said person had died seized of such land, and the same proceedings shall be had for that purpose as are prescribed in this act in respect to lands of which a person dies seized, except as hereinafter provided.

Kerr, C. C. P., 1565.

6011. Idem—Sale subject to payments—Confirmation subject to indemnity bond.

SEC. 154. Such sale shall be made subject to all payments that may thereafter become due on such contract, and if there be any such payments thereafter to become due, such sale shall not be confirmed by the district court until the purchaser or purchasers shall execute a bond to the executor or administrator for his benefit and indemnity, and for the benefit and indemnity of the person or persons entitled to the interest of deceased in the land so contracted for. The amount of such bond shall be double the whole amount of payments thereafter to become due on such contract, with such sureties as the district court or judge shall approve.

Kerr, C. C. P., 1566.

6012. Idem—Bond, how conditioned—Bond not required, when.

SEC. 155. Such bond shall be conditioned that the purchaser or purchasers will make all payments for such lands, that shall become due after the date of such sale, and will indemnify the executor or administrator, and the person or persons so entitled, against all demands, costs, charges and expenses, by reason of any covenant or agreement contained in such contract, but if there be no payment thereafter to become due on such contract, no bond shall be required of the purchaser or purchasers.

Kerr, C. C. P., 1567.

6013. Idem—Assignment of contract—Rights of purchaser.

SEC. 156. Upon the confirmation of such sale, the executor or administrator shall execute to the purchaser or purchasers an assignment of the contract, which assignment shall vest in the purchaser or purchasers all the right, title and interest of the person or persons entitled to the interest of the deceased in the lands sold at the time of the sale, and such purchaser or purchasers shall have the same rights and remedies against the vendor of such lands as the deceased would have if living.

Kerr, C. C. P., 1568.

6014. Sale of land subject to lien—Purchase money, how applied—Liens not affected by statute of limitations pending settlement of estate.

SEC. 157. When any sale is made by any executor or administrator, pursuant to the provisions of this act, of land subject to any mortgage or other lien, which is a valid claim against the estate of the deceased, the purchase money shall be applied, after paying the necessary expenses of the sale, first to the satisfaction of the mortgage or other lien and the residue in due course of administration. Such application of the purchase money shall be made without delay and the land shall remain subject to such mortgage or other lien until the purchase money shall have been actually so applied. No lien against any estate shall be affected by the statute of limitation pending the proceedings for the settlement of such estate.

Kerr, C. C. P., 1569.

The legislature, by the use of the words "valid claim against the estate of the deceased," construed with other language used in the same section, clearly intended that lands sold by the administrator, which were justly chargeable with the payment of

a mortgage lien, should be subject to sale divested of such lien only upon the actual application of the proceeds as specified. Kirman v. Powning, 25 Nev. 378, 379, 397, 398 (60 P. 834).

6015. Expenses of sale, primary charge.

SEC. 158. In all cases in which lands are sold by an executor or administrator the necessary expenses of the sale shall first be paid out of the proceeds.

Kerr, C. C. P., 1569.

6016. Misconduct in sale—Administrator liable on bond.

SEC. 159. If there shall be any neglect or misconduct in the proceedings of an executor or administrator in relation to any sale by which any person interested in the estate shall suffer any damage, the party aggrieved may recover for the same in a suit upon the bond of the executor or administrator or otherwise, as the case may require.

Kerr, C. C. P., 1571.

6017. Fraudulent sale—Administrator liable on bond—Double damages.

SEC. 160. Any executor or administrator who shall fraudulently sell any real estate of his decedent contrary to the provisions of this act shall be liable on his bond, in double the value of the land sold, as damages, to be recovered in an action by the person or persons having an estate of inheritance therein.

Kerr, C. C. P., 1572.

6018. Limitation for action to recover estate sold by executor or administrator—Three years—Disability, effect of.

SEC. 161. No action for the recovery of any estate sold by an executor or administrator under the provisions of this act shall be maintained by any heir or other person claiming under the deceased unless it be commenced within three years next after the sale, saving to minors or others under any legal disability at the time when the right of action shall first accrue the right to commence such action at any time within three years after the removal of the disability.

Kerr, C. C. P., 1573.
See secs. 4964–4966.

6019. Account of sale to be made, when—Penalty for neglect—Contempt—Revocation—Attachment for appearance.

SEC. 162. Whenever a sale has been made by an executor or administrator of any property of the estate, real or personal, it shall be his duty to return to the district court a return of sale thereof within five days after making such sale. If he neglects to make such return he may be punished as for a contempt or his letters may be revoked, one day's notice having first been given him to appear and show cause why he should not be punished for a contempt or his letters should not be revoked, and his appearance may be compelled by attachment or other proper process.

Kerr, C. C. P., 1575.

6020. Executor or administrator not to purchase.

SEC. 163. No executor or administrator shall directly or indirectly purchase any property of the estate he represents.

Kerr, C. C. P., 1576.

6021. Executor or administrator to take possession of all property—Exception—Deemed in possession for certain suits—Possession of heirs or devisees.

SEC. 164. The executor or administrator shall take into his possession all the estate of the deceased, real and personal, except that exempted as hereinbefore provided, and shall collect all debts due the deceased. For the purpose

of bringing suits to quiet title or for partition of such estate, the possession of the executor or administrator shall be deemed the possession of the heirs or devisees. Such possession of heirs or devisees shall be subject, however, to the possession of the executor or administrator for all other purposes.

Kerr, C. C. P., 1581.
See sec. 5950.
Cited, Price v. Ward, 25 Nev. 215 (46 L. R. A. 459, 58 P. 849).

6022. Executors or administrators may sue and be sued, for what.

SEC. 165. Actions for the recovery of any property, real or personal, or for the possession, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases where the same might have been maintained by or against their respective testators or intestates in their lifetime.

Kerr, C. C. P., 1582.
Cited, Schwartz v. Stock, 26 Nev. 153 (65 P. 35); Price v. Ward, 25 Nev. 215 (46 L. R. A. 459, 58 P. 849).

6023. Idem—May sue for trespass, waste or conversion.

SEC. 166. Executors or administrators may maintain actions against any person or persons, who shall have wasted, destroyed, taken, carried away or converted to his or their own use the goods of their testator or intestate in his lifetime. They may also maintain actions for trespass committed on the real estate of the deceased while living.

Kerr, C. C. P., 1583.
Cited, Price v. Ward, 25 Nev. 215 (46 L. R. A. 459, 58 P. 849).

6024. Executor or administrator may be sued for waste, trespass or conversion committed by decedent.

SEC. 167. Any person or his personal representatives shall have a right of action against the executor or administrator of any testator or intestate who in his lifetime shall have wasted, destroyed, taken, carried away or converted to his own use the goods or chattels of any such person, or committed any trespass on the real estate of such person.

Kerr, C. C. P., 1584.

6025. Surviving partner may continue in possession of partnership property—Duty to settle and account—May be compelled by attachment—May be sued—Inventory and appraisement.

SEC. 168. When there was a partnership existing between the testator or intestate at the time of his death and any other person, the surviving partner shall have the right to continue in possession of the effects of the partnership, and to settle its business, but the interest of the deceased shall be included in the inventory, and appraised as other property. The surviving partner shall proceed to settle the affairs of the partnership without delay, and shall account to the executor or administrator, and pay over such balance as may from time to time be payable to him in right of his testator or intestate. Upon the application of the executor or administrator the district judge may, whenever it may appear necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the deceased could have maintained.

Kerr, C. C. P., 1585.

A surviving partner is entitled to sue in his representative capacity for the amount due the partnership, and in his own name for the amount due himself individually. The respective demands may be united in the same action, but should be separately stated. Quillen v. Arnold, 12 Nev. 235, 248.

6026. Action on bond of former executor or administrator.

SEC. 169. Any administrator may, in his own name, for the use and benefit

of all parties interested in the estate, maintain actions on the bond of an executor of any former administrator of the same estate.

Kerr, C. C. P., 1586.

6027. Joinder of parties—Executors not qualifying.

SEC. 170. In actions brought by or against executors, it shall not be necessary to join those as parties who have not qualified.

Kerr, C. C. P., 1587.

6028. Debts and cases compromised, how.

SEC. 171. Whenever a debtor of a deceased person shall be unable to pay all his debts, the executor or administrator, with the approval of the district court or judge, may compromise with such debtor and give him a discharge, upon receiving a fair and just dividend of his effects. A compromise may also be authorized in any case when it shall be made to appear to the court to be just and for the best interests of the estate.

Kerr, C. C. P., 1588.

An executor may pay money to compromise a suit pending against an estate. But he cannot lawfully make such payment without the previous consent of the court. Lucich v. Medin, 3 Nev. 94, 109.

6029. Fraudulent conveyance by decedent—Duty of executor or administrator as to—Rights or credits.

SEC. 172. When there shall be a deficiency of assets in the hands of an executor or administrator, and when the deceased, in his lifetime, shall have conveyed any real estate or any rights or interests therein with intent to defraud his creditors or to avoid any right debt or duty of any person, or shall have so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator may, and it shall be his duty, to commence and prosecute to final judgment any proper action for the recovery of the same for the benefit of the creditors, and may also for such benefit sue for and recover all goods, chattels, rights or credits or their value, which may have been so fraudulently conveyed by the deceased in his lifetime, whatever may have been the manner of such fraudulent conveyance.

Kerr, C. C. P., 1589.

6030. Idem—Creditors to apply for—Costs secured.

SEC. 173. No executor or administrator shall be bound to sue for such estate as mentioned in the preceding section for the benefit of the creditors, unless upon application of creditors of the deceased, nor unless such creditors shall pay the costs and expense of such litigation, or give such security therefor as the court or judge shall direct.

Kerr, C. C. P., 1590.

6031. Idem—Disposition of, when recovered.

SEC. 174. All real estate so recovered shall be sold for the payment of debts in the same manner as hereinbefore prescribed for sales of real estate by executors or administrators, and the proceeds of all goods, chattels, rights or credits so received shall be applied in payment of debts in the same manner as other personal property in the hands of the executor or administrator.

Kerr, C. C. P., 1591.

6032. Specific performance of contracts of decedents—All interested parties to be made defendants.

SEC. 175. When any person who is bound by contract in writing to convey any real estate shall die before making the conveyance, the district court in a proper proceeding therefor may decree that the executor or administrator convey such real estate to the person entitled thereto in all cases where such deceased person, if living, might be compelled to make such conveyance.

All persons interested in the estate shall be made parties defendant in such action.

Kerr, C. C. P., 1597.
See secs. 6147, 6148.

6033. Idem—Effect of conveyance.

SEC. 176. Every conveyance made in pursuance of a decree of the court as above provided, shall be as effectual to pass the estate contracted for as fully as if the contracting party himself were living and executed the conveyance himself.

Kerr, C. C. P., 1603.

6034. Executor or administrator not liable out of own estate for damages or debts of decedents except upon promise in writing—Statute of frauds.

SEC. 177. No executor or administrator shall be chargeable upon any special promise to answer damages or to pay the debts of the deceased out of his own estate, unless the agreement for that purpose or some memorandum or note thereof is in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

Kerr, C. C. P., 1612.
See sec. 1075.

6035. Executor or administrator, with what chargeable in account.

SEC. 178. Every executor and administrator shall be chargeable in his account with the whole of the estate of the deceased which should come to his possession at the value of the appraisement contained in the inventory, except as hereinafter provided, and with all the interest, profit and income of the estate.

Kerr, C. C. P., 1613.

6036. Not to profit or lose unless in fault.

SEC. 179. He shall not make profit by the increase nor suffer loss by the decrease or destruction of any part of the estate without his fault. He shall account for the excess when he shall sell any part of the estate for more than the appraisement, and if any be sold for less than the appraisement he shall not be responsible for the loss if the sale has been justly made.

Kerr, C. C. P., 1614.

6037. Idem—Debts uncollected without fault.

SEC. 180. No executor or administrator shall be accountable for any debts due the deceased that remain uncollected without his fault.

Kerr, C. C. P., 1615.

6038. Expenses and compensation—Provision in will—May renunciate.

SEC. 181. He shall be allowed all necessary expenses in the care and management as well as settlement of the estate, and for his services such fees as provided by law; but when the deceased shall, by his will, make some other provision for the compensation of his executor, this shall be deemed a full compensation for such services, unless the executor files a renunciation, in writing, of all claim for the compensation provided by the will.

Kerr, C. C. P., 1617.

Insurance paid by an administrator on the property of a decedent is properly allowed as one of the expenses and charges of the administration. In re Nicholson, 1 Nev. 518.

An executor may employ counsel to attend to litigation concerning the estate. But he has no right to employ counsel at the expense of the estate to keep the accounts and do that business for which he is compensated by his fees. Lucich v. Medin, 3 Nev. 93.

Under former act (Stats. 1861, 186) it was held: An executor or administrator has no authority to borrow money for the use of the

estate represented by him, nor will interest on money borrowed for the estate be allowed. Estate of Millenovich, 5 Nev. 189.

Act cited, Merriman v. Stern, 14 Nev. 418.

The act of 1861, 186, was repealed by this act. See Kennedy v. Adams, under sec. 282 of this act.

If necessary, the executor or administrator is authorized to employ counsel in a particular matter, but such employment is terminated by the disposal of that matter. The allowance for such services is made, not to the counsel, but to the administrator, as a part of the necessary expenses of administration. Torreyson v. Bowman, 26 Nev. 371, 372 (68 P. 472).

6039. Not to purchase claims—Charge amounts actually paid.

SEC. 182. No administrator or executor shall purchase any claim against the estate he represents; and if he shall pay any claim for less than its nominal value he shall not charge in his account more than he has actually paid.

Kerr, C. C. P., 1617.

This section was designed to protect the estates of deceased persons, and to prevent administrators and executors from taking advantage of their position to the injury of the estate. Furth v. Wyatt, 17 Nev. 180, 182 (30 P. 828).

If an administrator purchases a claim for less than is due, he could not enforce it for the full amount, but would be entitled to be remunerated for the amount he actually paid. Idem.

When the money was advanced by the administrator for the benefit of the estate and to avoid litigation, and resulted to the benefit of the estate without gain to the administrator, the administrator is entitled to protection, and can maintain an action against the estate for the amount advanced. Idem.

There is nothing to prohibit an executor from becoming interested in property of the estate of his testator after the estate has ceased to have any interest in it. Estate of Millenovich, 5 Nev. 162.

An executor, who came into possession of an estate in his fiduciary capacity, cannot buy up a title adverse to the estate and withhold the rents on the ground that the title he has bought is superior to that of his testator. Lucich v. Medin, 3 Nev. 94 (93 A. D. 376).

6040. Commissions—Additional allowance, when.

SEC. 183. When no compensation shall have been provided by the will, or the executor shall renounce all claims thereto, he shall be allowed commissions upon the whole amount of the personal estate accounted for by him, as follows: For the first thousand dollars, at the rate of six per cent; for all above that sum and not exceeding five thousand dollars, at the rate of four per cent; for all above five thousand dollars, at the rate of two per cent, and the same commissions shall be allowed to administrators. In all cases such additional allowance may be made by the court for services in regard to the real estate, when it shall be made to appear that the same is just and reasonable.

Kerr, C. C. P., 1618.

Attorneys' fees may or may not be properly charged among the expenses of administration according to the peculiar circumstances of the case.

The percentage allowed by law to administrators for collecting and disbursing money is one of the expenses of administration which should be allowed in preference even to funeral expenses. Estate of Nicholson, 1 Nev. 518, 520.

6041. First account rendered, what to contain.

SEC. 184. Within thirty days after the judge has acted upon the claims filed against the estate, the executor or administrator shall file his first account, under oath, of his administration. Such account shall be itemized, showing the amount of money received and expended by him; the amount of all claims filed against the estate; the names of all claimants; the claims, if any, rejected, and all other matters necessary to show the conditions of the affairs of the estate.

Kerr, C. C. P., 1622.

6042. Full account and report to be rendered, when.

SEC. 185. Every executor or administrator shall render and file under oath, a full account and report of his administration whenever he deems it advisable, or shall be directed to do so by the court on its own motion, or on

motion on behalf of any person interested, when it shall appear to the court to be proper.

Kerr, C. C. P., 1622.

Cited, McNabb v. Wixom, 7 Nev. 170, 171; Deegan v. Deegan, 22 Nev. 186, 197 (58 A. S. 742, 37 P. 360).

6043. Citation to appear on failure to render account—Attachment—Revocation of letters.

SEC. 186. If the executor or administrator fail to render and file his first account within the time specified in section 184, above, it shall be the duty of the court or judge, to order a citation to issue requiring him to file such account by a time to be stated in said citation as fixed by the court or judge, or appear and show cause why he should not be compelled to file said account. If he fail to file said account by the time stated, or show cause why he should not, the court by attachment or other proper process may compel him to file such an account or may revoke his letters in the discretion of the court, and like action may be had in reference to any subsequent account he may be ordered to file.

Kerr, C. C. P., 1623.

Waste, negligence and mismanagement afford as good grounds for the removal of an executor as actual fraud. Lucich v. Medin, 3 Nev. 101 (93 A. D. 376).

If an executor qualify as such and totally neglect his duties, he should be removed, although he has committed no positive act of wrong. Idem.

6044. Clerk to give notice of account by posting.

SEC. 187. When any account shall be filed by an executor or administrator with the clerk, he shall give notice thereof by posting in three public places of the county, and notifying all persons interested in the estate, at a time and place, not less than ten days after the posting, to be stated in the notice, to appear and show cause why the account should not be approved and allowed and confirmed. *As amended, Stats. 1899, 112.*

Kerr, C. C. P., 1633.

Cited, Estate of Millenovich, 5 Nev. 188.

6045. Account, who may contest—Hearing—Examination.

SEC. 188. Any person interested in an estate may contest any account or any item therein of the executor or administrator, by filing in writing with the clerk, at any time before the hearing on approving the account, his objection. At the time fixed in the notice, or at such further time as the court may order, the court shall proceed to hear the matter, when the executor or administrator, or any other person, may be sworn and examined by either party, and the matter shall be adjudged by the court as law and right demand.

Kerr, C. C. P., 1635.

6046. Vouchers to be produced—Lost, how proved—May be withdrawn—Examination of account.

SEC. 189. In rendering his account the executor or administrator shall produce vouchers for all payments he may have made, which vouchers shall be filed and remain in court, and he may be examined on oath touching such payments, and also touching any property and effects of the deceased and the disposition thereof. When any such voucher shall be required for other purposes it may be withdrawn on leaving a certified copy on file. If any vouchers be lost, or for other good reason cannot be produced on settlement of an account, the payment may be proved by the oath of one competent witness.

Kerr, C. C. P., 1631.

Cited, Estate of Millenovich, 5 Nev. 188.

6047. Minors, guardians for—Attorney appointed for, when—For absent heirs, devisees or legatees—Contests.

SEC. 190. If there be a minor interested in the estate who has no legally

appointed guardian, the court shall appoint some disinterested attorney to represent him, who, on behalf of the minor, may contest the account as any other person having an interest might contest it. The court may also appoint an attorney to represent absent heirs and devisees or legatees. All matters, including allowed claims not passed upon on the settlement of any former account, or on making a decree of sale, may be contested by heirs for cause shown.

Kerr, C. C. P., 1664.

Concerning guardians, see secs. 6190–6192.

6048. Settlement conclusive except as to persons under disability—Two-year limitation—Presumption of correctness.

SEC. 191. The settlement of an account and the allowance thereof by the court shall be conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability their rights to proceed against the executor or administrator, either individually or upon his bond, within two years after their respective disabilities shall cease, and in any action brought by any such person the settlement and allowance of the account shall be presumptive evidence of its correctness.

Kerr, C. C. P., 1637.

This section seems to provide that what is settled at one settlement of an executor's account shall not be open to resettlement at any future time. Lucich v. Medin, 3 Nev. 93, 105, 110; Estate of Millenovich, 5 Nev. 163, 187.

The rule that the court cannot reinquire into that which has once been settled, only applies to those items of account which were properly before the court for adjustment. The general result at which the probate court arrives is immaterial. It is only as to those items of account acted on that the doctrine of res adjudicata applies. Idem.

It has been held that a mistake in a former settlement may be corrected in a subsequent one. The only difficulty in applying this rule is to determine what shall be treated as a mistake and what shall stand as res adjudicata. Perhaps the best rule is to say everything may be corrected which shows on its face the mistake or error. This would allow the court before final settlement to correct its own errors of judgment, but not to go de novo into proof of items already passed on. Idem.

6049. Proof of notice—Hearing on account—Order must show—Conclusive.

SEC. 192. No account shall be allowed by the court until it be first proved that the notice hereinbefore required has been given, and the order or decree shall show that such proof was made to the satisfaction of the court and shall be conclusive evidence of the fact.

Kerr, C. C. P., 1638.

6050. Account may be required after authority ceases.

SEC. 193. Whenever the authority of an executor or administrator shall cease or shall be revoked for any reason, he may be cited by the court to account, at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been by any person interested in the estate, during the time he was executor or administrator.

Kerr, C. C. P., 1629.

6051. Failure to account, cause for revocation of letters—Absence or concealment.

SEC. 194. If the executor or administrator resides out of the county, or absconds or conceals himself so that the citation cannot be personally served, and shall neglect to file an account within twenty days after the time fixed for that purpose, his letters shall be revoked.

Kerr, C. C. P., 1630.

6052. Debts, order of payment.

SEC. 195. The debts of the estate shall be paid in the following order: First—Funeral expenses. Second—The expenses of the last sickness. Third—Debts having preference by the laws of the United States. Fourth—

Judgments rendered against the deceased in his lifetime, and mortgages in order of their date. Fifth—All other demands against the estate.

Kerr, C. C. P., 1643.
See secs. 5959, 6145.

In the settlement of executors' accounts for funeral expenses, all the circumstances of the case should be taken into consideration, and their accounts allowed, if they have acted with ordinary prudence and with a regard for decency and respectability, according to the condition and life of deceased. Estate of Millenovich, 5 Nev.-162.

If the charges allowed and paid by an executor for the expenses of the last sickness of his testator, though apparently extravagant, are no more than the usual charges for like services at the time, an order approving his account of them will not be disturbed on appeal. Idem.

6053. Preference to mortgages—Extends only to proceeds.

SEC. 196. The preference given in the preceding section to a mortgage shall only extend to the proceeds of the property mortgaged. If the proceeds of such property be insufficient to pay the mortgage the part remaining unsatisfied shall be classed with other demands against the estate.

Kerr, C. C. P., 1644.

6054. Estate insufficient to pay debts in full—Dividends—Preference.

SEC. 197. If the estate be insufficient to pay all the debts of any one class, each creditor of such class shall be paid a dividend in proportion to his claim, and no creditor of any one class shall receive any payment until all of those of the preceding class have been fully paid.

Kerr, C. C. P., 1645.

6055. Funeral, last sickness and family expenses, when payable.

SEC. 198. It shall be the duty of the executor or administrator, as soon as he has sufficient funds in his hands to pay the funeral expenses, the expenses of the last sickness, and the allowance made to the family of the deceased, and he may retain in his hands the necessary expenses of administration, but he shall not be obliged to pay any other debt or any legacy until the payment shall have been ordered by the court.

Kerr, C. C. P., 1646.

6056. Order for payment to creditors—Dividends—When account final—Discharge.

SEC. 199. Upon the settlement of any account of an executor or administrator as in this act provided, the court may make an order for the payment of debts as the condition of the estate will warrant. If there shall not be sufficient funds in the hands of the executor or administrator to pay the debts in full, the court shall specify in the decree the sum to be paid to each creditor. If the whole estate should be exhausted by such payments, such account as is then before the court shall be the final account, and the executor or administrator shall be entitled to his discharge on producing and filing the necessary vouchers and proofs showing that such payments have been made and that he has fully complied with the decree of the court.

Kerr, C. C. P., 1647.

6057. Claims contingent, disputed or not due—Payment into court—Consent.

SEC. 200. If there be any claim not due or any contingent or disputed claim against the estate, the amount thereof or such part of the same as the holder would be entitled to if the claim were due, or established or absolute, shall be paid into court, where it shall remain to be paid over to the party when he shall become entitled thereto, or, if he fail to establish the claim, to be paid over or distributed, as the circumstances of the estate require; *provided,* that if any creditor whose claim has been allowed, but is not yet due,

shall appear and consent to a deduction therefrom of the legal interest for the time the claim has yet to run, he shall be entitled to be paid accordingly.

Kerr, C. C. P., 1648.

6058. Liability of executor or administrator to debtors after settlement of account—Execution may issue.

SEC. 201. Whenever a decree shall be made by the court for the payment of creditors, the executor or administrator shall be personally liable to each creditor for the amount of his claim, or the dividend thereon, and execution may be issued upon such decree as upon a judgment in any other action, in favor of each creditor, and the same proceedings may be had under such execution as if it had been issued upon a judgment. The executor or administrator shall also be liable on his bond to each creditor.

Kerr, C. C. P., 1649.

6059. Payment of legacies and distribution.

SEC. 202. When the whole of the debt and liabilities of an estate have been paid, the court shall proceed to direct the payment of legacies and the distribution of the estate among those entitled, as hereinafter provided; *provided*, the estate is in condition to be closed; if not, then at such time as it thereafter may be in condition.

Kerr, C. C. P., 1651.

Taxes to be ordered paid prior to distribution, sec. 3629.

Where an executor files his final account, an order of the court directing him to pay over money in his hands to the county treasurer, to be placed to the credit of the heirs and devisees of the testator, and to be paid to such heirs and devisees on the order of the court after proof of identity, is void. Estate of McMahan, 19 Nev. 241 (8 P. 797).

See McNabb v. Wixom, under sec. 203 of this act.

6060. Final account, when to be rendered.

SEC. 203. Whenever all the property of an estate shall have been sold, or there shall be sufficient funds in his hands for the payment of all debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator shall render and file his final account and pray a settlement of his administration.

Kerr, C. C. P., 1652.

Whenever an administrator does what the law prohibits, or fails to exercise reasonable care and diligence in the endeavor to do what the law enjoins, he and his sureties are liable for the damages consequent upon such act or omission. McNabb v. Wixom, 7 Nev. 163, 172.

If an administrator deposits money of an estate in a bank, and allows it to remain after the time when if he had fulfilled his duty it would have been distributed and in the hands of those entitled to it; and the bank fails and the money is lost, he and his sureties are liable therefor. Idem.

Where money of an estate is lost by reason of such neglect of an administrator as he and his sureties are liable for, the sum lost constitutes the measure of damages. Idem.

In settling the final account of an administrator, an attorney's fee for procuring letters of administration cannot be allowed. Bowman v. Bowman, 27 Nev. 413 (76 P. 634).

6061. Neglect to render final account—Proceedings.

SEC. 204. If he neglects to render and file his final account the same proceedings may be had as prescribed in this act in regard to the first account to be filed by him, and all the provisions relative to said first account, and the notice and settlement thereof, shall apply to his account for final settlement.

Kerr, C. C. P., 1653.

See secs. 6041–6051.

6062. Distribution, when made.

SEC. 205. When the accounts of an executor or administrator have been settled and a decree for the distribution of the estate made by the court, the executor or administrator shall without any unnecessary delay distribute the estate remaining in his hands as by the decree directed.

Kerr, C. C. P., 1665.

6063. Accounts confirmed, when.

SEC. 206. At the time any account comes before the court for allowance, if there are no exceptions filed by any person interested in the estate, and the account is made to appear to the court to be correct and according to law, the court may allow and confirm the account.

6064. Heirs, devisees or legatees may receive their portion of estate on giving bond, when.

SEC. 207. At any time after the lapse of three months after the issuing of letters testamentary or of administration, any heir, devisee or legatee may present his petition to the court, praying that the legacy or share of the estate to which he or she is entitled may be given to him or her upon giving bond, with approved security, for the payment of his or her proportion of the debts of the estate.

District courts, though now vested with jurisdiction of probate matters, are governed by the rules of practice that formerly applied to probate courts and the rules prescribed by the probate act, and must be governed by provisions of said act as to the character and extent of the judgment or decree. Estate of Foley, 24 Nev. 197 (31 P. 834).

Sections 252 and 260 (Stats. 1861, 186) provide when, on whose application, and to whom distribution may be made in proceedings for partial and final distribution, respectively. The courts are authorized to act in pursuance of these provisions, and not otherwise in the distribution of estates. Idem.

Under secs. 252, 253 and 255 (Stats. 1861, 186) it was held that, in a proceeding for partial distribution on petition of decedent's widow, the court cannot distribute any part of the property of the estate to parties having title thereto as grantees of the petitioner under an agreement with her, and not as heirs, legatees or devisees of the decedent. Idem.

In proceedings for partial distribution under the above sections, none other than an heir, devisee or legatee, having an interest as such in the property for which distribution is asked, is authorized to petition for such distribution, and the court is not authorized to make such distribution to any claimant other than one entitled to the property as an heir, devisee or legatee. Idem.

In such proceedings the question is not properly before the court to determine whether all the property or only the separate property of the decedent was embraced in an agreement between the widow and other heirs for a distribution of the estate. Idem.

Where, under the stipulation of the parties to this proceeding, the petitions present a case for the partial distribution of separate property to the appellant, and the respondents as heirs with respect to that property, and a case for partial distribution of community property to the appellant as the widow of the deceased, and to the respondents as grantees of the appellant, the court has no authority to distribute any portion of the community property to the respondents. Idem.

When any person appears in a proceeding for partial distribution of the estate of a decedent, claiming the property sought to be distributed as the grantee of an heir, devisee or legatee, and objects to such distribution being made to his grantor, the distribution should be denied or suspended until the rights of the contestant are determined on final distribution or in some other appropriate proceeding. Estate of Foley, 24 Nev. 291 (52 P. 1134).

6065. Idem—Notice of petition.

SEC. 208. Notice of the application shall be given to the executor or administrator personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of an account of an executor or administrator, or [as] the court may direct.

Kerr, C. C. P., 1659.

6066. Idem—Who may resist.

SEC. 209. The executor or administrator, or any person interested in the estate, may appear and resist the application, or any other heir, devisee or legatee may make a similar application for himself or herself.

Kerr, C. C. P., 1660.

See Estate of Foley, under sec. 207 of this act.

6067. Idem—Decree of distribution—Bond.

SEC. 210. If, on the hearing, it appears that the estate is but little indebted, and that the share or shares of the party or parties petitioning may be allowed,

without injury to the creditors of the estate, the court shall make a decree in conformity to the prayer of the applicant or applicants; *provided*, that each one of them shall first execute and deliver to the executor or administrator a bond in such sum as shall be designated by the court or judge, and with sureties to be approved by the judge. Such bond shall be made payable to the executor or administrator and conditioned for the payment by the heir, devisee or legatee whenever required of his or her proportion of the debts of the estate.

Kerr, C. C. P., 1661.
See sec. 3629.
See Estate of Foley, under sec. 207 of this act.

6068. Idem—Decree, what may direct.

SEC. 211. Such decree may direct the executor or administrator to deliver to the petitioner or petitioners the whole portion of the estate to which he, she or they may be entitled, or a part only thereof.

Kerr, C. C. P., 1661.

6069. Idem—Partition.

SEC. 212. If in the execution of such decree any partition be necessary between two or more of the parties, it shall be made in the manner hereinafter prescribed.

6070. Idem—Cost of proceedings, how paid.

SEC. 213. The costs of such proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally amongst them.

Kerr, C. C. P., 1663.

6071. Idem—Contribution to pay debts—Citation—Order—Action on bond.

SEC. 214. Whenever any bond has been executed and delivered as above prescribed, and the executor or administrator shall ascertain that it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, he shall petition the court for an order requiring the payment, and cause a citation to be issued and served upon the party bound, requiring him or her, at a time and place, not more than ten days after the date of the citation, to be stated therein, to appear and show cause why the order shall not be made. At the hearing the court, if satisfied of the necessity for such payment to be made, shall make an order accordingly, designating the amount and giving a time in which it shall be paid. If the money be not paid within the time allowed, an action may be maintained by the executor or administrator on the bond.

Kerr, C. C. P., 1662.

6072. Petition for distribution may accompany final account—When otherwise—Supplementary account—Decree.

SEC. 215. When an executor or administrator files his final account, with a petition praying for the allowance and confirmation thereof, he may also include in such petition a prayer for the distribution of the estate, and upon the settlement and allowance of the final account the court may also decree a distribution of the residue of the estate, if any, among the persons who are by law entitled. If a final account be settled and allowed without a decree of distribution the executor or administrator, or any heir, devisee or legatee, or assignee or grantee of any heir, devisee or grantee, at any time thereafter, may petition the court for a decree distributing the estate. A statement of the receipts and disbursements of the executor or administrator since the rendition of his final account shall be reported and filed before or at the time of making such distribution, unless distribution of real estate only be made, and a settlement thereof, together with an estimate of the expense of closing the estate, shall be made by the court, and shall be included in the decree,

or the court or judge may order notice of the settlement of such supplementary account.

Kerr, C. C. P., 1665.
Cited, McNabb v. Wixom, 7 Nev. 171.
See Estate of Foley, under sec. 207 of this act.

6073. Form of decree.

SEC. 216. In the decree the court shall name the persons and the proportion or parts to which each shall be entitled, and such person shall have the right to demand and recover his or her respective share from the executor or administrator or any other person having the same in possession.

Kerr, C. C. P., 1666.
See sec. 3629, payment of taxes.

Where defendant, before she was appointed executrix of an estate, promised, for the purposes of an amicable settlement of all questions as to the probate and validity of a certain will, that she would, when appointed executrix, make certain payments to the heirs and distributees of the decedent, she is bound individually by the agreement, when, as a result of the contract, she becomes executrix of the estate. Painter v. Kaiser, 27 Nev. 421 (103 A. S. 772, 65 L. R. A. 672, 76 P. 747); Esden v. Kaiser, 27 Nev. 432 (76 P. 1134); Kent v. Kaiser, 27 Nev. 435 (76 P. 1134).

Where defendant entered into a contract whereby she promised, on becoming executrix of an estate, to make certain payments, one for whose benefit the contract was made and partly executed could maintain an action thereon against the defendant, though she was not one of the parties that signed the contract. Idem.

6074. Petition for distribution, notice of—Service—Publication—Further notice.

SEC. 217. When a petition for distribution shall be filed, notice of the hearing of said petition shall be personally served, at the time of the filing of the final account or subsequently thereto, on all personally interested in the estate at least five days before the time specified in the notice, or shall be given by publication for at least three successive weeks in such newspaper as the court or judge shall order, and the court may order such further notice as it may deem proper. *As amended, Stats. 1899, 112.*

Kerr, C. C. P., 1668.

6075. Estates in common—Partition.

SEC. 218. When the estate, real or personal, assigned to two or more heirs, devisees or legatees shall be in common and undivided and the respective shares cannot be separated and distinguished, or when property of the estate shall be held in common and undivided with other parties, partition thereof may be made as hereinafter provided.

Kerr, C. C. P., 1675.

6076. Idem—Petition, who may file—Citation—Hearing—Decree.

SEC. 219. To secure such partition any person interested may file a petition stating the necessary facts, particularly describing the property to be partitioned and the party or parties interested in such property. Upon filing such petition a citation shall issue to all persons interested who shall reside in this state, or their guardians, and to agents, attorneys or guardians, if there be any in this state, or such as reside out of this state, to appear and show cause why a decree of partition should not be made as prayed for. The citation shall specify the estate and the party petitioning for partition, also the time and place for hearing the petition, not more than twenty days from its date, and must be served five days before the hearing at the time specified in the citation or at such further time as the court may continue the hearing. Upon proof, to the satisfaction of the court, that the citation has been properly served as above required, the court shall proceed to hear the petition and the allegation and proofs of the respective parties, and decree accordingly.

Kerr, C. C. P., 1676.

6077. Idem—Petition may be filed, when—Partition, when ordered.

SEC. 220. A petition for partition may be filed at any time before the decree of distribution, and attorneys, guardians and agents appointed and the citation issued, and the petition heard and determined as above provided, in which case the commissioners hereinafter provided for to make partition shall not be appointed until the decree has been made assigning the estate, when the court, having assigned the estate, may appoint commissioners to partition it as hereinafter provided. But when application is made solely to have partition between the estate administered upon and any other parties, such application may be heard and determined, and partition ordered at any time the court may direct.

Kerr, C. C. P., 1675.

6078. Idem—Commissioners appointed—Number of—Qualifications and proceedings—Surveyor.

SEC. 221. When the property to be partitioned is entirely personal property the court or judge shall appoint three competent, disinterested persons as commissioners for that purpose, who shall be duly sworn by any officer authorized to administer oaths, to faithfully and impartially discharge their duties. A certified copy of the order appointing them, attached to a certified copy of the decree assigning and distributing the estate, shall be given to them as their warrant, and their oath must be endorsed thereon. When the property to be divided is real estate, or partly real and partly personal, one of the three commissioners shall be a practical surveyor. Upon consent of the parties, and when the court shall deem it proper and just, the court may appoint one commissioner only, who shall have the same authority and be governed by the same rules as if three were appointed.

Kerr, C. C. P., 1675.

6079. Idem—When real estate is in different counties.

SEC. 222. If the real estate to be partitioned shall be in different counties, the court or judge, if deemed proper, may appoint commissioners for each county, and in such case the estate in each county shall be divided separately, as if there were no other estate to be partitioned; but the commissioners first appointed shall, unless otherwise directed by the court, make division of the real estate, wherever situated in this state.

Kerr, C. C. P., 1677.

6080. Idem—When interest parted with.

SEC. 223. Partition may be made as provided herein, although some of the original heirs, devisees or legatees may have assigned or conveyed their shares to other persons, and such shares shall be partitioned to the person holding the same, in the same manner as they would have been to the heirs, devisees or legatees, had they not transferred their shares.

Kerr, C. C. P., 1678.

6081. Idem—Shares, how set out—Description—In common, when.

SEC. 224. The several shares in the real and personal estate shall be set out to each individual in proportion to his or her right, and the real estate by metes and bounds, or such description that the same can be easily distinguished. If two or more of the parties request to have their shares set out so as to be held in common and undivided, such shares may be so partitioned.

Kerr, C. C. P., 1679.

6082. When partition cannot be made—May be assigned to one—Compensation to others, how determined—Minors.

SEC. 225. When any such real estate cannot be divided without prejudice or inconvenience to the owners, the court may assign the whole to one or

more of the parties entitled to shares therein, who will accept and pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or, in case of the minority of such party or parties, to the satisfaction of the guardian of such minor or minors, and the true value of the estate shall be ascertained and reported by the commissioners or appraisers appointed specially for that purpose.

Kerr, C. C. P., 1680.

6083. Idem—Value of property greater than either party's share—Commissioners to set off—Compensation to others.

SEC. 226. When any tract of land or tenement shall be of greater value than either party's share in the estate to be divided and cannot be divided without injury to the same, it may be set off by the commissioners to any one of the parties, who will accept it and pay, or secure to be paid, to one or more of the others interested, such sum or sums as the commissioners shall award to make the partition equal, and the commissioners shall make their award accordingly; but such partition shall not be established by the court until the sums so awarded shall be paid to the parties entitled to the same or secured to their satisfaction.

Kerr, C. C. P., 1681.

6084. Idem—When cannot be fairly divided—Estate sold—Sale conducted, how—Proceeds divided.

SEC. 227. When it cannot otherwise be fairly divided, the whole or any part of the estate, real or personal, may be recommended by the commissioners to be sold, and if the report be confirmed the court may order a sale by the executor or administrator or by a commissioner appointed for that purpose, and distribute the proceeds. The sale shall be conducted, reported upon and confirmed in the same manner and under the same rules as in ordinary cases of sales of land by an administrator under this act.

Kerr, C. C. P., 1682.

6085. Idem—Estates in common with other persons, how partitioned—Suit authorized.

SEC. 228. When partition of real estate among heirs, devisees, or legatees shall be required, and such real estate shall be in common and undivided with the real estate of any other person, the commissioner shall first divide and sever the estate of the deceased from the estate in which it lies in common, and such division so made and established by the court shall be binding upon all the persons interested. The court may authorize the executor or administrator to bring suit for such partition when deemed necessary.

Kerr, C. C. P., 1675.
Partition, civil practice act, secs. 5527–5583.

6086. Idem—Shares of equal cash value—Quality and quantity considered.

SEC. 229. In making partition the commissioners shall always have regard to quantity and quality, and may set off quantity against quality, or quality against quantity, so that when the partition is made all the shares partitioned shall be of equal cash value, as near as possible.

6087. Idem—Guardians and attorney appointed—Minors or absent heirs—Commissioners to give notice—May take testimony.

SEC. 230. Before any partition shall be made as provided herein guardians shall be appointed for all minor and insane persons interested in the estate to be divided, and an attorney shall be appointed for all nonresident or absent heirs or other persons interested. The commissioners shall notify all persons interested in the partition, their guardians, agents or attorneys, of the time when they will proceed to make partition, which time shall be as

reasonable after their appointment as circumstances will admit or the court in the order of appointment may fix the time. The commissioners may take testimony, for which purpose any one of them may administer an oath, and they may take all necessary steps to enable them to form a correct judgment upon the matters before them.

Kerr, C. C. P., 1664.

6088. Idem—Report of commissioners, exceptions to—Hearing—Court may recommit partition—New commissioners—Confirmation and conveyance.

SEC. 231. The commissioners, when they shall have completed their work, within a reasonable time [shall] make a report of their proceedings and of the partition made by them, and file the same with the clerk of the court. Within fifteen days after the report is filed any person interested may file exceptions to the report, particularly specifying the grounds of objection. A copy of such objection shall be served upon the commissioners and all parties interested in the partition, their guardians, agents or attorneys in the county, before or at the time they are filed, with a notice to such persons that the objecting party will, at a certain time to be mentioned, not later than twenty days after the filing of said report, move the court to set aside the report, and for a new partition. At the time specified, or at such other time as the court may sit, the court shall proceed to hear the report and exceptions, and may hear proof by either party, and for sufficient reasons the court may set aside the report, and recommit the partition to the same commissioners, or appoint others, or may confirm the report. If no exceptions shall be filed to the report within the time above specified, the court, on the expiration of said fifteen days, or at any time thereafter, if the report appears [to] be just and correct and all the proceedings regular, shall confirm the report, and when such report shall be finally confirmed the decree of confirmation and the report shall be recorded by the clerk, and the court shall order proper conveyance to be made by the respective parties to one another, or may, if for any reason necessary appoint a commissioner to make such conveyance or conveyances which, when acknowledged or recorded, shall effectually pass the title.

Kerr, C. C. P., 1684.

6089. Advancements, questions of, heard by court—Right of appeal.

SEC. 232. All questions as to advancement made or alleged to have been made by the deceased to any heirs may be heard and determined by the court, and shall be specified in the decree distributing the estate, and in the warrant to the commissioners, and the final decree of the court shall be binding on all parties interested in the estate with right, however, of any party to appeal from a final decree of the court to the supreme court as in other action.

Kerr, C. C. P., 1686.

Advancement, see secs. 6120–6124.

6090. Court may appoint agent for absentees.

SEC. 233. When any estate shall be distributed by the court or partitioned by commissioners as in this act provided to any person residing out of this state, and having no agent therein, and it shall be necessary that some person should be authorized to take charge and possession of the same for the benefit of such absent person, the court may appoint an agent for that purpose and authorize him to take charge of such estate.

Kerr, C. C. P., 1691.

6091. Idem—Bond of agent.

SEC. 234. Such agent shall give a bond to the district judge in such sum as the judge shall fix, which bond shall be approved by the judge and con-

ditioned for the faithful management of, and accounting for the estate, before such agent shall be authorized to receive the same, and the court may allow a reasonable sum out of the profits of the estate for services and expenses of such agent.

Kerr, C. C. P., 1692.

Regarding setting apart homestead on death of husband, see sec. 2165.

6092. Idem—Unclaimed estates—Sale—Proceeds paid to state treasurer—Receipt for.

SEC. 235. When the estate shall remain unclaimed in the hands of the agent for a year, it shall be sold under an order of the court, and the proceeds, deducting the expenses of the sale to be allowed by the court, shall be paid into the state treasury, for which the treasurer shall receipt in duplicate to the agent, one of which the agent shall file in the office of the state comptroller and the other in the estate matter in the district court.

Kerr, C. C. P., 1693.

6093. Idem—Liability of agent.

SEC. 236. The agent shall be liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale as required in the preceding section, and may be sued thereon by the state or any person interested.

Kerr, C. C. P., 1695.

6094. Idem—Amount recovered by claimant—Proceedings.

SEC. 237. When any person shall appear and claim the money paid into the treasury, the district court having ordered the sale, being first satisfied of his right, shall give him a certificate attested by the clerk, under the seal of the court, and upon the presentation of the certificate to the state comptroller shall draw his warrant on the treasurer for the amount.

Kerr, C. C. P., 1696.

6095. Decree of discharge of executor or administrator.

SEC. 238. When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up on the order of court all the property of the estate to the parties entitled, and has performed all acts lawfully required of him, the court shall make a decree discharging him and his sureties from all liability thereafter to be incurred.

Kerr, C. C. P., 1697.

6096. Subsequent letters may issue for cause.

SEC. 239. The final settlement of an estate shall not prevent a subsequent issuance of letters testamentary or of administration should other property of the estate be discovered, or should it become necessary or proper from any cause that letters should again be issued.

Kerr, C. C. P., 1698.

6097. Powers suspended by order of court pending investigation for cause.

SEC. 240. Whenever a district judge has reason to believe from his own knowledge or from credible information that any executor or administrator has wasted, converted to his own use, or mismanaged, or is about to waste or convert to his own use, the property of the estate committed to his charge, or has committed or is about to commit any wrong or fraud upon the estate, or has become incompetent to act, or has permanently removed from the state, or has wrongfully neglected the estate, or has unreasonably delayed the performance of necessary acts in any particular as such executor or administrator, it shall be his duty, by an order entered upon the minutes of the court, to sus-

pend the powers of such executor or administrator until the matter can be investigated.

Kerr, C. C. P., 1436.
Cited, State v. Borowsky, 11 Nev. 126.

6098. Idem—Special administrator may be appointed—Bond—Account.

SEC. 241. During the suspension of the powers of an executor or an administrator, as provided in the preceding section, the district court, or judge, if the condition of the estate requires it, may appoint a special administrator to take charge of the effects of the estate, who shall give bond and account as other special administrators are required to do.

6099. Idem—Proceedings on suspension—Revocation—New letters.

SEC. 242. When such suspension has been made the clerk shall issue a citation, reciting the order of suspension, to the executor or administrator, to appear before the court at a time therein to be stated, as fixed by the court or judge, to show cause why his letters should not be revoked, said citation to be served by the sheriff, or other person, as provided in the civil practice act for service of process. If he fail to appear in obedience to the citation, or appearing the court shall be satisfied that there exists good grounds for his removal, his letters shall be revoked, and letters of administration granted anew, as the case may require.

Kerr, C. C. P., 1437.

6100. Idem—Who may appear and participate in hearing.

SEC. 243. Any person interested may appear at the hearing and file allegations in writing, showing that the executor or administrator should be removed. Such allegations shall be heard and determined by the court.

Kerr, C. C. P., 1438.

6101. Executor absconding, concealed or out of state—Citation, how served.

SEC. 244. If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the state, the citation may be served by leaving a copy at his last known place of abode and upon his attorney of record, when the court shall have jurisdiction to proceed as if the citation had been personally served.

Kerr, C. C. P., 1439.

6102. Process to compel attendance—Required to answer—Commitment—Revocation of letters.

SEC. 245. In such proceedings for the removal of an executor or administrator the court may compel his attendance by attachment or other proper process and may require him to answer questions, on oath, touching his administration, and upon his refusal so to do may commit him to jail until he obey, or may revoke his letters, or both.

Kerr, C. C. P., 1440.

6103. General provisions—Minutes of proceedings—Probate register—Publications, how made—Times may be shortened.

SEC. 246. The clerk shall enter a minute of all proceedings in matters of estates, as in other actions, and also in the probate register. When publication is ordered such publication shall be made daily, or otherwise, as often as during the prescribed period as the paper is regularly issued, unless otherwise provided in this act. The court or judge, however, may prescribe a less number of publications during the period for publication, and the court or judge may, for good cause shown, extend or shorten any of the times prescribed in this act.

Kerr, C. C. P., 1704, 1705.
Clerk may give notices without order, sec. 6143.

The neglect of the clerk to enter the order could in no way affect the rights of executor nor render the order less effective as a protection to him. Estate of Millenovich, 5 Nev. 163, 186.

Where an order of the probate court necessary as an authorization to justify the acts of an executor is lost, secondary evidence of its character is allowed. Idem.

6104. Personal notice, how given—Citation.

SEC. 247. Whenever personal notice is required by this act to be given to any party in the matter of an estate, and no other mode of giving notice is prescribed, it shall be given by citation, which shall be issued by the clerk under the seal of the court, and directed to the sheriff of the proper county, commanding such person to appear before the court or judge, as the case may be, at a time and place to be named in the citation; also the nature or character of the proceeding shall be briefly stated in the body thereof.

Kerr, C. C. P., 1710.

6105. Citation, how served.

SEC. 248. The officer to whom a citation is directed, unless otherwise provided herein, or the order of the court or judge, shall serve the same by delivering a copy to the person therein named, or to each one of them, if there be more than one, and shall return the original to the court, according to its direction, indorsing thereon the time and manner of service.

Kerr, C. C. P., 1709.

6106. Proofs of service of papers—Publication—Affidavit—Evidence.

SEC. 249. All proofs of publication or other mode or modes of giving notice or serving papers may be made by the affidavit of any person competent to be a witness, which affidavit shall be filed, and shall constitute prima facie evidence of such publication or service, as the case may be.

Kerr, C. C. P., 1711.

6107. Citation, time of service.

SEC. 250. When no other time is specially prescribed, citation shall be served at least two days before the return day.

Kerr, C. C. P., 1711.

6108. Testimony in other places, how taken.

SEC. 251. For the purpose of taking the testimony of a witness or witnesses in other counties of this state, or in other states or territories, or foreign countries, a commission may be issued as in other cases, and, when issued ex parte no cross-interrogatories shall be necessary.

Kerr, C. C. P., 1713.

6109. Issues of fact, how tried—Costs determined by court—Execution.

SEC. 252. All issues of fact in matters of an estate shall be disposed of in the same manner as is by law provided upon the trial of issues of fact in a common-law action. All questions of costs may be determined by the court, and execution may issue therefor in accordance with the order of the court.

Kerr, C. C. P., 1716.

Cited, Estate of McMahan, 19 Nev. 241 (8 P. 797); Abel v. Hitt, 30 Nev. 105, 106 (93 P. 227); State ex rel. Cook v. Langan, 32 Nev. 176 (105 P. 569).

6110. Attorney for minors.

SEC. 253. When, upon any proceeding in an estate, an attorney has been appointed for minors or others interested in the estate, such attorney, until another may be appointed, shall represent the party or parties for whom he has been appointed in all subsequent proceedings.

Kerr, C. C. P., 1718.

6111. Decree setting aside homestead—Copy recorded.

SEC. 254. When a decree is rendered setting apart a homestead, a certified

copy of such decree shall be recorded in the county recorder's office where the property is.

Kerr, C. C. P., 1719.

Cited, State ex rel. N. T. G. & T. Co. v. Grimes, 29 Nev. 59.

6112. Appeal—What decisions and orders may be appealed from to the supreme court—How governed.

SEC. 255. Any person interested in, affected by, and aggrieved at the decision and decree of the district court appointing an executor or administrator, revoking letters, allowing a final account, or disallowing it, decreeing a distribution or partition, order or decree, confirming or setting aside a report of commissioners, admitting or refusing a will for probate, and any other decision wherein the amount in controversy equals or exceeds, exclusive of costs, one thousand dollars, may appeal to the supreme court of the state, to be governed in all respects as an appeal from a final decision and judgment in action at law.

Kerr, C. C. P., 1714.

See sec. 6089.

Cited, Lambert v. Moore, 1 Nev. 232; In re Winkleman, 9 Nev. 306; Quinn v. Quinn, 27 Nev. 156, 174 (74 P. 5).

See Lonkey v. Powning, under sec. 109 of this act.

A decree in a probate proceeding, reading, "It is ordered, adjudged and decreed that the said final account of said administrator be, and the same is, settled, allowed, and affirmed," is a "decision and decree allowing a final account" of an administrator, within this section, which authorizes an appeal from such a decision or decree. Bowman v. Bowman, 27 Nev. 413, 417–419 (76 P. 634).

A notice of appeal stating that appellants appealed from an "order" allowing, settling and affirming a final account of administrator, also reciting the date of the entry of the document appealed from, and the amount of the attorney's fee fixed by the order, which was objected to, was sufficiently descriptive of the document and matter appealed from to meet the requirements of this section. Idem.

Cited, State ex rel. Cook v. Langan, 32 Nev. 176 (105 P. 569).

An appeal will lie from an order refusing to revoke letters. In re Bailey's Estate, 31 Nev. 377 (103 P. 232).

6113. Power of appellate court—Costs, execution may issue for.

SEC. 256. Upon an appeal the appellate court may in its discretion reverse, affirm, or modify the judgment, order or decree appealed from, and as to any or all of the parties, and order a remittitur as in other cases, and may order costs to be paid by any party to the proceedings, or out of the estate as justice may require. Execution for costs may issue out of the district court.

Kerr, C. C. P., 1714.

6114. Undertaking on appeal not required by executor or administrator.

SEC. 257. An appeal by an executor or administrator as herein provided, who has given an official bond, shall be complete and effectual without an undertaking on appeal.

Kerr, C. C. P., 1714.

6115. Reversal of order appointing executor or administrator—Prior acts valid—Successor—Certain proof not again required.

SEC. 258. When an order or decree appointing an executor or administrator shall be reversed on appeal, all lawful acts in administration upon the estate performed by such executor or administrator, if he shall have qualified, shall be as valid as if such order or decree had been affirmed. When an executor or administrator resigns or is removed, a successor may be appointed if a necessity therefor exists, without again proving the death and residence of the deceased.

Kerr, C. C. P., 1728.

6116. Estate of intestate—Descent and distribution—When to escheat to state for support of common schools.

SEC. 259. When any person having title to any estate, not otherwise

limited by marriage contracts, shall die intestate as to such estate, it shall descend and be distributed subject to the payment of his or her debts in the following manner:

First—If there be a surviving husband or wife, and only one child, or the lawful issue of one child, one-half to the surviving husband or wife and one-half to such child or issue of such child. If there be a surviving husband or wife and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife and the remainder in equal shares to his or her children, and to the lawful issue of any deceased child by right of representation. If there be no child of the intestate living at his or her death, the remainder shall go to all of his or her lineal descendants, and if all of the said descendants are in the same degree of kindred to the intestate, they shall share equally, otherwise they shall take according to the right of representation.

Second—If he or she shall leave no issue, the estate shall go in equal shares to the surviving husband or wife and to the intestate's father, and if he or she shall leave no father, it shall go in equal shares to the surviving husband or wife, and to the intestate's mother. If he or she shall leave no issue nor father nor mother, the whole community property of the intestate shall go to the surviving husband or wife, and one-half of the separate property of the intestate shall go to the surviving husband or wife, and the other half thereof shall go in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister by right of representation. If he or she shall leave no issue, or husband, or wife, the estate shall go to his or her father, if living, if not to his or her mother, if living.

Third—If there be no issue, nor husband, nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister by right of representation.

Fourth—If the intestate shall leave no issue, nor husband, nor wife, nor father, nor mother, and no brother or sister living at his or her death, the estate shall go to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestors shall be preferred to those who claim through ancestors more remote; *provided, however,* if any person shall die leaving several children, or leaving one child and issue of one or more children and any such surviving child shall die under age and not having been married, all the estate that came to such deceased child by inheritance from such deceased parent shall descend in equal shares to the other children of the same parent, and to the issue of any such other children who may have died, by right of representation.

Fifth—If at the death of such child, who shall die under age and not having been married, all the other children of his said parent being also dead, and any of them shall have left issue, the estate that came to such child by inheritance from his or her said parent shall descend to all the issue of the other children of the same parent, and if all the said issue are in the same degree of kindred to said child they shall share the said estate equally; otherwise they shall take according to the right of representation.

Sixth—If the intestate shall leave no husband nor wife nor kindred, the estate shall escheat to the state for the support of the common schools. *As amended, Stats. 1899, 113; 1901, 44; 1903, 218.*

See secs. 2164, 2165, 6125, 6140–6142.

Right of representation defined, sec. 6129.

C. died intestate without issue, leaving a widow and brothers and sisters, but no father or mother. Upon the sale of real property belonging to the estate, the court distributed the proceeds one-half to the widow and one-half to the brothers and sisters. Such distribution was held correct under the rules of the common law. Clark v. Clark, 17 Nev. 124 (28 P. 238).

It was held under this section, that one-half of the property shall descend and be distributed, subject to the payment of the

Amended 1917- Page 37

debts, to the surviving husband or wife and the other half to the intestate's brothers and sisters and to the children of any deceased brother or sister by right of representation, provided, if the intestate shall also have a mother, she shall share equally with the brothers and sisters. Estate of Foley, 24 Nev. 197, 214 (51 P. 834).

6117. Illegitimate child, inheritance of—Acknowledgment by father—Issue of null or dissolved marriage deemed legitimate.

SEC. 260. Every illegitimate child shall be considered as an heir of the person who shall acknowledge himself to be the father of such child by signing in writing a declaration to that effect in the presence of one credible witness, who shall sign the declaration also as a witness, and shall in all cases be considered as heir of the mother, and shall inherit in whole or in part, as the case may be, in the same manner as if born in lawful wedlock. The issue of all marriages deemed null in law or dissolved by divorce shall be legitimate.

See sec. 5833.

6118. Heirs of illegitimate child.

SEC. 261. If any illegitimate child shall die intestate without lawful issue and shall not have been acknowledged as above provided, his estate shall descend to his mother, or, in case of her decease, to her heirs at law.

6119. Degrees of kindred computed—Rules of civil law—Kindred of half blood—Inheritance.

SEC. 262. The degrees of kindred shall be computed according to the rules of the civil law, and kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise or gift from some one of his or her ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from the inheritance.

6120. Advancement considered a part of estate for purposes of distribution.

SEC. 263. Any estate, real or personal, that may have been given by the deceased in his or her lifetime as an advancement to any child or other lineal descendant shall be considered as part of the estate of the intestate, so far as regards the distribution and division thereof among his or her issue, and shall be taken by such child or other lineal descendant towards his or her share of the estate of the deceased.

Kerr, C. C. P., 1686.
See sec. 6089.

6121. When advancement exceeds share—When not.

SEC. 264. If the amount of such advancement shall exceed the share of the heir so advanced, such heir shall be excluded from any further portion in the distribution and division of the estate, but he or she shall not be required to refund any part of such advancement; and if the amount so received shall be less than his or her share, he or she shall be entitled to as much more as will give him or her his or her full share of the estate of the deceased.

Kerr, C. C. P., 1686.

6122. Gifts and grants not deemed advancement, when.

SEC. 265. No gift or grant shall be deemed to have been made as an advancement unless so expressed in the gift or grant, or charged in writing by the deceased as an advancement, or acknowledged in writing by the child or other descendant to be such.

Kerr, C. C. P., 1686.
See sec. 6089.

6123. Value of advancement, how determined.

SEC. 266. If the value of the advancement shall be expressed in the con-

veyance, or in the charge thereof made by the deceased, or in the acknowledgment of the party receiving it, it shall be considered of that value in the distribution and division of the estate; otherwise it shall be estimated according to its value when given as nearly as the same can be ascertained.

Kerr, C. C. P., 1686.

6124. In case of prior death of recipient, how advancement affects heirs.

SEC. 267. If any child, or other lineal descendant so advanced, shall die before the person making the advancement leaving issue, the advancement shall be taken into consideration in the distribution and division of the estate, and the amount thereof shall be allowed accordingly by the representatives of the heir so advanced in the like manner as if the advancement had been made directly to them.

Kerr, C. C. P., 1686.

6125. Husband and wife—Separate property only affected.

SEC. 268. The provisions of this act, as to the inheritance of the husband and wife from each other, apply only to the separate property of the intestate.

See secs. 2164, 2165.

6126. Act to be liberally construed—Proceedings of record—Attorneys of record, powers of—Compensation.

SEC. 269. This act shall be liberally construed, to the end that justice may be done all parties, and as speedy settlement of estates at the least expense secured; and all proceedings in matters of estate shall be proceedings of record as other actions and proceedings; and all attorneys for estates or executors or administrators or appointed in the proceedings shall be attorneys of record with like powers and responsibilities as attorneys in other actions and proceedings, and shall be entitled to receive a reasonable compensation, to be paid out of the estate they respectively represent for services rendered, to be allowed by the court.

Kerr, C. C. P., 1710.

Authority of attorneys, see sec. 507.

Cited, Kirman v. Powning, 25 Nev. 379 (60 P. 834).

An ordinary action will not lie to bind an estate for services rendered by an attorney therefor. Torreyson v. Bowman, 26 Nev. 369, 371 (68 P. 472).

6127. Summary administration may be ordered, when—Value of estate not in excess of $2000—Procedure—Costs limited.

SEC. 270. When it shall be made to appear to the court or judge, by affidavit or otherwise, that the value of an estate does not exceed two thousand dollars, the court or judge may, if deemed advisable, make an order for a summary administration of such an estate, dispensing with all regular proceedings and notices, except the notice of appointment of executor or administrator, which shall always be given by publication for four weeks, provided the cost does not exceed five dollars. Creditors of such an estate must file their claims, due or to become due, with the clerk, within forty days after the first publication of said notice, and within five days thereafter the executor or administrator must act on the claims filed, and present them in three days thereafter to the judge for his action. Any claim which shall not be filed within said forty days shall be barred forever. The judge or court may, however, if deemed proper, order the notice herein provided for to be given by posting, instead of by publication. The court or judge must be satisfied that proper notice has been given before decreeing distribution of the estate and discharging the executor or administrator. Every claim which shall have been filed as above provided, allowed by the executor or administrator, and approved by the judge, shall then, and not till then, be ranked as an acknowledged debt of the estate, to be paid in due course of administration.

The administration of the estate may be closed and distribution made at any time after the expiration of the time for the judge to act on the claims, when it shall appear to the court that all the debts of the estate, expenses and charges of administration and allowance to the family, if any, have been paid, and the estate in condition to be finally settled. The total of fees and costs of the clerk in a summary administration shall not exceed fifteen dollars. The provisions of this section shall apply only to estates of which summary administrations shall be ordered.

Kerr, C. C. P., 1469.

6128. Form of notice to creditors.

SEC. 271. The notice in this act required to be given by every executor or administrator upon his qualifying shall be in substantially the following form: "Notice to Creditors: Notice is hereby given that the undersigned has been duly appointed and qualified by the (giving the title of the court), as (executor or administrator, as the case may be) of the estate of_____, late of said county, deceased. All creditors having claims against said estate are required to file the same, with proper vouchers attached, with the clerk of the court, within three months of the first publication of this notice. Dated_____." *As amended, Stats. 1899, 114.*

Kerr, C. C. P., 1469.

6129. "Right of representation" defined—Posthumous children, rights of.

SEC. 272. Inheritance or succession "by right of representation" takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents.

Kerr, C. C. P., 1665.

6130. Estates, when escheat to state.

SEC. 273. If any person shall die, or any person who may have died, within this state, seized of any real or personal estate, and leaving no heirs, representatives, devisees or legatees capable of inheriting or holding the same, and in all cases where there is no owner of such estate capable of holding the same, such estate shall escheat to and be vested in the State of Nevada.

Kerr, C. C. P., 1269.

See Estate of Sticknoth, 7 Nev. 223, 238.

6131. Idem—Duty of attorney-general—Information to file—Citation to issue.

SEC. 274. Whenever the attorney-general shall be informed, or shall have reason to believe, that any real or personal estate has become escheatable to this state for the reasons specified in the preceding section, or that any such estate has for any other reason become escheatable, it shall be his duty to file an information in behalf of the state in the district court of the county wherein such estate, or any part thereof, is situated, setting forth a description of the estate, the name of the person last lawfully seized, the name of the terre-tenant and persons claiming such estate, if known, and the facts and circumstances in consequence of which said estate is claimed to have become escheated, and alleging that by reason thereof the State of Nevada has by law right to such estate; whereupon, such court shall order that a citation be issued, to such person or persons, bodies politic or corporate, alleged in such information to hold, possess or claim such estate, requiring them to appear and show cause why such estate should not be vested in the State of Nevada, said citation to be made returnable within the time allowed by law in other civil actions. The court may also, if deemed advisable, order the citation to be published in a newspaper published in said county (if any), and, if none, then in some other newspaper in this state.

Kerr, C. C. P., 1269.

6132. Idem—Contesting escheats—Procedure—Judgment and costs—Sale of real property—Proceeds from escheats paid into state treasury.

SEC. 275. All persons, bodies politic or corporate, named in such information as terre-tenants or claimants to such estate, may appear and plead to such proceedings, and may traverse or deny the facts stated in such information—the title of the state to the estate therein mentioned—at any time on or before the return day of the citation; and any other person claiming an interest in such estate may appear and be made a defendant, and plead as aforesaid, by motion for that purpose made in open court, within the time allowed for pleading as aforesaid; and if any person shall appear and plead as aforesaid, denying the title set up by the state, or traverse any material fact set forth in the information, or issue or issues of fact to be made up, the matter shall proceed as other civil actions on issues of fact, and a survey may be ordered as in other civil actions when the boundary is called into question; and after the issues are tried, if it shall appear from the facts that the state has a good title to the estate in the information mentioned, or any part thereof, or if no defense be made by anyone, judgment shall be rendered that the state be seized thereof, and recover costs of suit against the defendants, if any appear. Upon any judgment hereafter rendered, or that has heretofore been rendered by any court of competent jurisdiction, escheating real property to the state, on motion of the attorney-general, or on motion of any executor or administrator having charge of such estate, the court shall, or the court may, upon its own motion, make an order that said real property be sold by the sheriff of the county wherein the same is situated, at public sale, for gold coin, after giving such notice of the time and place of sale as is provided in cases of sale of property under execution; and the sheriff shall, within ten days after such sale, make a report thereof to the court, and upon the hearing of said report, the court may examine the said report and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value of the property sold, or if it appear that a sum exceeding such bid at least ten per cent, exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another sale to be had of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. In an offer of ten per cent more in amount than that named in the report be made to the court in writing, by a responsible person, the court may, in its discretion, accept such offer, and confirm the sale to such person, or order a new sale. If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, and that a greater sum than ten per cent, exclusive of the expense of a new sale, cannot be obtained, or if the increased bid above mentioned be made and accepted by the court, the court must make an order confirming the sale, and directing the sheriff, in the name of the state, to execute to the purchaser or purchasers, a conveyance of said property sold; and conveyance shall vest in the purchaser or purchasers all of the right and title of the state therein, and the sheriff shall, out of the proceeds of such sale, pay the cost of said proceedings incurred on behalf of the state, including the expenses of making such sale, and also an attorney's fee, if additional counsel was employed in such proceedings, to be fixed by the court, not exceeding fifteen per cent on the amount of such sale, and the residue thereof shall be paid by said sheriff into the state treasury. In all proceedings to recover estates which have vested in the state by escheat, whenever the same has been sold as provided in this section, the party adjudged entitled thereto, shall be entitled to the proceeds of such sale paid into the state treasury, in lieu of

the real property sold, and the court shall decree accordingly. *As amended, Stats. 1905, 46.*

Kerr, C. C. P., 1269.

Court may order money paid into state treasury as escheats paid back to heirs, sec. 1625.

6133. Idem—Appeal may be taken.

SEC. 276. Any party who shall have appeared to any proceedings as aforesaid, and the attorney-general, in behalf of the state, shall respectively have the same right to prosecute an appeal or writ of error upon any judgment, as aforesaid, as parties in other cases.

Kerr, C. C. P., 1269.

6134. Idem—Controller to keep account of—Proceedings to recover from state, when and how taken—Costs—Limitations—Persons under disability—Legislature may cause sale of lands.

SEC. 277. The state comptroller shall keep a just and true account of all moneys paid into the treasury, as also of all lands and personal property vested in the [e]state by escheat; and if, within ten years after any judgment escheating property to the state any person shall appear and claim any money that may have been paid into the state treasury on any real or personal property vested in the state by such judgment, such person may file a petition in the district court, at the seat of government, stating the nature of the claim, with an appropriate prayer for the relief demanded. A copy of such petition shall be served upon the attorney-general before or at the time of filing the same, who shall, within twenty days thereafter, appear in said proceeding and plead or answer to such petition; or, if the attorney-general, after examining all the facts, should become convinced that the state had no legal defense against the petition, he may, with the consent of the court, confess on behalf of the state judgment. If judgment shall not be so confessed the petition shall be considered at issue on the twentieth day after its filing, and may be heard by the court on that day or at such future day as the court may order. Upon the hearing the court shall examine into said claim and hear the allegations and proofs, from which, if the court shall find that such person is entitled to any money paid into the state treasury as aforesaid, it shall, by judgment, order and direct the state comptroller to draw his warrant in favor of such claimant upon the treasurer for the sum specified in such order, but without interest or cost to the state. If any real estate is the subject of such trial, and the court finds the claimant entitled to it, the court shall decree accordingly, which shall be effectual for divesting the interests of the state in or to such real estate, but no costs shall be taxed against the state. A certified copy of the judgment and order directing the comptroller to draw his warrant for money, shall be a sufficient voucher for him so to do. All persons who shall fail to appear and file their petitions within the time limited as aforesaid, shall be forever barred, saving, however, infants, married women, persons of unsound mind, and persons beyond the limits of the United States the right to appear and file their petition as aforesaid, at any time within five years after their respective disabilities shall be removed. The legislature may cause any lands, escheated to the state, or personal estate, other than money, at any time after the judgment of escheatal, to be sold as may be provided by law, and the proceeds paid into the state treasury, in which case the petitioners shall be entitled to the proceeds thereof, in lieu of such lands or personal estate, and the court shall decree accordingly.

Kerr, C. C. P., 1272.

See sec. 1625.

6135. Idem—Receiver may be appointed pending determination of title—To give bond.

SEC. 278. The said district court, upon the filing of the information herein-

before provided, upon the motion of the attorney-general, either before or after answer, upon notice to the party or parties claiming the estate, if known, may, sufficient cause therefor being shown, appoint a receiver to take charge of the real estate or personal property, other than money, mentioned in such information, and receive the rents and profits of the same until the title of such property shall be finally settled. Such receiver shall, before entering upon his duties, execute to the State of Nevada a bond in a sum to be fixed by the court, with sureties to be approved by the judge, conditioned to faithfully perform the duties of the trust, and fully account to the party finally adjudged to be entitled to the property. Such party may maintain an action on such bond for any default or damage.

Kerr, C. C. P., 1270.

6136. Idem—Information to attorney-general—Percentage to informer—Proviso.

SEC. 279. Any person furnishing original information to the attorney-general of any property escheatable to the state, with the necessary evidence to sustain the action of the state in that behalf, shall be entitled to receive, upon the final recovery of such property, five per cent of the value of such property so recovered; *provided*, that the amount so recovered by the person furnishing the information shall not in the aggregate exceed the sum of twenty thousand dollars in any one case; *and, provided further*, that one person only shall be entitled to compensation for such service.

Kerr, C. C. P., 1269.

6137. Idem—Disposition of money.

SEC. 280. All moneys which have accrued or may hereafter accrue to the state from escheated estates shall be paid into the general fund, and, if need be, in defraying the current expenses of the government and the redemption of the comptroller's warrants.

Kerr, C. C. P., 1260.

All estates which escheat to state pledged to educational purposes, see Const., sec. 355; see, also, secs. 3373, 6116.

Money paid into state treasury as escheats may be ordered paid back to heirs, sec. 1625.

6138. Civil practice act applicable.

SEC. 281. When not otherwise specially provided in this act all the provisions of law regulating proceedings in civil cases shall apply in matters of estate, when appropriate, or the same may be applied as auxiliary to the provisions of this act.

Kerr, C. C. P., 1713.

Civil practice act, secs. 4943–5821.

Cited, Estate of Millenovich, 5 Nev. 188.

Facts recited entitling a claimant to have his claim amended as requested and that constituted an amendment of the same. Kirman v. Powning, 25 Nev. 379, 396 (60 P. 834).

Cited, Abel v. Hitt, 30 Nev. 93, 105, 106 (93 P. 227).

A motion for a new trial preliminary to appeal is proper in estate proceedings to set aside a homestead to the widow. State ex rel. Cook v. Langan, 32 Nev. 176 (105 P. 568).

6139. Acts repealed.

SEC. 282. The act entitled "An act to regulate the settlement of the estates of deceased persons," approved November 29, 1861 [p. 186], and all acts amendatory thereof and supplementary thereto, are hereby repealed.

A right of action depending solely upon a statute that has been repealed falls with the repeal of the statute. Kennedy v. Adams, 24 Nev. 217, 220 (51 P. 840).

The probate law of 1861, allowing holders of rejected claims three months in which to commence suit for the purpose of determining the validity, was repealed, before the commencement of the suit, by this act, which required such suits to be commenced within thirty days after notice of the rejection, under penalty of being barred. It was held that the action was governed and barred by this statute. Idem.

An Act supplemental to an act entitled "An act to regulate the settlement of the estates of deceased persons," approved March 23, 1897.

Approved March 20, 1901, 95

6140. When estate of widow descends to heirs of deceased husband.

SECTION 1. Whenever any husband dies intestate, leaving heirs in this state, and if the wife dies intestate subsequently to her husband, without heirs, leaving property in this state, her estate shall vest in the heirs of her husband, subject to expenses of administration, and payment of legal debts against the estate.

See sec. 6116.

6141. When estate of widower descends to heirs of deceased wife.

SEC. 2. Whenever any wife dies intestate without issue, leaving heirs in this state, and if the husband dies intestate subsequently to his wife, without heirs, leaving property in this state, his estate shall vest in the heirs of the wife, subject to expenses of administration, and payment of legal debts against the estate.

6142. Act, how applicable.

SEC. 3. This act shall apply to estates of deceased persons hereafter to arise, or now in process of settlement.

An Act supplemental to an act entitled "An act to regulate the settlement of the estates of deceased persons," approved March 23, 1897.

Approved March 4, 1899, 102

6143. Notices to be given by clerk without order from judge.

SECTION 1. All notices required to be given by the act entitled "An act to regulate the settlement of the estates of deceased persons," approved March 23, 1897, may hereafter be given by the county clerk without an order from the judge for the same; and when so given for the time and in the manner required by law, they shall be as legal and valid as though made upon an order from such judge.

6144. Objections filed with clerk—Time of hearing.

SEC. 2. If the court is not in session at the time set for the hearing of any matter concerning the settlement of the estates of deceased persons, any one opposing the application therein made may file objections thereto with the clerk, and thereafter the matter shall be heard upon the first day when the court is in session, unless such hearing is continued to some future day.

An Act to protect the wages of labor.

Approved February 21, 1873, 76

[Sections 1 and 3, included in and repealed by Stats. 1911, civil practice act, sec. 5821, covered by secs. 5493–5494.]

6145. Claims for wages against estates of deceased employers—Not to affect homesteads or liens.

SEC. 2. That in all cases of the death of any employer or employers, the wages of each miner, mechanic, salesman, servant, clerk, and laborer, for services rendered, or labor performed, within ninety days next preceding the death of the employer, shall rank after the funeral expenses of the deceased, the charges and expenses of administering upon the estate, and the allowance to the widow and infant children, and be paid pro rata before all other claims against the estate of the deceased person or persons; *provided*, this act shall in no way affect the homestead or other property exempted by law

from forced sale, or any mortgage or lien lawfully obtained on the property of the deceased person before his or her death.

Kerr, C. C. P., 1205.
See secs. 5062, 5959, 6052.
See sec. 195 of the act relating to estates of deceased persons.
Regarding wages as preferred claims against assignment, attachment and execution, see secs. 5493, 5494.

An Act supplementary to an act entitled "An act to regulate the settlement of the estates of deceased persons," approved March 23, 1897.

Approved March 22, 1911. 316

6146. Property of estate may be mortgaged, when and how.

SECTION 1. In all cases in the settlement of the estates of deceased persons, the court or judge may, on a petition setting forth facts showing the advisability, and upon notice the same as on petition for the sale of real property, and on sufficient proof, make an order authorizing the mortgaging of real or personal property belonging to the estate, by the executor or administrator.

See sec. 5985, et seq., for sales of real property.

An Act to facilitate the execution of deeds and conveyances of property of persons who are bound by bond or contract to convey real estate or transfer personal property, but who die before making the conveyance or transfer, authorizing the district court having jurisdiction over the estate to decree that the executor or administrator complete the execution of the contract.

Approved March 22, 1911. 315

6147. Executors may complete contract of decedent in conveying property.

SECTION 1. If any deceased person was, at the time of his death, a party to a bond or contract in writing for a deed for a sale and conveyance of real estate, or personal property, his interest in said property may be conveyed by his executor or administrator, upon full compliance of the terms and conditions of such bond or contract by the other parties thereto, and a deed of conveyance so made shall transfer the same title as though made by such deceased if alive. Such conveyance shall be made upon report to the district court of the county in which the estate of such deceased person is being administered, showing that all the terms and conditions of said bond or contract have been met, and if satisfied therewith, said district court shall thereupon make an order authorizing and directing the execution of requisite deed or transfer to the proper parties.

6148. Present cases included.

SEC. 2. This act shall affect estates of deceased persons now being probated.

See secs. 6032, 6033.

GUARDIANS

General act regarding the appointment and duties of guardians, sections 6149–6197.

Act supplemental to above act, providing for removal of property of nonresident ward, sections 6198–6202.

Adoption of children, sections 5825–5835.
Bonds and undertakings by surety companies, sections 695–701.
Children, sections 728–766.
Civil practice, sections 4943–5821.
Compulsory education, sections 3443–3451.
District court rule XXIX concerning guardians, following section 4942.
Failure of guardian to keep child at school, section 3445.
Guardian ad litem in justice's court, section 5726.
Guardian may be ordered to place child in hospital, section 738.
Guardian may consent to adoption, section 739.

Guardians in district court proceedings, sections 4992, 4993.
Guardians in estates of deceased persons, sections 6190–6192.
Jurisdiction over guardians in district court, section 4849.
Juvenile court law, section 729, et seq.
Protection of school children, sections 3452–3454.

An Act to provide for the appointment of guardians and to prescribe their duties.

Approved March 11, 1899. 70

6149. Guardians of minors may be appointed.
6150. Idem—Petition to be filed in relation to—Notice, how given—Petition and notice not required when guardian named in will.
6151. Idem—Hearing—Appointment—Minor may nominate, when.
6152. Idem—Minor arriving at age of fourteen may nominate—Judge to approve.
6153. Idem—Father or mother entitled to, when.
6154. Powers and duties of guardian—Lawful age.
6155. Idem—Bond to be given—Sureties—Conditions of bond.
6156. Idem—Insufficiency of bond—Procedure to determine—Service.
6157. Idem—District judge to investigate—Further security required.
6158. Idem—Neglect to comply with order, cause for revocation of letters.
6159. Idem—Removal for incapacity or mismanagement—Citation and hearing—May suspend pending judgment.
6160. Education and maintenance—Minor's estate may be applied to, when.
6161. Guardian pendente lite—Next friend may sue or defend for—Power to appoint by will.
6162. Petition to be filed in relation to insane or other incompetent person—Citation and procedure.
6163. Idem—District judge to appoint.
6164. Idem—Power of guardian—Qualifications—Bond.
6165. Guardians generally—Payment of debts—Sale or mortgage of property—Notice and hearing.
6166. Idem—Management of estate—Application of income—Sales and partition.
6167. Idem—To settle or compound all accounts—Legal proceedings.
6168. Idem—Inventory to be returned—Accounts—Law of estates to apply.
6169. Idem—Insufficiency of income to maintain—Sale of property.
6170. Idem—Sale of realty for investment for benefit of ward.
6171. Idem—Proceeds of sales generally, how may be applied.
6172. Idem—Proceeds invested to the best advantage—Judge to approve.
6173. Idem—Petition for order of sale to be filed—Citation to issue.
6174. Idem—Citation, upon whom served—Court may order publication.
6175. Idem—Hearing—Who may object to order.
6176. Idem—Examination of guardian—Process for witnesses.
6177. Idem—In case of objection—Costs may be imposed.
6178. Idem—Order of sale, what to specify—Notice of sale, when posting sufficient.
6179. Idem—Additional bond to be given.
6180. Idem—Proceeds of sale or money on hand, how invested—Notice, hearing and order.
6181. Removal or resignation of guardian—Causes for removal—Appointment of successor.
6182. When discharged.
6183. When new bond shall be required—Discharge of sureties.
6184. Form of bond—Where filed—Liability of parties to proceedings in action in behalf of ward.
6185. Action against sureties to be commenced within three years after discharge—Disability, effect of.
6186. Examination upon charge of fraud—Complaint and proceedings.
6187. Letters of guardianship for nonresident minor—Bond—Guardian in other state may be appointed—Proof.
6188. Powers and duties alike.
6189. Idem—Bond and qualification—Duties.
6190. Guardianship first granted—Exclusive powers—Jurisdiction.
6191. Expenses allowed—Reasonable compensation.
6192. Joint guardian.
6193. Idem—Form of bond.
6194. Idem—Account—Oath of one.
6195. Sales of realty, credit may be allowed.
6196. Fees of clerk—Limitation on.
6197. Acts repealed—Saving clause.
6198. Nonresident guardian of nonresident ward may remove property out of state upon application.
6199. Idem—Notice and showing.
6200. Idem—Discretion of court—Order granting authority to recover property.
6201. Idem—Order, discharge of local guardian—Receipt, to file.

6149. Guardians of minors may be appointed.

SECTION 1. When necessary or convenient, guardians of the person and

estate or either, of minors, who are inhabitants of, or reside in the county wherein application may be made; or minors who being now residents of the state, have any estate in such county, may be appointed as herein provided.

Guardians ad litem, how appointed, sec. 4993.
See secs. 4992, 4995, 4996.
See juvenile court law, secs. 728–756.

In guardianship matters where the judgment of the district court is collaterally attacked, the jurisdiction of the court is conclusively presumed, and evidence to the contrary is not admissible. Deegan v. Deegan, 22 Nev. 186, 197 (58 A. S. 742, 37 P. 360).

The judgment of the district court on matters concerning persons or estates of minors cannot be successfully resisted until overruled or modified by some proceeding impeaching it. Idem.

Such judgments are conclusive not only against the guardian himself, but also against the sureties on his guardianship bond; whatever binds and concludes the guardian equally binds and concludes his sureties. Idem.

6150. Idem—Petition to be filed in relation to—Notice, how given—Petition and notice not required when guardian named in will.

SEC. 2. To secure the appointment of a guardian, any relative of or any person interested in or befriending a minor, may file in the clerk's office of the district court of the proper county a petition setting forth the necessary facts, and praying for the appointment of some designated person or persons as guardian or guardians. Upon such petition being filed, the clerk shall give notice of the hearing thereof by posting in three public places in the county, one of which shall be at the front door of the court house thereof, a notice containing the name or names of the minor or minors, the party petitioning, the object, and the time and place for the hearing, which shall not be later than ten days after such posting. The party petitioning shall also cause notice to be served upon any person in whose custody or care such minor or minors may be; *provided*, if any person shall be nominated guardian by will, the court may, on the probate of such will, or at any time thereafter, appoint such person or persons guardian without any petition or notice.

See sec. 5376.

In the appointment of a guardian the interest of the minor is the paramount consideration. The parental request is entitled to great weight and ought to prevail unless good reason to the contrary be shown. Padenhoof v. Johnson, 11 Nev. 87, 89.

The district judge has no authority to appoint any person guardian of the person or estate of a minor except upon a written petition in his behalf and after notice of his application. Idem.

The appointment of a stranger as guardian of the person and estate of an infant within three days after petition and without notice to the infant's relatives or the persons having its custody, is gravely irregular. In re Winkleman, 9 Nev. 303.

The provisions of the old probate law that letters of administration shall issue to the guardian of a minor, instead of to the minor himself, refers to a guardian appointed in this state and not the one appointed in some other state. Estate of Nickals, 21 Nev. 462, 465, 466 (34 P. 250).

Except as a matter of comity, in exceptional cases, a guardian of a minor appointed in one state is not recognized as such in another state. Idem.

6151. Idem—Hearing—Appointment—Minor may nominate, when.

SEC. 3. At the time fixed in the notice for the hearing, or at such other time to which the hearing may be continued, upon proof of the proper notices having been posted and served, the court may hear the petition and appoint a guardian or guardians. If a minor is above the age of fourteen years, he or she may nominate his or her own guardian, who, if approved by the judge, shall be appointed accordingly, but if the guardian so nominated by the minor should not be approved by the judge, or if the minor shall reside out of the state or is not fourteen years of age, the judge may nominate and appoint the guardian.

6152. Idem—Minor arriving at age of fourteen may nominate—Judge to approve.

SEC. 4. When a guardian of a minor under the age of fourteen years has

been appointed by the judge, such minor, at any time after attaining to said age, may nominate his or her guardian who, if approved by the judge, shall be appointed.

6153. Idem—Father or mother entitled to, when.

SEC. 5. The father, if living, and in case of his decease, the mother, being each competent to transact his or her own business, and not otherwise unsuitable, shall be entitled to the guardianship of the minor.

6154. Idem—Powers and duties of guardian—Lawful age.

SEC. 6. Every guardian appointed as aforesaid, shall have the custody and tuition of the minor, and the care and management of the estate, of which appointed, until such minor shall attain to the age of twenty-one years, if a male, or eighteen years, if a female, unless sooner discharged according to law.

6155. Idem—Bond to be given—Sureties—Conditions of bond.

SEC. 7. Before the order appointing any person guardian under this act shall take effect, and before letters shall issue, the person or persons so appointed shall take and subscribe the official oath, to be endorsed on the letters, and shall give bond to the minor or minors in such sum as the court may order, with at least two sufficient sureties to be approved by the court or judge, and conditioned that the guardian shall faithfully execute the duties of his or her trust according to law; and the following conditions shall be deemed to form a part of such bond without being expressed therein:

First—To make a full and true inventory of all the estate, real and personal, of the ward, and have the same appraised by three disinterested persons, to be appointed by the court or judge, and to return and file in the clerk's office, within twenty days after qualifying, such inventory and appraisement under oath.

Second—To manage all such estate according to law and for the best interest of the ward, and to discharge faithfully his or her trust in relation thereto, and also in relation to the care, custody and education of the ward.

Third—To render under oath a true account of the property, estate and moneys of the ward, and all proceeds or interest derived therefrom, and of the management and disposition of the same, within one year after appointment, and annually thereafter, and at such other time as the court may direct.

Fourth—At the expiration of his trust, to settle his or her final account with the court or with the ward if of legal age, or his or her legal representative, and to pay over all moneys, and deliver all the estate and effects remaining in his or her hands or justly chargeable to the guardian on such settlement, to the person or persons lawfully entitled thereto.

Upon filing such bonds duly approved by the district judge, and taking the oath of office as aforesaid, the clerk shall issue letters of guardianship to the person or persons appointed. Letters of guardianship may be substantially in the following form:

(After properly entitling court and cause.) Whereas, by order of said court herein made and entered on the_____day of_____, 1____, _____ _____was (or were, as the case may be) appointed guardian of the (person and estate, or either, as the case may be) of_____, minor; and, whereas, the said_____has (or have, as the case may be) duly qualified according to law, these letters are hereby issued to_____, as such guardian. Witness my hand and the seal of said court, this_____ day of_____. _____, Clerk.

Provided, if a person is appointed in a will to be guardian without bonds, the court may direct letters to issue to such on taking and subscribing the oath of office.

Sections 8 and 32 of former act (Stats. 1861, 256) were cited in connection with the following:

A ward, on attaining his majority, brought suit against his guardian and the sureties on his general bond to recover moneys received by the guardian on sale of the ward's real estate, and not accounted for. It was held that the suit could not be maintained on the general bond, for the reason that the sale of real estate was not one of the general duties of a guardian, and that therefore a nonsuit was properly granted. Henderson v. Coover, 4 Nev. 429, 433, 434.

The general duties of a guardian do not include the sale of a ward's real estate, and he has no right to sell such real estate except upon special license from the court, and no valid sale can take place until a special bond for the faithful application of the proceeds is given, and for such faithful application the sureties on the special bond only, and not those on the general bond, are bound. Idem.

Though the general bond of a guardian is conditioned for the payment and delivery by him of "all the estate, moneys and effects remaining in his hands or due from him on final settlement," it does not make the sureties responsible for the misapplication of moneys arising from the sale of real estate, for the reason that the sale and application of the proceeds of real estate are not general duties of a guardian. Idem.

There is wisdom in the rule, and it is of the highest importance, that a guardian's bond, though inartistically drawn or slightly defective, is to be held sufficient to bind the obligors. The law regards not the form but the substance of such an obligation. Deegan v. Deegan, 22 Nev. 185 (57 A. S. 742, 37 P. 360).

Where a guardian of several minors gives but one bond, the sureties cannot escape liability in an action on a bond, on the ground that it is not such a bond as the law requires, in that it is joint instead of several as to the obligees, nor on the ground that the action is brought by only one of the obligees. Idem.

If a guardian converts the funds of his ward to his own use, there is a breach of his duty as guardian, and consequently a breach as to the condition of his bond, for which the sureties are liable. Idem.

6156. Idem—Insufficiency of bond—Procedure to determine—Service.

SEC. 8. Whenever any guardian's bond shall become insufficient by reason of the death, insolvency or removal from the state of any surety or sureties, it shall be the duty of the guardian to give further security, and he may be ordered by the court to do so within a given time, whenever the court shall be satisfied the bond has become insufficient. To this end, whenever the district judge shall be satisfied that the matter requires investigation he shall direct the clerk to issue a citation to the guardian, requiring him or her to appear at a given time and place, to be therein specified, to show cause why he or she should not give further security. Such citation shall be served personally on the guardian by the sheriff or any other citizen of the United States over twenty-one years of age, at least five days before the return day thereof; *provided*, if the guardian shall have absconded, or cannot be found, it may be served by leaving a copy thereof at his or her last place of abode.

6157. Idem—District judge to investigate—Further security required.

SEC. 9. At the time designated, or at such other time as the judge may appoint, he shall proceed, on proof of service of citation, to investigate the sufficiency of the bond of such guardian, and if satisfied that the security is from any cause insufficient, he may, by order, require the guardian to give further security or file a new bond within a reasonable time.

6158. Idem—Neglect to comply with order, cause for revocation of letters.

SEC. 10. If the guardian shall neglect to comply with the order within the time prescribed, the judge shall by order revoke his or her letters, and his or her authority shall thereupon cease.

6159. Idem—Removal for incapacity or mismanagement—Citation and hearing—May suspend pending judgment.

SEC. 11. Any person may file a petition under oath, for the removal of a guardian by reason of incapacity, or that the guardian is mismanaging or wasting the estate, or that the best interests of the ward require it, and upon filing such petition a citation shall issue and be served as provided in section 8 of this act, and until the same can be heard and determined the court or

judge may suspend the guardian, and on the hearing enter such judgment and order as the facts may warrant.

6160. Education and maintenance—Minor's estate may be applied to, when.

SEC. 12. If any minor who has a father living has property, the income of which is sufficient for his maintenance and education in a manner more expensive than the father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed, in whole or in part, out of the income of such property as shall be judged reasonable and directed by the district court; and the charges therefor shall be allowed the guardian of such minor in the settlement of his accounts.

6161. Guardian pendente lite—Next friend may sue or defend for—Power to appoint by will.

SEC. 13. Nothing contained in this act shall affect or impair the power of the court to appoint a guardian to defend the interest of any minor, in any suit or matter pending therein, or to appoint or allow any person as the next friend of a minor to commence and prosecute any suit in behalf of a minor; nor impair the right of the father, or in case of his decease or divorce, the mother, of any minor child, to appoint by last will and testament, a guardian or guardians of such child, whether born before or after the time of making such will.

Guardian ad litem, how appointed, see sec. 4993.

In an action for damages for malicious prosecution, the suit was properly brought in the name of his mother and guardian. Ricord v. C. P. R. R. Co., 15 Nev. 167.

6162. Petition to be filed in relation to insane or other incompetent person—Citation and procedure.

SEC. 14. Any relative or friend of any insane person, or of any person, who, by reason of extreme old age, or for any other cause, is mentally incompetent to manage his or her property, may present a petition, under oath, setting out the necessary facts, to the district judge, praying that a guardian for the person and estate, or either, be appointed. Such judge shall direct the clerk to issue a citation, requiring such supposed insane or incompetent person to be and appear at a time and place to be therein specified to show cause why a guardian should not be appointed. Such citation shall be served as provided in section 8 of this act, on such person, and also on such person, with whom or in whose custody, such insane or incompetent may be, not less than five days before the return day thereof; and if able to attend, the judge shall cause such insane or incompetent person to be produced before him on the hearing.

See sec. 4992.

6163. Idem—District judge to appoint.

SEC. 15. If, after a full hearing and examination upon such petition, it shall appear to the district judge that the person in question is incapable of taking care of himself or herself, and managing his or her property, he shall appoint a guardian of the person and estate or either, of such person.

6164. Idem—Power of guardian—Qualifications—Bond.

SEC. 16. Every guardian appointed under the provisions of the preceding section shall have the care and custody of the person or estate of the ward, until such guardian shall be discharged according to law; and he shall give bond and qualify in like manner and with like conditions as hereinbefore prescribed with respect to the guardian of a minor.

See secs. 4992, 4995, 4996, 5571.

6165. Guardians generally—Payment of debts—Sale or mortgage of property—Notice and hearing.

SEC. 17. Every guardian appointed under the provisions of this act, whether for a minor or any other person, shall pay all just debts due from the ward out of the personal estate and the income from the real estate of the ward, if sufficient, and if not, then from the proceeds of a sale of the personal or real estate, upon obtaining an order for such sale according to law; *provided*, that if, upon petition of the guardian, it shall appear for the best interest of the ward to mortgage any of his real estate, instead of making a sale of any of his property, the court may authorize the guardian to execute such a mortgage upon such terms and conditions as the court shall deem prudent, upon the guardian filing a bond in favor of the ward in such sum as the court shall fix, to be approved by the court or a judge thereof; and notice of the petition and hearing shall be given as prescribed by sections 25 and 26 of this act. *As amended, Stats. 1911, 71.*

See secs. 5571, 6195.

6166. Idem—Management of estate—Application of income—Sales and partition.

SEC. 18. Every guardian shall manage the estate of his or her ward frugally and without unreasonable waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance, support and education of the ward, and if such income and profits be insufficient for such purposes, the guardian may sell the personal or real estate upon obtaining an order therefor, as provided by law for such purpose. A guardian may join in and assent to a partition of the real estate of the ward in the cases and in the manner provided by law.

6167. Idem—To settle or compound all accounts—Legal proceedings.

SEC. 19. Every guardian shall settle all accounts of the ward, and demand, sue for and receive all and every debt or property due the ward; or may, with the consent of the district judge, compound for the same and give a discharge to the debtors on receiving a fair and just dividend of his or her estate and effects; and he shall appear for and represent his ward in all legal proceedings, unless when another person shall be appointed for that purpose as guardian ad litem, or next friend.

6168. Idem—Inventory to be returned—Accounts—Law of estates to apply.

SEC. 20. Every guardian shall return to the district court an inventory of the estate of his or her ward within twenty days after his or her qualification, and annually, or at such other times as the court may order, present to and have settled by said court his account as guardian, and shall return to said court additional inventories whenever any further property belonging to the ward not included in any previous inventory shall come to his hands or knowledge. If there be no estate he shall return that fact. The provisions of law regulating the settlement of the estates of deceased persons regarding inventories shall apply to the inventories herein required in all respects, except as to the time of filing.

For inventory, see secs. 5942–5945, 6025.

6169. Idem—Insufficiency of income to maintain—Sale of property.

SEC. 21. When the income of the estate of any person under guardianship shall not be sufficient to maintain the ward and his or her family, if any, or to educate his or her family, or the ward, if a minor, the guardian may sell the personal or real estate of the ward, or such portion as may be necessary for such purpose, upon obtaining an order therefor and proceeding therein as in this act provided.

6170. Idem—Sale of realty for investment for benefit of ward.

SEC. 22. Whenever it shall be made to appear that it would be for the benefit of the ward that his or her real estate, or some portion thereof, should be sold in order that the proceeds thereof may be put out at interest, or invested in some productive security, or in the improvement or security of other real estate of the ward, or to be reinvested in other real estate, the same may be sold as in this act provided.

6171. Idem—Proceeds of sales generally, how may be applied.

SEC. 23. If the estate shall be sold for maintenance or education, the guardian shall apply the proceeds of the sale to such purposes, so far as necessary, and shall put out the residue, if any, at interest or invest it to the best advantage, under the direction of the court, until the capital may be required for the maintenance of the ward and his or her family, or the education of the family, if any, or for the education of the ward, if a minor, in which case the capital may be used as far as necessary for such purpose.

See sec. 5571.

6172. Idem—Proceeds invested to the best advantage—Judge to approve.

SEC. 24. If the estate be sold for the purpose of putting out the proceeds on interest, or investing, or reinvesting the same as in this act provided, the guardian shall, with the approval of the district judge, so dispose of such proceeds to the best advantage possible.

6173. Idem—Petition for order of sale to be filed—Citation to issue.

SEC. 25. To obtain an order for the sale of a ward's estate, or any part thereof, the guardian must file in the clerk's office of the district court having jurisdiction, a petition therefor, setting forth the condition of the estate of the ward with the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale, which petition shall be verified by the oath of the petitioner, whereupon the clerk shall issue a citation to the next of kin to the ward, if any, in the county, and to all persons interested in the estate who may be in the county, to appear before the court at a time and place therein to be specified, not less than twenty days after the date of the citation, to show cause why an order for the sale of such estate should not be granted.

6174. Idem—Citation, upon whom served—Court may order publication.

SEC. 26. The citation shall be served personally on the next of kin and all persons interested in the estate within the county at least ten days before the return day thereof, or, if thought advisable, the court instead may order the service of the citation to be made by the publication thereof, for fifteen days before the return day, in some newspaper in the county, but if there be no newspaper in the county, then in such newspaper as the court or judge may designate.

6175. Idem—Hearing—Who may object to order.

SEC. 27. At the time designated in the citation, or at such other time as the hearing may be adjourned to, upon proof of the due service or publication of the citation, the court shall proceed to hear the petition and any objections that may be made to such sale. Any person may object to an order being made to sell a ward's estate.

6176. Idem—Examination of guardian—Process for witnesses.

SEC. 28. On such hearing the guardian may be examined under oath and witnesses may be produced and examined by any party, and process to compel their attendance and testimony may issue as in other cases and with like effect.

6177. Idem—In case of objection, costs may be imposed.

SEC. 29. If any person shall appear and object to the granting of the order prayed for, and it shall appear to the court that either the petition or the objection thereto is unreasonable, the court may in its discretion award costs to the party prevailing and enforce the payment thereof.

6178. Idem—Order of sale, what to specify—Notice of sale, when posting sufficient.

SEC. 30. If, after a full examination, it shall appear to the court either that it is necessary or would be for the benefit of the ward, for any purpose mentioned in sections 21 and 22 of this act, that his or her real estate or some part of it should be sold, such court may grant an order therefor, specifying therein whether necessary or proper and the object for which made. The order may also direct the sale to be at public auction or private sale upon like proceedings and in the manner as prescribed by law in case of the sale of real estate by an executor or administrator, and subject to the same proceedings in relation to the report, confirmation or rejection of the sale, or resale thereof; *provided*, that where the property ordered sold shall have been valued in the inventory at less than five hundred dollars, it shall be in the discretion of the court to order the notice of sale thereof to be given by posting only. *As amended, Stats. 1903, 211.*

6179. Idem—Additional bond to be given.

SEC. 31. Every guardian authorized to sell real estate as aforesaid, shall before the sale give an additional bond to the ward, in an amount to be fixed by the court or judge, with sufficient security, to be approved by the judge, and conditioned to sell the property as prescribed by law and to account for and dispose of the proceeds of the sale in the manner provided by law.

See Henderson v. Coover, under sec. 7 of this act.

6180. Idem—Proceeds of sale or money on hand, how invested—Notice, hearing and order.

SEC. 32. The district court, on the application of a guardian, or of any other person interested in the welfare of the ward, after such notice to the next of kin and all persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and also any other money in his hands, in real estate, or in any other manner as in this act provided; and the district court may make such further orders and give such directions as the case may require for managing, investing and disposing of the estate and effects in the hands of the guardian.

See Henderson v. Coover, under sec. 7 of this act.

6181. Removal or resignation of guardian—Causes for removal—Appointment of successor.

SEC. 33. Whenever any guardian, either testamentary or otherwise, appointed under this act, shall become insane, remove from the state, or otherwise become incapable of discharging the trust, or evidently unsuitable therefor, or shall have wasted or mismanaged the estate, the district judge, after notice served as hereinbefore provided for service of citation, may remove him or her; and every guardian may, upon request, be allowed to resign his or her trust, when it shall appear to the district judge proper to allow the same, and proper accounts have been settled and allowed. And upon every such resignation or removal, or upon the death of any guardian, the court or judge may appoint another.

After a guardian has been duly cited to account, the court has jurisdiction to remove him for failure to do so without further notice. Deegan v. Deegan, 22 Nev. 186, 197 (58 A. S. 742, 37 P. 360).

6182. When discharged.

SEC. 34. The guardian of any person may be discharged by the district court or judge when upon the application of the ward or otherwise, it shall appear that such guardianship is no longer necessary.

6183. When a new bond shall be required—Discharge of sureties.

SEC. 35. The district judge may require a new bond to be given by any guardian whenever he shall deem it necessary, and may discharge the existing sureties from further liability, after due notice given as such judge may direct, when it shall appear that no injury can result therefrom to the estate, or any one interested therein.

6184. Form of bond—Where filed—Liability of parties to proceedings in action in behalf of ward.

SEC. 36. Every bond given by a guardian may be to one or more wards and shall be filed and preserved in the office of the clerk of the district court of the county; and in case of the breach of any condition thereof, an action may be maintained therefor in behalf of the ward, or wards jointly, if all are interested, or of any person interested in the estate, and shall not be void on the first recovery; and if the action is in behalf of one ward on a bond given to more than one, the others mentioned in the bond need not be united in or made parties to such action.

6185. Action against sureties to be commenced within three years after discharge—Disability, effect of.

SEC. 37. No action shall be maintained against the sureties in any bond given by a guardian unless it be commenced in three years from the time when the guardian shall have been discharged; *provided*, if at the time of such discharge the person entitled to bring such action shall be under any legal disability to sue, the action may be brought at any time within three years after such disability shall be removed.

6186. Examination upon charge of fraud—Complaint and proceedings.

SEC. 38. Upon complaint made to the district judge by any guardian, ward, creditor of, or any other person interested in the ward or his or her estate, against any one, charging such an one with having concealed, converted, having in possession or conveyed away any of the money, goods or effects of, or any instrument in writing belonging to the ward, the judge may cause such person by citation to appear before him for examination, and proceed in the same manner as is provided with respect to persons suspected of concealing, converting or conveying away the effects of a deceased person.

See sec. 6024.

6187. Letters of guardianship for nonresident minor—Bond—Guardian in other state—Proof.

SEC. 39. When any minor, or other person liable to be placed under guardianship, according to the provisions of this act, shall reside out of this state, and shall have estate therein, any friend of such person, or anyone interested in his or her estate, in expectancy or otherwise, may apply to the district court of any county in which there may be any estate of such absent person in expectancy or otherwise for letters of guardianship of such estate, as in case of a resident ward, and the court may proceed in like manner and appoint a guardian. If a guardian of the estate of such absent person has been appointed in the state of his or her residence by a court there having jurisdiction, said guardian may be appointed as such guardian in this state upon giving a bond and qualifying as prescribed by section 7 of this act, and no citation need be issued or served. In such case the production of duly

authenticated copies of the order appointing guardian and of the letters of guardianship shall be prima facie proof of the necessity of the appointment of such guardian in this state. *As amended, Stats. 1911, 72.*

See secs. 6198–6201.

6188. Idem—Powers and duties alike.

SEC. 40. Every guardian appointed under the provisions of the preceding section shall have the same power and perform the same duties with respect to any estate of the ward that may be found within this state, and also with respect to the person of the ward if he or she shall come to reside therein, as are prescribed with respect to any other guardian appointed under this act.

6189. Idem—Bond and qualification—Duties.

SEC. 41. Every such guardian shall give bond to the ward and qualify in the same manner and with like conditions as hereinbefore provided with respect to other guardians, excepting that the provisions repecting the inventory, disposal of the estate and effects, and the accounts to be rendered by the guardian shall be confined to such estate and such effects as shall come to his hands in this state.

6190. Guardianship, first granted—Exclusive powers—Jurisdiction.

SEC. 42. The guardianship, which shall be first lawfully granted of the estate of any person residing without this state shall extend to all the estate of the ward within this state, and shall include the jurisdiction of every other district court.

6191. Expenses allowed—Reasonable compensation.

SEC. 43. Every guardian shall be allowed his or her reasonable expenses incurred in the execution of his or her trust, and shall also have such other compensation for his or her services as the court in which the accounts are settled shall allow as just and reasonable.

6192. Joint guardians.

SEC. 44. The court in its discretion may appoint more than one guardian of any person or estate subject to guardianship.

6193. Idem—Form of bond.

SEC. 45. Joint guardians may unite in a bond to the ward or wards, or each may give a separate bond.

6194. Idem—Account—Oath of one.

SEC. 46. When an account shall be rendered by two or more joint guardians, the district court or judge may allow the same upon the oath of any one of them.

6195. Sales of realty—Credit may be allowed.

SEC. 47. All sales of real estate of minor heirs, made in accordance with the provisions of this act, shall be for cash or on credit, or part cash and part on credit, as in the discretion of the court or judge may be most beneficial for such heirs. When credit is given, the court or judge shall fix the credit, and the purchaser or purchasers shall execute and deliver to the guardian or guardians promissory notes for deferred payments, bearing interest and secured by mortgage on the real estate sold, with such additional security as the judge may deem necessary and sufficient to secure the payment of the deferred payments, and the interest thereon.

6196. Fees of clerk, limitation on.

SEC. 48. The total fees and charges of the clerk where any estate in

guardianship shall not exceed in value two thousand dollars, shall not exceed fifteen dollars.

6197. Acts repealed—Saving clause.

SEC. 49. An act entitled "An act to provide for the appointment and prescribe the duties of guardians," approved November 29, 1861 [p. 255], and all acts and parts of acts amendatory thereof, or supplementary thereto, are hereby repealed, saving the rights in matters of guardianship pending at the date of the approval of this act to proceed with and close up such guardianship under the law existing at the institution of such proceedings.

An Act supplemental to an act entitled "An act to provide for the appointment of guardians and to prescribe their duties," approved March 11, 1899.

Approved March 12, 1901, 54

6198. Nonresident guardian of nonresident ward may remove property out of state upon application.

SECTION 1. If a ward be a nonresident of this state, and entitled to property in this state, and have a guardian by authority of the laws of any state, territory or possession of the United States, or of a foreign country in which such ward resides, such property may be removed to such state or territory or possession or foreign country in which such ward resides upon the application of such guardian to the district court of this state in the county in which the property of such ward, or any part of such property, is situated.

See sec. 6187.

6199. Idem—Notice and showing.

SEC. 2. The application must be made upon ten days' notice to the resident executor, administrator or guardian, if there be such, and upon such application the nonresident guardian must produce and file a certificate under the hand of the clerk and seal of the court from which his appointment was derived, showing:

First—A transcript of the record of his appointment.

Second—That he has entered upon the discharge of his duties.

Third—That he is entitled by the laws of the state, territory, possession or country of his appointment to the possession of the estate of his ward, or must produce and file a certificate, under the hand and seal of the clerk of the court having jurisdiction in the country of his residence, of the estates of persons under guardianship, or of the highest court of such country, attested by a minister, consul or any consular officer of the United States resident in such country, that by the laws of such country the applicant is entitled to the custody of the estate of his ward without the appointment of any court.

6200. Idem—Discretion of court—Order granting authority to recover property.

SEC. 3. Upon such application, unless good cause to the contrary is shown, the court may in its discretion, upon satisfactory proof that the interests of such ward are fully protected by sufficient security, in the place of residence of such foreign guardian, make an order granting to such guardian leave to take and remove the property of his ward to the state or place of his residence, which is authority to him to sue for and receive the same in his own name for the use and benefit of his ward.

6201. Idem—Order—Discharge of local guardian—Receipt to file.

SEC. 4. Such order is a discharge of the executor, administrator, local guardian, or other person in whose possession the property may be at the time the order is made, on filing with the court the receipt therefor of the foreign guardian of such absent ward; said receipt shall be recorded in the rec-

ords of said court, and the court shall make an order discharging said executor, administrator or local guardian from all further duties and responsibilities as such executor, administrator or guardian, and that his letters of administration or guardianship are vacated, and that the sureties upon the bond of such executor, administrator or local guardian are released from any liability thereafter incurred.

WILLS

General act concerning wills, sections 6202–6222.

Holographic wills, sections 6223–6225.

Adoption of children, sections 5825–5835.
Bonds and undertakings by surety companies, sections 695–701.
Children, sections 728–766.
Civil practice act, sections 4943–5821.
Estates of deceased persons, section 5854, et seq.
Guardians, sections 6149–6201.
Guardians in estates of deceased persons, sections 6190–6192.
Jurisdiction over wills in district court, section 4849.

An Act concerning wills.

Approved December 19, 1862, 58

6202. Who may make wills—Subject to testator's debts.
6203. Wills of married women—Separate estate—General provisions control.
6204. Requisites of valid wills—Nuncupative, exception.
6205. Provisions in favor of subscribing witnesses, when void.
6206. Nuncupative wills—Limited to estates of $1,000—Witnesses—Proof.
6207. Idem—Proof within three months.
6208. Idem—Probate of, when made—Process or notice.
6209. Revocation of wills, how affected—When implied.
6210. Second wills, cancelation of, does not revive first—Exception.
6211. Effect of marriage on wills—When deemed revoked.
6212. Idem.
6213. Subsequent bond, covenant or agreement to convey property bequeathed, not a revocation—Remedy.
6214. Mortgage not a revocation—Effect of.
6215. Children born after wills made to share—Exception.
6216. Children or issue of, unprovided for, to share—Exception.
6217. After-born or omitted children, how provided for.
6218. Advancement, effect of.
6219. Descendants of devisee inherit share of devisee.
6220. Devise of land, how construed.
6221. After-acquired property, how considered.
6222. Will defined—To include codicils.

6202. Who may make wills—Subject to testator's debts.

SECTION 1. Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his or her estate, real and personal, the same being chargeable with the payment of the testator's debts.

Evidence held to show that a testatrix was mentally incompetent to execute a will, and that in making her will she acted under undue influence. Abel v. Hitt, 30 Nev. 93 (93 P. 227).

6203. Wills of married women—Separate estate—General provisions control.

SEC. 2. Any married woman may dispose of all her separate estate by will, absolutely, without the consent of her husband, either express or implied, and may alter or revoke the same in like manner as a person under no disability may do. Her will must be attested, witnessed, and proved in like manner as all other wills. *As amended, Stats. 1873, 102.*

6204. Requisites of valid wills—Nuncupative, exception.

SEC. 3. No will, except such nuncupative wills as are mentioned in this act, shall be valid unless it be in writing, and signed by the testator, and sealed with his seal, or by some person in his presence, and by his express direction, and attested by at least two competent witnesses, subscribing their names to the will in the presence of the testator.

Attesting witnesses to a will are not required for the purpose of protecting the contingent and possible right of property in the state by way of escheat; but to prevent the setting up of fictitious wills against heirs and representatives. Estate of Sticknoth, 7 Nev. 223.

A special act (Stats. 1871, 129) was passed validating the will considered in above case, but such acts are now expressly prohibited by Const., sec. 278, ante.

Though the statute contains an absurd and novel requirement that a will should be sealed, it is unnecessary to make mention of the seal in the instrument, nor is it necessary, if by the act of sealing the condition imposed by the statute is performed, that the seal should remain. Idem.

6205. Provisions in favor of subscribing witnesses, when void.

SEC. 4. All beneficial devises, legacies, and gifts, whatsoever, made or given in any will to a subscribing witness thereto, shall be void, unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts shall not prevent his creditors from being competent witnesses to his will.

6206. Nuncupative wills limited to estates of $1,000—Witnesses—Proof.

SEC. 5. No nuncupative or verbal will shall be good where the estate bequeathed exceeds the value of one thousand dollars, nor unless the same be proved by two witnesses who were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid some one present to bear witness that such was his will, or words of like import, nor unless such nuncupative will was made at the time of the last sickness of the deceased.

6207. Idem—Proof within three months.

SEC. 6. No proof shall be received of any nuncupative will unless it be offered within three months after speaking the testamentary words.

6208. Idem—Probate of, when made—Process or notice.

SEC. 7. No probate of any nuncupative will shall be granted for fourteen days after the death of the testator, nor shall any nuncupative will be at any time proved unless the testamentary words, or the substance thereof, be first committed to writing by the probate judge, and process be issued to call in the widow, should she be a resident of the territory, or other person or persons interested as heirs of the testator, residing in the territory, to contest the probate of such will, if they think proper.

6209. Revocation of wills, how effected—When implied.

SEC. 8. No will in writing shall be revoked unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence, or by his direction, or by some other will or codicil in writing, executed as prescribed by this act; but nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator.

6210. Second wills, cancelation of, does not revive first—Exception.

SEC. 9. If, after the making of any will, the testator shall duly make and execute a second will, the destruction, canceling, or revocation of such second will shall not revive the first will, unless it appear by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, canceling or revocation the first will shall be duly reexecuted.

6211. Effect of marriage on wills—When deemed revoked.

SEC. 10. If, after the making of any will, the testator shall marry, and the wife shall be living at the death of the testator, such will shall be deemed revoked unless she shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of such revocation shall be received.

6212. Idem.

SEC. 11. A will executed by an unmarried woman shall be deemed revoked on her subsequent marriage, and shall not be revived by the death of her husband.

6213. Subsequent bond, covenant or agreement to convey property bequeathed not a revocation—Remedy.

SEC. 12. A bond, covenant, or agreement, made by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, but such property shall pass by the devise or bequest, subject to the same remedies on such bond, covenant, or agreement, for the specific performance or otherwise, against the devisees or legatees, as might be had by law, against the heirs of the testator, if the same had descended to them.

6214. Mortgage not a revocation—Effect of.

SEC. 13. A charge or incumbrance upon any estate, for the purpose of securing the payment of money, or the performance of any covenant or agreement, shall not be deemed a revocation of any will relating to the same estate which was previously executed, but the devise and legacies therein contained shall pass, subject to such charge or incumbrance.

The testator, by his will, disposed of his property to his wife, "having the fullest confidence in her capacity, judgment, discretion and affection to properly bring up, educate and provide for our children, and to manage and dispose of my said property in the best manner for their interests and her own." It was held that the devisee took the property devised as absolute owner and not upon trust. Hunt v. Hunt, 11 Nev. 442, 449.

In construing this will, the court held that the widow had the absolute right to sell and dispose of the estate at her discretion. Idem.

Above section cited, and held not to apply. Idem.

6215. Children born after wills made to share—Exception.

SEC. 14. When any child shall have been born after the making of its parent's will, and no provision shall be made for him or her therein, such child shall have the same share in the estate of the testator as if the testator had died intestate, unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child.

6216. Children, or issue of, unprovided for to share—Exception.

SEC. 15. When any testator shall omit to provide in his or her will for any of his or her children, or for the issue of any deceased child, unless it shall appear that such omission was intentional, such child, or the issue of such child, shall have the same share in the estate of the testator as if he or she had died intestate.

6217. After-born or omitted children, how provided for.

SEC. 16. When any share of the estate of a testator shall be assigned to a child born after the making of a will, or to a child or the issue of a child omitted in the will, as hereinbefore mentioned, the same shall first be taken from the estate not disposed of by the will, if any; if that shall not be sufficient, so much as shall be necessary shall be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator, in relation to some specific devise or bequest or other provision in the will would thereby be defeated; in such case, such specific devise, legacy, or provision, may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

6218. Advancement, effect of.

SEC. 17. If such child or children, or their descendants, so unprovided for

shall have had an equal proportion of the testator's estate bestowed upon them in the testator's lifetime, by way of advancement, they shall take nothing in virtue of the provisions of the three preceding sections.

6219. Descendants of devisee inherit share of devisee.

SEC. 18. When any estate shall be devised to any child or other relation of the testator, and the devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate so given by the will, in the same manner as the devisee would have done if he would have survived the testator.

6220. Devise of land, how construed.

SEC. 19. Every devisee of land in any will shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that he intended to convey a less estate.

6221. After-acquired property, how considered.

SEC. 20. Any estate, right, or interest in lands acquired by the testator, after the making of his or her will, shall pass thereby, in like manner as if it passed at the time of making the will, if such should manifestly appear by the will to have been the intention of the testator.

6222. Will defined—To include codicils.

SEC. 21. The term "will" as used in this act, shall be so construed as to include all codicils as well as wills.

An Act relating to holographic wills.

Approved March 20, 1895, 112

6223. Holographic wills valid.

SECTION 1. Property may be disposed of and taken under holographic wills. Such wills shall be valid and have full effect for the purpose for which they are intended.

6224. Holographic will defined—Provisions concerning.

SEC. 2. An holographic will is one that is entirely written by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state and need not be witnessed.

6225. Idem—How proved.

SEC. 3. An holographic will may be proved in the same manner as other private writings are proved.

HABEAS CORPUS

Bail on examination upon habeas corpus, sections 6248, 7323.
Civil practice act, sections 4943–5821.
Criminal practice act, sections 6851–7528.
Excessive bail on civil arrest, section 5113.
Habeas corpus not to be suspended except in case of rebellion or invasion, Nev. Const., section 234; U. S. Const., section 130.
Judicial power of United States courts, U. S. Const., ante, sections 119, 159.
Jurisdiction of district courts and judges to issue writs of habeas corpus, Const., section 321.
Jurisdiction of supreme court and justices to issue writs of habeas corpus, Const., section 319.
Style of process, "The State of Nevada," Const., section 328.
Writs may be telegraphed, sections 4618, 6967.

An Act concerning the writ of habeas corpus.

Approved December 19, 1862. 98

6226. Who may prosecute writ.
6227. Application for, what to state.
6228. Who may grant writ—Granted at any time.
6229. Granted without delay.
6230. To whom directed and what commanded.
6231. Clerk to deliver without delay, when.
6232. Sheriff or deputy to serve, when.
6233. Service, how made.
6234. Refusal to obey, judge to issue attachment—Court may appoint elisor to serve, when.
6235. Return of writ, what to be stated—When to be sworn to.
6236. Body of party in custody to be brought—Exception.
6237. Idem—When not able to appear—Verified return to show.
6238. Idem—Hearing on absence of party——May take adjournment.
6239. Immediate hearing on the return.
6240. Traverse of return.
6241. Summary proceeding.
6242. Power of judge—Witnesses.
6243. When party entitled to discharge.
6244. When may be remanded.
6245. Ground for discharge.
6246. Defect of form of warrant not valid ground.
6247. When judge may conduct reexamination—Powers under.
6248. May be granted for release on bail.
6249. Idem—Recognizance, may take.
6250. May remand to custody.
6251. Judge may order change of custody.
6252. Pending judgment on proceedings may commit or place in custody.
6253. Defect of form not material.
6254. Person discharged not again imprisoned on same cause—Exception.
6255. Warrant may issue, when, authorizing sheriff or constable to bring party.
6256. Idem—Arrest of restraining party.
6257. Idem—Execution of warrant.
6258. Idem—Return to, traverse and hearing.
6259. Idem—Discharge or remand.
6260. Writ may issue on Sunday or nonjudicial day.
6261. Clerk to issue writs, warrants and process—When sealed—Service and return.
6262. Penalty for refusing to grant, or obedience to writ.
6263. Penalty for custodian disobeying or avoiding writ.
6264. Idem—Accessories.
6265. Further penalty—Imprisonment.

6226. Who may prosecute writ.

SECTION 1. Every person unlawfully committed, detained, confined, or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint.

Kerr, P. C., 1473.

The writ is not to be used to do the work of a writ of error or an appeal. Breckenridge v. Lamb, 34 Nev. —; Ex Parte Maxwell, 11 Nev. 428; Dimmick v. Tompkins, 194 U. S. 551.

But if the statute on which the prosecution is founded is unconstitutional, or if the undisputed facts sought to be charged against the accused do not constitute a public offense, he may be discharged by the writ. Ex Parte Rosenblatt, 19 Nev. 439; Ex Parte Boyce, 27 Nev. 29 (75 P. 1, 65 L. R. A. 47); Ex Parte Rickey, 31 Nev. 82; Ex Parte Hose, 34 Nev. — (116 P. 417); Ex Parte Smith, 33 Nev. — (111 P. 930); Ex Parte Lewis, 33 Nev. — (115 P. 729); Ex Parte Waterman, 29 Nev. 288, 11 L. R. A. (N. S.) 424.

If by reason of mistaken identity the wrong person is arrested under a warrant of extradition he may be discharged. Ex Parte Spencer, 34 Nev. — (117 P. 1).

A writ of habeas corpus cannot be used to perform the functions of an appeal or

writ of error, but can only review questions going to the jurisdiction of the court to enter the particular judgment, and not as to whether the court erred in the exercise of such jurisdiction. Ex Parte Davis, 33 Nev. — (110 P. 1131).

See Ex Parte Finlen, under Const., sec. 236, ante; Ex Parte Rickey, under sec. 20 of this act.

Where, on trial for a criminal offense, the evidence without conflict shows that defendant is exempted from the penal provisions of the act, the court is without power to render a judgment of conviction. Idem.

Where the evidence without conflict establishes that the defendant belongs to a class not within a penal statute, habeas corpus is available to bring up for determination the court's jurisdiction to render judgment of conviction and to obtain defendant's discharge. Idem.

6227. Application for, what to state.

SEC. 2. Application for such writ shall be made by a petition, signed either by the party for whose relief it is intended, or by some person in his behalf, and shall specify: First—That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty; the officer or person by whom he is so confined, or restrained, and the place where, naming all the parties, if they are known, or describing them, if they are not known. Second—If the imprisonment be illegal, the petition must also state in what the alleged illegality consists. Third—The petition must be verified by the oath or affirmation of the party making the application.

Kerr, P. C., 1474.

Habeas corpus is not the proper remedy to correct errors. Ex Parte Smith, 2 Nev. 238.

A state court or judge, duly authorized by the laws of the state, may issue the writ of habeas corpus in any case where a party is imprisoned within its territorial limits, provided it does not appear when the application is made that the party imprisoned is in custody under the authority of the United States. Ex Parte Hill, 5 Nev. 154.

In every case where process regular upon its face has been issued from the United States court having power to issue process of such a nature, the officer while acting thereunder is fully protected against any interference from a state court, and such state court, when judicially informed of the existence of the process, cannot go behind the same to make any further inquiry. Ex Parte Hill, 5 Nev. 154.

The second clause of this section contemplates that the facts showing the alleged illegality should be stated. Ex Parte Deny, 10 Nev. 212, 213.

A general statement that the warrant is illegal, null and void, and that it was issued without authority of law, is a mere conclusion of law, not a statement of any fact. Idem.

Before a writ of habeas corpus is granted, sufficient probable cause must be shown to enable the court to form such judgment in a case, and if it appears from the petitioner's statement that there is no sufficient ground for his discharge, the court should not issue the writ. Idem.

Where it is sought to bring petitioner from a distant country, a writ of habeas corpus will not be made returnable before the supreme court, in the first instance, without a showing of the absence, disability or refusal of the district judge of the county to act, or other good cause why it should be heard by the supreme court, or a justice thereof. Idem.

Petitioner cannot be in the custody of two different officers at the same time; and where petitioner alleges that he is in the custody of the sheriff, but suggests to the court that the sheriff will deliver him to another officer upon receipt of the governor's requisition, the supreme court will not anticipate such arrest in order to determine the validity of the governor's warrant. Idem.

Where petitioner had been held to answer before the grand jury for the crime of murder, the grand jury had met and ignored the charge, and the court, upon sufficient cause shown, ordered that he be held to appear before the next grand jury, it was decided that petitioner was not entitled to his discharge upon a writ of habeas corpus. Ex Parte Isbell, 11 Nev. 295.

Where it appears from the facts set out in petition that there is no sufficient ground to grant the relief asked for, the writ should not be issued. Idem.

A petition for habeas corpus, which fails to state any facts from which it can be inferred that petitioner's imprisonment is illegal, is insufficient to authorize the issuance of the writ. Ex Parte Allen, 12 Nev. 87, 88.

6228. Who may grant writ—Granted at any time.

SEC. 3. Such writ of habeas corpus may be granted by any judge of the supreme or district courts, at any time in term or vacation.

Kerr, P. C., 1475.

See Ex Parte Deny, under sec. 2 of this act.

See secs. 319, 321.

6229. Granted without delay.

SEC. 4. Any judge empowered to grant a writ applied for under this act, if it appear that the writ ought to issue, shall grant the same without delay.

Kerr, P. C., 1476.

See Ex Parte Davis, under sec. 1 of this act.

6230. To whom directed and what commanded.

SEC. 5. Such writ shall be directed to the officer or party having such person in custody or under restraint, commanding him to have the body of such person, so imprisoned or detained, as it is alleged by the petition, before the judge, at such time as the judge shall direct, specifying in such writ the place where the petition will be heard, to do and receive what shall then and there be considered concerning such person, together with the time and cause of his detention, and have then and there such writ.

Kerr, P. C., 1477.

See Ex Parte Deny, under sec. 2 of this act.

6231. Clerk to deliver without delay, when.

SEC. 6. If such writ be directed to the sheriff or other ministerial officer, it shall be delivered by the clerk of the court presided over by the judge issuing said writ to such officer without delay.

Kerr, P. C., 1478.

6232. Sheriff or deputy to serve, when.

SEC. 7. If such writ be directed to any person other than is specified in the last preceding section, the same shall be delivered to the sheriff or his deputy, and shall be by him served upon such person by delivering the same to him without delay.

Kerr, P. C., 1478.

6233. Service, how made.

SEC. 8. If the officers or person to whom such writ is directed cannot be found, or shall refuse admittance to the officer or person serving or delivering such writ, the same may be served or delivered by leaving it at the residence of the officer or person to whom it is directed, or by affixing the same on some conspicuous place on the outside of his dwelling house, or the place where the party is confined or under restraint. The service of said writ is made by serving a copy and exhibiting the original, and, where posting is required, by posting a copy.

Kerr, P. C., 1478.

6234. Refusal to obey, judge to issue attachment—Court may appoint elisor to serve, when.

SEC. 9. If the officer or person to whom such writ is directed refuse, after due service as aforesaid, to obey the same, it shall be the duty of the judge, upon affidavit, to issue an attachment against such person, directed to the sheriff, or, if the sheriff be the defendant, to an elisor, appointed for the purpose by the judge, commanding him forthwith to apprehend such person and bring him immediately before such judge; and upon being so brought he shall be committed to the jail of the county until he make due return of such writ, or be otherwise legally discharged.

Kerr, P. C., 1479.

6235. Return of writ, what to be stated—When to be sworn to.

SEC. 10. The party upon whom such writ shall be duly served shall state in his return plainly and unequivocally: First—Whether he have or have not the party in custody, or under his power or restraint. Second—If he have the party in his custody or power, or under his restraint, he shall state

the authority and cause of such imprisonment or restraint, setting forth the same at large. Third—If the party be detained by virtue of any writ, warrant or any other written authority, a copy thereof shall be annexed to the return, and the original shall be produced and exhibited to the judge on the hearing of such return. Fourth—If the officer or person upon whom such writ shall have been served shall have had the party in his power or custody, or under his restraint, any time prior or subsequent to the date of the writ of habeas corpus, but such officer or person has transferred such custody or restraint to another, the return shall state particularly to whom, at what time and place, for what cause, and by what authority such transfer took place. Fifth—The return must be signed by the person making the same, and, except when such person shall be a sworn public officer, and shall make such return in his official capacity, it shall be verified by his oath or affirmation.

Kerr, P. C., 1480.

This section, which prescribes what returns shall be made to the writ, does not confine the party or officer making that return (and admitting that he was the person named in the writ in his custody) to what is prescribed in either of the second or third subdivisions of the section, but his return may embrace matters embraced in both subdivisions. Ex Parte Salge, 1 Nev. 449, 452.

It is the duty of any person having the custody of a prisoner to make known by a proper return to the court or judge issuing a writ of habeas corpus to him, the authority by which he holds such person in custody; and this duty applies to a United States marshal in response to a writ from a state court or judge. Ex Parte Hill, 5 Nev. 154.

6236. Body of party in custody to be brought—Exception.

SEC. 11. If the writ of habeas corpus be served, the person or officer to whom the same is directed shall also bring the body of the party in his custody or under his restraint, according to the command of the writ, except in the cases specified in the next two sections.

Kerr, P. C., 1481.

6237. Idem—When not able to appear—Return to show.

SEC. 12. Whenever, from sickness or infirmity of the person directed to be produced by any writ of habeas corpus, such person cannot, without danger, be brought before the judge, the officer or person in whose custody or power he is, may state that fact in his return to the writ, verifying the same by affidavit.

Kerr, P. C., 1482.

6238. Idem—Hearing on absence of party—May take adjournment.

SEC. 13. If the judge be satisfied of the truth of such allegation of sickness or infirmity, and the return to the writ is otherwise sufficient, such judge may proceed to decide on such return and to dispose of the matter, as if such party had been produced on the writ, or the hearing thereof may be adjourned until such party can be produced.

Kerr, P. C., 1482.

6239. Immediate hearing on the return.

SEC. 14. The judge before whom a writ of habeas corpus shall be returned shall, immediately after the return thereof, proceed to hear and examine the return, and such other matters as may be properly submitted for his hearing and consideration.

Kerr, P. C., 1483.

6240. Traverse of return.

SEC. 15. The party brought before the judge on the return of the writ may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either

that his imprisonment or detention is unlawful or that he is entitled to his discharge.

Kerr, P. C., 1484.

The writ of habeas corpus is not intended to have the force or operation of an appeal, writ of error or certiorari, nor is it designed as a substitute for either. Ex Parte Maxwell, 11 Nev. 429, 439.

Where there has been a legal jeopardy it is equivalent to a verdict of acquittal; and, on motion, the prisoner is entitled to his discharge; but the writ of habeas corpus will not lie. Idem.

The jurisdiction of a court or judge to render a particular judgment or sentence by which a person is imprisoned is a proper subject of inquiry on habeas corpus. Ex Parte Dela, 25 Nev. 346, 351 (83 A. S. 603, 60 P. 217).

In a proceeding on habeas corpus where it is shown by the return that the petitioner is detained by virtue of a process issued upon a judgment of a competent court of criminal jurisdiction, such showing is prima facie only of the fact, and may be attacked or impeached by the record of the action, for the purpose of showing such excess or want of jurisdiction of the court or officer rendering or issuing the same as to make its action absolutely void, and that where the record shows such excess of jurisdiction, or such want of jurisdiction, as to render the judgment or process void, the petitioner, under such showing, is entitled to his discharge. Idem.

Upon an indictment and trial for murder, and a verdict adjudging defendant guilty of rape, the court has no jurisdiction to sentence and imprison defendant for such crime of rape, since the constitution (sec. 237, ante) requires presentment and indictment for the particular offense before conviction is had, and, further, because the defendant is thereby deprived of his liberty without due process of law. Idem.

Murder is a distinct class of offense under our law. It is a generic offense. Rape is of another class, and is, also, a generic offense. Hence, the act of making all murder which shall be committed in the perpetration of arson, rape, etc., murder in the first degree, did not create a new crime, but merely made a distinction with a view of different degrees of punishment, based on different grades of crime. Idem.

Under our statute making murder committed in the perpetration of rape, arson, etc., murder in the first degree, proof that the murder was committed in the perpetration of such other offense stands in lieu of the proof of malice aforethought. Idem.

6241. Summary proceeding.

SEC. 16. Such judge shall thereupon proceed in a summary way to hear such allegation and proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require.

Kerr, P. C., 1484.

See Ex Parte Maxwell, under sec. 15 of this act.

6242. Power of judge—Witnesses.

SEC. 17. Such judge shall have full power and authority to require and compel the attendance of witnesses by process of subpena and attachment and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case.

Kerr, P. C., 1489.

Cited, Ex Parte Finlen, 20 Nev. 141, 150 (18 P. 827).

A prisoner charged with a grave offense will not be discharged on habeas corpus on the ground that all efforts to obtain a competent jury at the term at which he was properly triable failed, and that no competent jury can be obtained, until it appears that all possible means of securing a jury have failed and a trial cannot be had within a reasonable time. Ex Parte Stanley, 4 Nev. 113.

If it appear that a jury cannot be procured in a criminal case at the term at which it is regularly triable, an order of indefinite postponement is irregular, but does not operate as a release of the prisoner. Idem.

A court is not authorized upon a writ of habeas corpus to inquire into the question of fact as to whether or not an indictment, regular upon its face, was ever found by the grand jury. Ex Parte Twohig, 13 Nev. 302.

A judgment of conviction in the district court, regular upon its face, is conclusive until reversed, and cannot be reviewed upon habeas corpus. Idem.

To hold a fugitive from justice to await the requisition of the governor of another state, it must affirmatively appear from the complaint filed before the committing magistrate in this state: 1. That a crime has been committed in the other state. 2. That the accused has been charged in that state with the commission of such crime. 3. That he has fled from justice, and is within this state. Ex Parte Lorraine, 16 Nev. 63.

To hold a fugitive from justice, upon the ground that the money taken by him in committing the robbery was brought into

this state, there must be a complaint charging him with this offense substantially in the language of the statute. Idem.

If a prisoner is held under a legal and valid commitment, the illegality of other commitments need not be considered until his term of service under the valid commitment has expired. Ex Parte Ryan, 10 Nev. 261, 17 Nev. 139 (28 P. 1040).

Alleged errors and irregularities in the proceedings of the court cannot be reviewed on habeas corpus. Ex Parte Bergman, 18 Nev. 331 (4 P. 209).

The supreme court will review, upon habeas corpus, the question of the constitutionality of an act under which petitioner has been convicted, and if the act is unconstitutional the petitioner will be discharged. Ex Parte Rosenblatt, 19 Nev. 439 (3 A. S 901, 14 P. 298).

When an accused person is held by a judge for examination before him, under the provisions of the habeas corpus act, he is invested with such powers only as are conferred on other magistrates in matters of preliminary examinations. Ex Parte Ah Kee, 22 Nev. 374 (40 P. 879).

In order to justify a committing magistrate in holding an accused to answer to a charge, the evidence need not show guilt beyond a reasonable doubt. In re Kelly, 28 Nev. 491 (83 P. 223).

The court, on habeas corpus for the discharge of one arrested as a fugitive from justice, under an executive warrant, may examine into the sufficiency of the papers on which the warrant is based, and, if the indictment or complaint on which the requisition is made, and the executive warrant issued, is insufficient, the court will discharge the prisoner. In re Waterman, 29 Nev. 288, 11 L. R. A. (N. S.) 424, 89 P. 29.

6243. When party entitled to discharge.

SEC. 18. If no legal cause be shown for such imprisonment or restraint, or for the continuation thereof, such judge shall discharge such party from the custody or restraint under which he is held.

Kerr, P. C., 1485.

See Ex Parte Rickey, under sec. 20 of this act.

6244. When may be remanded.

SEC. 19. It shall be the duty of such judge, if the time during which such party may be legally detained in custody has not expired, to remand such party, if it shall appear that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree, or in cases of contempt of court.

Kerr, P. C., 1486.

A person held in custody under a regular commitment of a justice of the peace will not be discharged on habeas corpus, unless it appears that the jurisdiction of the justice has been exceeded or that the commitment issued without authority of any judgment, order or decree of any court or any provision of law. Ex Parte Winston, 9 Nev. 71, 74.

A habeas corpus is not a writ of error, nor can it be used to authorize the exercise of appellate jurisdiction. Idem.

On habeas corpus, in case of a commitment under the judgment of a court, such judgment cannot be disregarded; nor will the record be looked into except to ascertain whether a judgment exists, without regard to the question whether it be right or wrong. Idem.

When it appears that petitioner was imprisoned under a final judgment of a justice of the peace, and the justice had jurisdiction of the offense charged as well as of the petitioner, it was held the petitioner must be remanded; that if error was committed on the trial the only remedy of petitioner was by appeal, and not by habeas corpus. Ex Parte Edgington, 10 Nev. 215, 217; Ex Parte Crawford, 24 Nev. 91, 92 (49 P. 1038).

A sentence against two defendants jointly on a joint verdict is not void, the court having jurisdiction, though the same may be erroneous, but whether erroneous or not cannot be determined on habeas corpus. Ex Parte Gafford, 25 Nev. 101, 104 (83 A. S. 568, 57 P. 484).

Habeas corpus proceedings cannot be used to authorize the exercise of appellate jurisdiction. Idem.

The jurisdiction of the court may be properly inquired into on habeas corpus. See Ex Parte Dela, under sec. 15 of this act.

On conviction of a felony, the sentence imposed was within the discretion vested in the district court as to the amount of the fine and the time of alternative imprisonment in the event that the fine was not paid, and was erroneous only that it declared that such alternative imprisonment should be in the state prison, whereas it should have declared the same should be in the county jail. It was held that, in habeas corpus proceedings, such direction as to the place of imprisonment might be rejected as surplusage and did not vitiate the entire sentence. Ex Parte Tani, 29 Nev. 385, 389, 13 L. R. A. (N. S.) 518, 91 P. 197.

6245. Grounds for discharge.

SEC. 20. If it appears on the return of the writ of habeas corpus that the prisoner is in custody by virtue of process from any court of this territory, or judge or officer thereof, such prisoner may be discharged, in any one of the following cases, subject to the restrictions of the last preceding section: First—When the jurisdiction of such court or officer has been exceeded. Second—When the imprisonment was at first lawful, yet by some act, omission, or event, which has taken place afterwards, the party has become entitled to be discharged. Third—When the process is defective in some matter of substance required by law, rendering such process void. Fourth—When the process, though proper in form, has been issued in a case not allowed by law. Fifth—When the person having the custody of the prisoner is not the person allowed by law to detain him. Sixth—Where the process is not authorized by any judgment, order, or decree of any court, nor by any provision of law. Seventh—Where a party has been committed on a criminal charge without reasonable or probable cause.

Kerr, P. C., 1487.

A state court or judge cannot on habeas corpus examine or decide whether a particular offense charged in an indictment, found in a United States court, is or is not an offense against the laws of the United States. Ex Parte Hill, 5 Nev. 155.

Where it appears that the petitioner is held in custody by the sheriff by virtue of a commitment, which shows that the prisoner was found guilty of a public offense, and no objection is made touching the regularity of the commitment, and the jurisdiction of the court was not questioned, it was held that whether petitioner was guilty or not was the question to be decided upon the trial, and, if erroneously decided, the remedy is by appeal (Ex Parte Edgington, 10 Nev. 215, affirmed). Ex Parte Crawford, 29 Nev. 91 (49 P. 1038).

The provision of the seventh clause of this section only applies to cases where the evidence given on the examination is insufficient to warrant the committing magistrate in holding the prisoner to answer. Ex Parte Allen, 12 Nev. 87, 88.

Petitioner cannot claim the issuance of a writ of habeas corpus for the sole purpose of impeaching the witnesses who testified against him at his examination. Idem.

Petitioner discharged under provisions of clause 4 above. Ex Parte Diedesheimer, 14 Nev. 311, 314.

See Ex Parte Winston and Ex Parte Tani, under sec. 19 of this act; Ex Parte Maxwell, under sec. 15 of this act.

There are three essential elements necessary to render conviction valid. These are that the court must have jurisdiction over the subject-matter, the person of the defendant, and authority to render the particular judgment. If either of these elements is lacking, the judgment is fatally defective and the prisoner held under such judgment may be released on habeas corpus. Ex Parte Webb, 24 Nev. 238 (51 P. 1027).

When one is imprisoned under a statute entirely void, the remedy is habeas corpus. Ex Parte Kair, 28 Nev. 127 (113 A. S. 817, 80 P. 463); Ex Parte Boyce, 27 Nev. 299 (65 L. R. A. 47, 75 P. 1).

Where accused avers that the indictment does not allege an offense and the state admits that the facts are stated therein, the court on habeas corpus must consider the question whether the indictment states an offense, and if it does not, accused must be discharged. Ex Parte Rickey, 31 Nev. 82, 89 (100 P. 134, 135 A. S. 651).

The question of the legality of impaneling a jury in a criminal case should be raised on appeal from the judgment and from an order denying a new trial, and not on habeas corpus. Ex Parte Jackman, 31 Nev. 106 (100 P. 749).

6246. Defect of form of warrant not valid ground.

SEC. 21. If any person be committed to prison, or be in custody of any officer on any criminal charge, by virtue of any warrant or commitment of a justice of the peace, such person shall not be discharged from such imprisonment or custody on the ground of any defect of form in such warrant or commitment.

Kerr, P. C., 1488.

6247. When judge may conduct reexamination—Powers under.

SEC. 22. If it shall appear to the judge, by affidavit, or upon hearing of the matter, or otherwise, or upon the inspection of the process or warrant of commitment, and such other papers in the proceedings as may be shown to such judge, that the party is guilty of a criminal offense, or ought not to be

discharged, such judge, although the charge be defectively or unsubstantially set forth in such process or warrant of commitment, shall cause the complainant, or other necessary witnesses, to be subpenaed to attend at such time as shall be ordered, to testify before such judge; and upon the examination, he shall discharge such prisoner, let him to bail, if the offense be bailable, or recommit him to custody, as may be just and legal.

Kerr, P. C., 1489.

6248. May be granted for release on bail.

SEC. 23. Whenever any person may be imprisoned, or detained in custody, on any criminal charge, for want of bail, such person shall be entitled to a writ of habeas corpus, for the purpose of giving bail, upon averring that fact in his petition, without alleging that he is illegally confined.

Kerr, P. C., 1490.

6249. Idem—Recognizance, may take.

SEC. 24. Any judge, before whom any person who has been committed on a criminal charge shall be brought on a writ of habeas corpus, if the same be bailable, may take a recognizance from such person, as in other cases, and shall file the same in the proper court without delay.

Kerr, P. C. 1491.

6250. May remand to custody.

SEC. 25. If any party brought before the judge, on the return of the writ, be not entitled to his discharge, and be not bailed where such bail is allowable, such judge shall remand him to custody, or place him under the restraint from which he was taken, if the person, under whose custody or restraint he was, be legally entitled thereto.

Kerr, P. C., 1492.

If the indictment be defective but enough appears to retain the accused in custody, he should not be discharged on habeas corpus Ex Parte Kitchen, 19 Nev. 178 (18 P. 886).

6251. Judge may order change of custody.

SEC. 26. In cases where any party is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party, such judge may order such party to be committed to the restraint or custody of such person as is by law entitled thereto.

Kerr, P. C., 1493.

Prisoner taken from the custody of the warden of the penitentiary and committed to the sheriff of Storey County. Ex Parte Janes, 1 Nev. 319, 322.

Where a petitioner is brought before the supreme court upon a writ of habeas corpus, the court is authorized, if after examining the case, it should be of the opinion that petitioner was guilty of an offense other than that on which he is held, to issue a new commitment. Ex Parte Ricord, 11 Nev. 288.

6252. Pending judgment on proceedings, may commit or place in custody.

SEC. 27. Until judgment be given on the return, the judge, before whom any party may be brought on such writ, may commit him or her to the custody of the sheriff of the county, or place him or her in such care or under such custody as his or her age or circumstances may require.

Kerr, P. C., 1494.

6253. Defect of form not material.

SEC. 28. No writ of habeas corpus shall be disobeyed for defect of form, if it sufficiently appear therefrom in whose custody or under whose restraint the party imprisoned or restrained is, the officer or person detaining him, and the judge before whom he is to be brought.

Kerr, P. C., 1495.

6254. Person discharged not again imprisoned on same cause—Exception.

SEC. 29. No person who has been discharged by the order of the judge upon

a habeas corpus issued pursuant to the provisions of this act, shall be again imprisoned, restrained, or kept in custody for the same cause, except in the following cases: First—If he shall have been discharged from custody on a criminal charge, and be afterwards committed for the same offense by legal order or process. Second—If after a discharge for defect of proof, or for any defect of the process, warrant, or commitment, in a criminal case, the prisoner be again arrested on sufficient proof, and committed by legal process for the same offense.

Kerr, P. C., 1496.

6255. Warrant may issue, when, authorizing sheriff or constable to bring party.

SEC. 30. Whenever it shall appear by satisfactory proof, by affidavit, to any judge authorized by law to grant a writ of habeas corpus, that any one is illegally held in custody, confinement, or restraint, and that there is good reason to believe that such person will be carried out of the jurisdiction of such judge, before whom the application is made, or will suffer some irreparable injury before compliance with the writ of habeas corpus can be enforced, said judge may cause a warrant to be issued, reciting the facts, and directed to the sheriff or any constable of the county, commanding such officer to take such person thus held in custody, confinement, or restraint, and forthwith bring him or her before such judge, to be dealt with according to law.

Kerr, P. C., 1497.

6256. Idem—Arrest of restraining party.

SEC. 31. Such judge may also, if the same be deemed necessary, insert in such warrant a command for the apprehension of the person charged with such illegal detention and restraint.

Kerr, P. C., 1498.

6257. Idem—Execution of warrant.

SEC. 32. The officer to whom such warrant is delivered shall execute the same by bringing the person or persons therein named before the judge who may have directed the issuing of such warrant.

Kerr, P. C., 1499.

6258. Idem—Return to, traverse and hearing.

SEC. 33. The person alleged to have such party under illegal confinement or restraint may make return to such warrant, as in the case of a writ of habeas corpus, and the same may be denied, and like allegations, proofs, and trial, shall be thereon had as upon the return to a writ of habeas corpus.

Kerr, P. C., 1500.

6259. Idem—Discharge or remand.

SEC. 34. If such party be held under illegal restraint or custody, he or she shall be discharged, and if not, he or she shall be restored to the custody of the person entitled thereto, or left at liberty, as the case may require.

Kerr, P. C., 1501.

6260. Writ may issue on Sunday or nonjudicial day.

SEC. 35. Any writ or process authorized by this act may be issued and served on the first day of the week, commonly called Sunday, or any other nonjudicial day.

Kerr, P. C., 1502.

For list of nonjudicial days, see sec. 4870.

6261. Clerk to issue writs, warrants and process—When sealed—Service and return.

SEC. 36. All writs, warrants, processes, and subpenas, authorized by the

provisions of this act, shall be issued by the clerk of the court, and, except subpenas, sealed with the seal of the court, and shall be served and returned forthwith, unless the judge shall specify a particular time for any such return.

Kerr, P. C., 1503, 1504.

6262. Penalty for refusing to grant, or obedience to writ.

SEC. 37. If any judge, after a proper application is made, shall refuse to grant an order for a writ of habeas corpus, or if the officer or person to whom such writ may be directed shall refuse obedience to the command thereof, he or she shall forfeit and pay to the person aggrieved a sum not exceeding five thousand dollars, to be recovered by an action of debt in any court having cognizance thereof.

Kerr, P. C., 1505.

The writ of habeas corpus is guaranteed, except in case of rebellion or invasion, by the federal constitution (sec. 130) and the state constitution (sec. 234).

6263. Penalty for custodian disobeying or avoiding writ.

SEC. 38. Any person having in his custody or under his restraint or power any person for whose relief a writ of habeas corpus shall have been duly issued pursuant to the provisions of this act, who, with the intent to elude the service of such writ, or to avoid the effect thereof, shall transfer such person to the custody of another, or shall place him or her under the power or control of another or shall conceal or exchange the place of his or her confinement or restraint, or shall remove him or her without the jurisdiction of such judge, shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding five thousand dollars.

Kerr, P. C., 362-364.

6264. Idem—Accessories.

SEC. 39. Every person who shall knowingly aid or assist in the commission of any offense specified in the last preceding section, shall be deemed guilty of a misdemeanor, and punished as in the last preceding section mentioned.

6265. Further penalty, imprisonment.

SEC. 40. Every person convicted of any offense under the provisions of the last two preceding sections, in addition to the punishment therein mentioned, may be also imprisoned in the county jail for a term not exceeding two years.

CRIMES AND PUNISHMENTS

General act concerning crimes and punishments, sections 6266–6835.

Act making criminal the selling of liquor to habitual drunkards or dipsomaniacs, sections 6836–6838.

Act prohibiting the sale of liquor within five miles of construction camps, sections 6839–6841.

Act making it unlawful to allow minors to remain in saloons, section 6842.

Act making keepers of saloons and gambling houses liable in damages for giving liquor to minors or allowing minors to gamble, section 6843.

Act making superintendents and managers of electric light and water companies liable in damages for refusal to connect main wires and pipes, sections 6844–6846.

Act to prevent slavery or involuntary servitude except for the punishment of crime, sections 6848–6850.

Arrest in civil cases in district court, section 5087, et seq.
Arrest in civil cases in justice's court, section 5744, et seq.
Arrest in criminal cases, sections 6930–6951, et seq.
Contempts, sections 5394–5407.
Contempts punishable in justice's courts, sections 5794–5798.

Criminal practice act, sections 6851–7528.
District court has jurisdiction of criminal cases appealed from justice's court, sections 4840, 4848.
Grand juries under jurisdiction of district court, section 4848.
Habeas corpus, sections 6226–6265.
Indictment found and triable in district court, section 4848.
Judge of municipal or recorder's court as committing magistrate, section 4848.
Jurisdiction of public offenses, supreme court, sections 319, 4832, 4834; district courts, sections 321, 4840, 4848; justices' courts, sections 323, 4851; municipal or recorder's court, sections 316, 324, 4854; committing magistrates, section 6927, et seq.
Juvenile court law under jurisdiction of district court, section 729, et seq.
Prosecution and expenses on offenses by persons in or escaping from state prison, section 6820.
Trial and sentence for crimes committed by imprisoned person, sections 6818, 6819.

CONSTITUTIONAL PROVISIONS

Accused not to be compelled to be witness against himself, section 237; U. S. Const., section 175.
Appeal, legislature may prescribe methods, section 323.
Bail, excessive not to be required, section 235; U. S. Const., section 178.
Bail to be allowed, except when, section 236.
Bill of attainder not to be passed, section 244.
Charge to jury, how to be made, section 327.
Civil process suspended on election day, section 253.
Concurrent jurisdiction of district and justices' courts, section 323.
Counsel, right of accused to have, section 237, U. S. Const., section 178.
Court may state testimony and declare the law, section 327.
Due process and equal protection of law guaranteed, section 237; U. S. Const., sections 175, 185.
Extradition, U. S. Const., section 161.
Fines, excessive not to be imposed, section 235; U. S. Const., section 178.
Fines, governor may suspend collection of not exceeding sixty days, section 306.
Fines, remission of, section 307.
Freedom of speech and press, section 238.
Habeas corpus not to be suspended except in case of rebellion or invasion, section 234; U. S. Const., section 130.
Impeachment, chief justice and associate justices liable to, sections 335, 336.
Impeachment, district judges subject to, sections 335, 336.
Impeachment, powers of, conferred upon the legislature, section 334.
Impeachment proceedings in senate, chief justice to preside over, section 334.
Impeachments, sections 335, 336.
Impeachments, conviction on not pardonable, section 307.
Imprisonment for debt prohibited, except for fraud, libel or slander, section 243.
Indictment, trial by secured (resolution for amendment of state constitution pending), section 237; U. S. Const., section 175.
Information, resolutions of legislatures 1909, 1911, favoring amendment of constitution to allow prosecutions by, section 237.
Jeopardy, no person to be twice put in, section 237; U. S. Const., section 175.
Judges not to charge juries regarding matters of fact, but may state testimony and declare the law, section 327.
Judicial power of state in supreme court, district courts, justices of the peace and municipal courts, section 316.
Judicial power of the United States, U. S. Const., sections 119, 154.
Juries, how to be charged, section 327.
Juries, persons convicted of crime, or not electors, not to serve on, section 285.
Jurisdiction of public offenses, supreme court, section 319; district courts, section 321; justices' courts, section 323; municipal or recorder's court, sections 316, 324.
Jury trial secured, section 232; U. S. Const., sections 156, 176.
Libel, in civil and criminal actions for, truth may be given in evidence, section 238.
Libel, if true and justifiable jury may acquit, section 238.
Liberty guaranteed, section 230.
Militia fine, imprisonment for in time of peace prohibited, section 243.
Pardons, section 307.
Right of assembly and petition, section 238.
Search and seizure not to take place without oath and probable cause, section 247; U. S. Const., section 174.
Slavery prohibited except for crime, section 246; U. S. Const., section 183.
Style of process, "The State of Nevada," section 328.
Testimony, court may state, section 327.
Treason defined, two witnesses necessary, section 248; U. S. Const., section 157.
Treason, governor may suspend sentence until convening of legislature, section 306.
Treason not pardonable, section 307.

STATUTORY OFFENSES UNDER OTHER TITLES

Acknowledgments, failure to keep record of, section 1099.
Animals, diseased, bringing into state, section 2995.
Animals, diseased, sale of, section 2995.
Apiaries, spreading diseases among bees, section 481.
Apprentice, aiding or concealing runaway, sections 495, 496.
Assayer, failure to keep record of bullion purchased or transported, section 2485.
Assessor, failure to make returns of poll taxes, section 3726.
Assessor, giving false receipt, section 3684.
Assessor, making assessment contrary to state board, section 3809.
Assessor, misdemeanor in office, section 3681.
Assessor, neglect of duty, section 1574.
Assessor, refusing inspection of books by license and bullion tax agent, section 4245.
Attorney-general, refusal to perform duties, section 4134.
Automobiles, running for rent without license, section 3878.
Banks, banking board, violation of act, section 685.
Banks, certifying check when no funds in deposit, section 647.
Banks, credit, circulation of false reports concerning, section 661.
Banks, defrauding, section 648.
Banks, deposits, assent to reception of in failing, section 634.
Banks, deposits, receiving in failing, section 635.
Banks, examiners violation of bank act, section 685.
Banks, false oath by officials, perjury, section 660.
Banks, false reports, circulation of as to credit, section 661.
Banks, false statements by officials, section 631.
Banks, embezzlement of funds, section 648.
Banks, funds, misappropriation of, section 648.
Banks, loans indorsed by officials, section 632.
Banks, officials borrowing without approval of majority of directors, section 633.
Banks, officials transacting business after authority revoked, section 655.
Banks, time deposits, paying more than 4 per cent interest on, section 644.
Banks, violation of bank act, section 689.
Banks, wilful violation of banking act, section 645.
Bees, spreading diseases among, section 481.
Birth, altering certificate of, section 2972.
Birth, false certificate of, section 2987.
Birth, failure to record, section 2986.
Birth, failure to report, section 2972.
Board of examiners (county), neglect of duty, section 1551.
Board of examiners (state), failure to order examination of accounts, section 2858.
Board of pardons, false oath or affirmation before, section 7627.
Bonding company, false affidavit of stockholder, section 1244.
Bullion, purchaser failing to inquire concerning, or keep records, section 2485.
Bureau of industry, distributing unreliable literature, section 4494.
Children, contributory dependency and delinquency, sections 757–764.
Children, foreign corporations, placing, section 747.
Children, illegitimate, abandonment or neglect of, section 766.
Cigarettes and cigarette papers, selling or giving to minors, sections 3874, 3875.
City council, malfeasance in office, section 808.
City officers, interested in contracts, section 812.
City officers, refusing information to revenue examiners, section 983.
City officers, voting for excessive municipal tax, section 976.
City officers, voting for unlawful municipal indebtedness, section 981.
Constable, purchasing judgment, section 2821.
Contributory delinquency and dependency, sections 757–764.
Controller, malfeasance or misfeasance in office, section 4170.
Controller, receipts from, false affidavit as to loss of, section 4187.
Corporations, failure to report to secretary of state, officers and agents, section 1186.
Corporations, false entry by officer, sections 1176, 1235.
Corporations, false statements relative to, section 1174.
Corporations, refusing inspection or copy, sections 1176, 1235.
Corporations, officer destroying records, sections 1177, 1178.
Corporations, officer, receiving or possessing property unlawfully, sections 1177, 1178.
Corporations, officer keeping false records, sections 1177, 1178.
Corporations (mining), failure to maintain agent, section 1218.
County officers, refusing inspection to state auditor, section 4152.
County commissioners, failure to abate nuisance, section 1562.
County commissioners, failing to comply with act relative to storage of explosives, section 1947.
County commissioners, failure to investigate licensed business upon complaint, section 3638.

County commissioners, failure to order examination of accounts, sections 2858, 2859.
County commissioners, interested in contracts, section 1522.
County commissioners, voting indebtedness contrary to law, section 3834.
County commissioners, voting on contract extending beyond term of office, sections 1537, 1538.
County officers, office hours, failure to keep, section 1565.
County officers, refusing inspection to state auditor, section 4152.
County recorder, recording unlawful brand, section 2248.
County recorders, violating recorder's act, section 1638.
County surveyor, neglect of duty, section 1673.
Cruelty to animals, sections 1378–1380.
Dead body, burying without permit, section 2972.
Dead body, removal without permit, section 2972.
Death, failure to record, section 2986.
Death, false certificate of, section 2987.
Death certificate, altering of, section 2972.
Death certificate, carrier shipping without, section 2972.
Death certificate, physician failing to issue or issuing false, section 2972.
Dental examiners' act, violation of, section 4439.
Dentistry, practicing without license, section 4427.
Diseased meats, poultry and fish, sale of, section 2995.
Diseases, spreading among bees, section 481.
District recorders, violating recorder's act, section 1638.
District attorney, misfeasance or malfeasance in office, section 1606.
District attorney, nuisance, failure to abate, section 1562.
District attorney, partners opposing in same action, section 1611.
District attorney, taxes collected, failure to account for, section 3676.
Drugs, adulteration of, section 4511.
Drunkenness in office, sections 2861–2863.
Eight-hour day, top men of underground mine, section 1941.
Elections, aiding or abetting illegal registration, section 1718.
Elections, aiding, advising or assisting fraudulent voting, section 1827.
Elections, abstracting ballot lawfully polled, section 1826.
Elections, attempt to add additional ballot to those cast, section 1826.
Elections, attempting to vote twice or more, section 1827.
Elections, ballot or stub marking for identification, section 1859.
Elections, ballot paper, disclosing design or water mark, section 1859.
Elections, ballot paper, printing, furnishing or having possession of imitation, section 1859.
Elections, ballot, applying for at wrong precinct, section 1862.
Elections, ballot, elector delivering other than one received, section 1862.
Elections, ballot not to be shown or examined, section 1862.
Elections, ballot, placing identification mark on, section 1862.
Elections, ballot, receiving from other than clerk of election, section 1862.
Elections, ballot, receiving by person other than election board, section 1862.
Elections, ballot, removal from election place before closing polls, section 1862.
Elections, ballots, soliciting elector to show, section 1862.
Elections, cards of instruction, defacing or tearing down, section 1860.
Elections, certificate of nomination false, filing of, section 1859.
Elections, certificate of nomination, falsely making, section 1859.
Elections, certificate of nomination, fraudulently defacing or destroying, section 1859.
Elections, certificate of nomination, suppressing, section 1859.
Elections, candidate offering appointment as inducement, section 1829.
Elections, changing ballot after same has been deposited, section 1826.
Elections, communicating offer of appointment by candidate as inducement, section 1829.
Elections, destroying or attempting to destroy poll list, ballot or boxes, section 1826.
Elections, elector refusing to answer lawful questions of election board or be sworn, section 1825.
Elections, false swearing before registry agent, section 1719.
Elections, false swearing, unable to mark ballot, section 1859.
Elections, fraudulent voting, section 1826.
Elections, interfering with election officers to prevent lawful action, section 1826.
Elections, liquor, selling or giving away on election day, section 1830.
Elections, officer, wilful neglect of duty, section 1861.
Elections, officer of, attempting to influence votes, section 2814.
Elections, officer fraudulently obtaining or attempting to obtain information of ballot, section 1828.
Elections, officer opening folded ballot or attempting to obtain information thereof, section 1828.
Elections, officers failing or refusing to perform duty, section 1824.
Elections, person not entitled to, attempting to vote, section 1827.
Elections, primary, penal provisions of general election laws applicable to, section 1765.

Elections, primary, misconduct of officer in filing nomination paper, section 1765.
Elections, prompting voter upon examination for identification, section 1731.
Elections, registering illegally, section 1718.
Elections, returns, counterfeiting or substituting false for original, section 1828.
Elections, secretary of state or election officer, fraudulent or corrupt conduct of, section 2815.
Elections, secretary of state or election officer, wilful neglect of duty, section 2815.
Elections, supplies, removing or destroying, section 1860.
Elections, United States senator, paying or promising money or reward in aid of candidacy, section 1900.
Elections, voter, asking for whom he intends voting within 100 feet of polls, section 1862.
Elections, voting or attempting to vote illegally, section 1718.
Embalming, practicing without license, section 4451.
Embezzlement, of bank funds, section 648.
Emblems, illegal use or wrongful wearing of, section 2505.
Employee, hospital fees, unlawful to collect in certain cases, section 1943.
Employee, issuance of nonnegotiable paper to for wages, section 1939.
Escape of prisoner, permitting, section 1657.
Excavations, failure to protect, section 3236.
Explosives, commissioners failing to comply with act relative to storage, section 1947.
False statements, relative to corporations, section 1174.
Foreign building and loan association agent doing business contrary to law, section 1363.
Foreign building and loan association, soliciting business for unlicensed, section 1358.
Foreign corporations, doing business without authority, section 1350.
Foreign corporations, failure to file annual statement with assessor, section 1353.
Foreign corporations, failure to file copy of charter with recorder, section 1347.
Fish, catching otherwise than by hook and line, section 2061.
Fish, closed season, selling or possession during, section 2060.
Fish, closed season, violation of, section 2058.
Fish, excessive amount, unlawful to ship, section 2074.
Fish, ladders, dam-owners failing to provide, section 2048.
Fish, ladders, destruction or interference with, section 2049.
Fish, ladders, fishing within 100 feet of, sections 2049, 2066.
Fish, limit of catch, violation of, section 2065.
Fish, night fishing unlawful, section 2068.
Fish, pollution of streams, section 2047.
Fish, private hatchery act, violation of, section 2084.
Fish, selling or having, caught otherwise than by hook and line, section 2062.
Fish, transporting or offering for, for sale outside of state, section 2051.
Fish, United States reclamation dam, fishing within one mile thereof, section 2067.
Fish, undersized, catching or having, section 2063.
Fish, warden, failure to aid on command, section 2070.
Fish and game, license, failure to procure, section 2101.
Fish and game, license, refusing to exhibit or transferring, section 2108.
Forestry, cutting timber unlawfully, sections 2114–2116.
Forestry, young trees, selling or offering for sale, section 2118.
Game law, violation of, sections 2085, 2097, 2100.
Game, transporting or receiving for transportation, section 2113.
Glove contest act, violation of, section 3889.
Goats, permitting to run at large in towns or cities, section 2330.
Guideboards, on highways, failure to erect, defacing or destroying, section 3028.
Health, quarantine, failure to observe, sections 2999, 3000.
Health officer, neglect of duty, section 2972.
Highways, driving diseased or infected animals on, sections 2266, 2268.
Highways, guideboards, defacing or destroying, section 3208.
Highways, guideboards, failure to erect, section 3028.
Highways, obstruction of, section 3009.
Hoisting machinery, operation without license, section 3904.
Horses, false certificate of sheriff, section 2294.
Horses, furnishing false pedigree of, section 2287.
Horses, pedigree, failure to keep posted, section 2288.
Horses, receiving for transportation out of state without inspection, sections 2289–2291.
Horses, removing out of state without inspection, section 2295.
Horses, shipping out of state without inspection, section 2290.
Houses of prostitution, within 800 yards of school, section 3457.
Illegitimate child, abandonment or neglect of, section 766.
Insurance company doing certain business without authority, section 1309.
Insurance company, doing business after certificate revoked, sections 1270, 1274.
Insurance company, doing business without a license, section 1280.
Insurance company, failure to file annual statement, doing business upon, sections 1327, 1328.

Insurance company, false affidavit relative to death or disability deemed perjury, section 1317.
Insurance company, false statement to annual report, perjury, sections 1317, 1328.
Insurance company, violation of act, section 1283.
Jailer, failure to make return to commissioners, section 7607.
Jailer, permitting escape, section 1657.
Justice of the peace, neglect of duty relative to estrays, sections 2277, 2279.
Justice of the peace, purchasing judgment, sections 2821.
Labor, eights hours for top men of underground mine, section 1941.
Laborers, false advertising or deception to change from one place to another, section 1936.
Labor, public works, violation of act concerning, section 3482.
License, auctioneer doing business without, section 3895.
License, automobiles for rent, running without, section 3878.
License, bogus, possession or delivery of, section 3744.
License, doing business without, section 3737.
License, failure to deliver on receipt of payment, section 3744.
License, forfeited, failure of officers to enforce, section 3871.
License, insurance company doing business without, section 1280.
License, itinerant peddler doing business without, section 3895.
License, peddling without, section 3735.
License, revoked, doing business after, section 3870.
License, state liquor, violation of, section 3784.
License and bullion tax agent, refusing inspection to, sections 4243–4246.
Liquors, selling or giving away on election day, section 1830.
Marriage, ceremony by unauthorized person, section 2348.
Marriage, certificate of, failure to deliver or record, section 2346.
Marriage, false certificate of, section 2347.
Marriage, legal impediment, when known exists, section 2348.
Malfeasance in office, mayor and councilmen, section 808.
Mayor of city, malfeasance in office, section 808.
Medicine, issuing false certificate to practice, section 2373.
Medicine, practicing without license, section 2371.
Merchandise, sale of, in violation of bulk act, section 3910.
Mines, excessive number riding in cages, section 4235.
Mines, inspector act, noncompliance with, section 4238.
Mines, proceeds of, false oath concerning, section 3690.
Mines, using metal tamping bar in, section 4212.
Mining, district recorder violating duty, sections 2455, 2468, 2474.
Mining company, failure to comply with act requiring annual statements, sections 1336–1340.
Mining corporations, failure to maintain agent, section 1218.
Mine owner, refusing inspection of books to license and bullion tax agent, section 4246.
Minors, selling or giving cigarettes or papers to, sections 3874, 3875.
Mortgage, satisfaction of, false affidavit, section 3755.
Municipal indebtedness, unlawful, voting for, section 981.
Municipal officers, refusing inspection of finances, section 983.
Municipal tax, excessive, voting for, section 976.
Mutual fire insurance company, violation of act, section 1295.
Newspapers, defacing or abstracting from recorder's office, section 1642.
Notary public, wilful violation of duty, section 2756.
Nuisance, failure to abate, section 1562.
Officer, granting authority to perform duties, section 2822.
Officer of revenue, selling or dealing in scrip, sections 2824, 2825.
Optometry, violation of act concerning, section 2896.
Pauper, bringing into state, section 2928.
Paupers, bringing or leaving in county, section 2925.
Peddling without license, section 3735.
Perjury, before registry agent, section 1719.
Perjury, by bank officials, section 660.
Perjury, false affidavit as to taxes or satisfaction of mortgage, section 3755.
Perjury, false affidavit of loss of receipts received from controller, section 4187.
Perjury, false oath as to proceeds of mines, section 3690.
Perjury, false oath by official of public utility, section 4513.
Perjury, false oath or affirmation before board of pardons, section 7627.
Perjury, false oath or list of taxable property, section 3630.
Perjury, false statement to amend report of insurance company, section 1328.
Perjury, false affidavit to insurance company relative to death or disability, section 1317.
Physician, failing to issue death certificate, section 2972.
Physician, false impersonation of, section 2372.
Physician, issuing false death certificate, section 2972.
Prisoners, inhumanity to, section 2818.

Public administrator, misdemeanor in office, section 1621.
Public works, labor on, violation of act regulating, section 3482.
Pure food and drug act, adulteration of foods, drugs or liquors, section 3486.
Pure food and drug act, misbranding of foods, drugs or liquors, section 3486.
Pure food and drug act, refusing information to agent, section 3502.
Pure food and drug act, refusing to sell samples, section 3502.
Pure food and drug act, violation of general provisions, section 3508.
Pharmacy, adulteration of drugs, section 4511.
Pharmacy, compounding drugs without license, section 4513.
Pharmacy, poisons, retailing without label, section 4512.
Pharmacy, presenting fraudulent diploma of, section 4500.
Pharmacy, practicing without license, section 4509.
Poll tax, issuing fraudulent receipt for, sections 3714–3717.
Public utility, books, failure to produce, section 4529.
Public utility, books and papers, witness refusing to exhibit, section 4537.
Public utility, failure to report to commission, section 4522.
Public utility, false oath by official, section 4513.
Public utility, violation of general provisions, section 4542.
Quarantine, failure to observe, sections 2999, 3000.
Railroads, confining stock over thirty-six hours, sections 3572, 3585.
Railroads, excavating under, section 3565.
Railroads, failure to give notice of live stock killed, section 3600.
Railroads, failure to make returns or exhibit books and papers, section 4575.
Railroads, failure to ring bell at crossing, section 3552.
Railroads, full crew act, violation of, sections 3591, 3594.
Railroads, general penal provisions concerning, section 4576.
Railroads, general provisions, violation of, section 3581.
Railroads, granting rebates, drawbacks, etc., section 3581.
Railroads, sheep, transporting without health certificate, section 2309.
Railroads, injury to property of, section 3565.
Railroads, intoxication of engineer or conductor, section 3564.
Railroads, officer making false report, section 3567.
Railroads, passes, issuance or acceptance of, section 4573.
Railroads, rebates, discrimination, false devices by, sections 4570–4572.
Railroads, telegraph operators working over eight hours, section 3597.
Recorder's office, newspapers, abstracting or defacing, section 1642.
Records, refusal to deliver to proper custodian, section 2819.
Records, stealing, altering or defacing, section 2817.
Registry agent, refusal to perform duties, sections 1712, 1719.
Revenue and taxes, assessor failing to assess as directed by state board, section 2809.
Revenue and taxes, assessor, misdemeanor in office, section 3681.
Revenue and taxes, district attorney failing to account, section 3676.
Revenue and taxes, stock evading or attempting to evade tax on, section 3856.
Revenue and taxes, false affidavit as to, section 3755.
Revenue and taxes, false oath or list of property, section 3630.
Revenue and taxes, mine owner refusing access to books, sections 3691, 3694.
Revenue and taxes, officers violating official duty, section 3751.
Revenue and taxes, poll taxes, assessor failing to make return of, section 3726.
Revenue and taxes, poll-tax receipt, issuing fraudulent, sections 3414–3417.
Revenue and taxes, proceeds of mines, false oath concerning, section 3690.
Revenue and taxes, refusing information relative to poll tax, section 3720.
Revenue and taxes, refusing statement to assessor, section 3624.
Revenue and taxes, stock herding or grazing without certificate, sections 3857, 3858.
Revenue and taxes, transient stock, revenue officers neglecting, section 3859.
Revenue officers, negligence relative to transient stock, section 3859.
Salaried officers, neglect to pay over fees, section 1698.
School books, overcharge for, section 3412.
Schools, distributing of, section 3453.
Schools, false statement of age or attendance of pupil, section 3450.
Schools, election law, violation of, sections 3294, 3296.
Schools, houses of prostitution located within eight hundred yards of, section 3457.
Schools, interfering with pupils, section 3452.
Schools, property of, injuring or defacing, section 3455.
Schools, supply act, violation of, section 3472.
Schools, truancy, encouraging of, section 3449.
Schools, truancy, parent failing to prevent, section 3435.
Sheep, bringing into state without inspection, sections 2300, 2301.
Sheep, herder refusing information to inspector, section 2306.
Sheep, herding or grazing within three miles of town or village, sections 2317, 2318.

Sheep, infected, exposing or permitting to run at large, section 2310.
Sheep, infected, failure to dip, section 2302.
Sheep, inspector permitting removal without examination, section 2304.
Sheep, owner failing to report infected to inspector, section 2305.
Sheep, permitting to run at large in towns or cities, section 2330.
Sheep, railroads transporting without health certificate, section 2309.
Sheep, removing from county to county without traveling permit, section 2308.
Sheep, inspection act, violation of, section 4602.
Sheriff, failure to enforce itinerant peddler act, section 3895.
Sheriff, false certificate relative to horses shipped out of state, section 2394.
Sheriff, illegal fees, charging of, section 1654.
Sheriff, permitting escape, section 1657.
State and county indebtedness, purchase of by officials, section 2825.
State board of examiners, failure to order examination of accounts, sections 2858, 2859.
State library, injury to property of, section 3950.
State library, books, failure to return, section 3950.
State liquor license, violation of act concerning, section 3784.
State militia, encampment, failure to attend, section 4038.
State militia, insulting officers or members, section 4083.
State militia, obstructing, section 4082.
State militia, property of, unlawful retention, sections 4025, 4035, 4052.
State police, absence without leave, section 4286.
State police, falsely impersonating or wearing badge of, section 4291.
State police, molestation of in discharge of duty, section 4291.
State police, refusal to aid on command, section 4290.
State veterinarian, violation of act concerning, section 4388.
Stationary engine, operating without license, section 3904.
Stock, branding in same place as previous brand, section 2247.
Stock, confinement on railroads over thirty-six hours, sections 3572, 3585.
Stock, driving diseased or infected animal on public highway, sections 2266, 2268.
Stock, driving or attempting to drive out of state to evade tax, section 3856.
Stock, dying of contagious disease, failure to burn, sections 2272, 2273.
Stock, estrays, failure to give notice of, sections 2274, 2279.
Stock, herding or grazing without revenue certificate, sections 3857, 3858.
Stock, marking by removing more than one-half of ear, section 2240.
Stock, mismarking or misbranding not one's own, section 2242.
Stock, permitting to run at large in towns or cities, sections 2263, 2265.
Stock, recording similar brand to one already recorded, section 2248.
Stock, quarantine, violation of, section 2271.
Streams, pollution of, section 2047.
Swine, permitting to run at large in towns or cities, section 2330.
Telegraph message, altering or divulging, section 4603.
Telegraph, bribery of operator, officer or employee, section 4609.
Telegraph, company's private mark or design, unlawful use of, section 4619.
Telegraph message, transmitting false or forged, section 4604.
Telegraph, injury to or obstruction of line, section 4610.
Telegraph message, larceny of, section 4608.
Telegraph, officer or employee using information obtained, section 4605.
Telegraph message, opening unlawfully, section 4607.
Telegraph, operators for railroads working over eight hours, section 3597.
Telegraph message, sending out of order or unreasonably delaying, section 4606.
Timber, cutting unlawfully, sections 2114–2116.
Timber, young trees, selling or offering for sale, section 2118.
Towns and cities, officer failing to enforce act relative to stock running at large, section 2265.
Trade mark, counterfeiting of, section 4637.
Underground mine, eight-hour day for top men, section 1941.
Underground mine, surface employees, sections 1941, 1942.
Union label, counterfeiting of, section 4637.
United States senator, paying or promising money or reward in aid of candidacy for, section 1900.
Water, claimant failing to make statement to state engineer within ninety days, section 4687.
Water, pollution of streams, section 4720.
Water, resisting or interfering with state engineer or water officers, section 4704.
Water, users of, failing to install head gate or weir, section 4709.
Water, waste, unlawful diversion of, section 4722.
Weights and measures act, obstructing sealer or deputy, section 4817.
Weights and measures act, sealer or deputy, neglect of duty, section 4819.
Weights and measures act, violation of, section 4812.

An Act concerning crimes and punishments, and repealing certain acts relating thereto.

Approved March 17, 1911; effective January 1, 1912

Chapter 1—Classification of crimes, section 6266.

Chapter 2—Persons liable to punishment, sections 6267–6272.

Chapter 3—Parties to crimes, sections 6273–6276.

Chapter 4—Rights and privileges of defendants, sections 6277–6282.

Chapter 5—Punishments for offenses not otherwise fixed, sections 6283–6289.

Chapter 6—Convictions for attempts and lesser degrees, sections 6290, 6291.

Chapter 7—Habitual criminals—Prevention of procreation, sections 6292, 6293.

Chapter 8—Definitions—Construction—Impeachments—Common law—Contempts—Miscellaneous, sections 6294–6302.

Chapter 9—Imprisonment on more than one conviction—Acts punishable under foreign law—Contempts punishable as crimes—Sending letter, when complete, and venue, sections 6303–6307.

Chapter 10—Crimes against the sovereignty of the state, sections 6308–6310.

Chapter 11—Crimes by or against public officers—Jurors—Witnesses—Records, sections 6311–6349.

Chapter 12—Crimes and offenses against public justice, sections 6350–6378.

Chapter 13—Crimes against the person, sections 6379–6441.

Chapter 14—Crimes against morality and decency, sections 6442–6528.

Chapter 15—Crimes against public health, sections 6529–6560.

Chapter 16—Crimes against public safety, sections 6561–6591.

Chapter 17—Crimes against public peace, sections 6592–6618.

Chapter 18—Vagrancy, sections 6619–6623.

Chapter 19—Arson—Forest and negligent fires, sections 6624–6633.

Chapter 20—Burglary, sections 6634–6637.

Chapter 21—Larceny—Altering brands—Driving away animals, sections 6638–6652.

Chapter 22—Embezzlement—Retention or payment of public money, sections 6653–6662.

Chapter 23—Forgery and counterfeiting, sections 6663–6694.

Chapter 24—Fraudulent and kindred crimes, sections 6695–6740.

Chapter 25—Miscellaneous crimes against property, sections 6741–6777.

Chapter 26—Crimes by or against employer or employee, sections 6778–6801.

Chapter 27—Corrupting electors—Wrongful exercise of power—Obstructing officer—Oppression under color of office—Vending without license—Killing birds—Cruelty to animals—Offenses by imprisoned persons—Extortion—Employment of children—Common-law and miscellaneous crimes, sections 6802–6830.

Chapter 28—On repeal, sections 6831–6834.

CHAPTER 1

6266. Classification of crimes.

SECTION 1. A crime is an act or omission forbidden by law and punishable upon conviction by death, imprisonment, fine or other penal discipline. Every crime which may be punished by death or by imprisonment in the state prison is a felony. Every crime punishable by a fine of not more than five hundred dollars, or by imprisonment in a county jail for not more than six months, is a misdemeanor. Every other crime is a gross misdemeanor.

The act supplementary to an act entitled "An act concerning crimes and punishments, approved November 26, 1861," does, in its title, express the subject embraced therein as required by Const., sec. 275, ante. State v. Davis, 14 Nev. 439, 442 (33 A. R. 563).

CHAPTER 2

PERSONS LIABLE TO PUNISHMENT

6267. Persons punishable.
6268. Persons capable of committing crime—Exceptions.
6269. Who considered of sound mind.
6270. Indians amenable to criminal law.
6271. Must be union of act and intention.
6272. Intent, how manifested.

6267. Persons punishable.

SEC. 2. The following persons, except as provided in the next section, are liable to punishment:

1. A person who commits in the state any crime, in whole or in part.

2. A person who commits out of the state any act which, if committed within it, would be larceny, and is afterwards found in the state with any of the stolen property.

3. A person who, being out of the state, counsels, causes, procures, aids or abets another to commit a crime in this state.

4. A person who, being out of the state, abducts or kidnaps, by force or fraud, any person, contrary to the laws of the place where the act is committed, and brings, sends or conveys such person into this state.

5. A person who commits an act without the state which affects persons or property within the state, or the public health, morals or decency of the state, which, if committed within the state, would be a crime.

6268. All persons capable of committing crime, except following.

SEC. 3. All persons are liable to punishment except those belonging to the following classes:

1. Children under the age of eight years;

2. Children between the ages of eight years and fourteen years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness;

3. Idiots;

4. Lunatics and insane persons;

5. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent, where a specific intent is required to constitute the offense.

6. Persons who committed the act charged without being conscious thereof.

7. Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence;

8. Married women, unless the crime be punishable with death, acting under the threats, command, or coercion of their husbands; *provided*, it appear, from all the facts and circumstances of the case, that violent threats, command, or coercion were used;

9. Persons, unless the crime be punishable with death, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered if they refused, or that they would suffer great bodily harm.

Proceedings against defendants over 18 and under 21 years of age, see sec. 737.

6269. Who considered of sound mind.

SEC. 4. A person shall be considered of sound mind who is neither an idiot or lunatic, or affected with insanity, and who has arrived at the age of fourteen years, or before that age, if such person knew the distinction between good and evil.

Opinion of witnesses, not experts, as to the sanity of a defendant is admissible in evidence if the witnesses have had sufficient observation to enable them to form a belief upon the question, without giving in detail the facts upon which their opinions are based. State v. Lewis, 20 Nev. 333 (22 P. 241).

The real question to be determined by the jury is as to defendant's sanity or insanity, at the time of the homicide. Testimony as to condition of mind at times previous and subsequent thereto is admissible solely upon the ground that it tends to show the mental condition at the time of the homicide. Idem.

A person who had known accused for four months, had seen him every day during that

time, had sat at the same table and eaten with him once or twice, had observed his manner of speech and conversation, had seen him in the evening and night before the homicide, and had considerable conversation with him on the day after, is a competent witness as to sanity of accused. Idem.

The instructions of the court to the effect that if the defendant has capacity and reason sufficient to enable him to distinguish right from wrong as to the particular act in question and has knowledge and consciousness that the act he is doing is wrong and will deserve punishment, he is, in the eye of the law, of sound mind and memory, and should be held responsible for his acts. Held, correct. Idem.

The court instructed the jury that the defendant "is presumed to be sane until the contrary is shown, and a doubt upon this question alone should not acquit, for insanity is an affirmative proposition, and the burden of proving it is upon the defense." Held, correct. Idem.

Insanity as a defense to crime must be established by a preponderance of evidence. Idem.

The court instructed the jury that "an insane delusion is an incorrigible belief, not the result of reasoning, in the existence of facts which are either impossible absolutely or are impossible under the circumstances of the individual," etc. Held, correct. Idem.

The court instructed the jury that "when the person labors under a partial delusion only, and is not in other respects insane—that is, not insane upon all subjects—he must be considered in the same situation as to responsibility as if the facts, with regard to which the delusion exists, were real." Held, correct. Idem.

See State v. Petty, 32 Nev. 384 (108 P. 934); State v. Casey, 33 Nev.— (117 P. 5).

6270. Indians amenable to criminal law.

SEC. 5. All the laws of this state concerning crimes and punishments, or applicable thereto, are extended to and over all Indians in this state, whether such Indians be on or off an Indian reservation, and all of said laws are hereby declared to be applicable to all crimes committed by Indians within this state, whether committed on or off an Indian reservation, save and except an offense committed upon an Indian reservation by one Indian against the person or property of another Indian.

An Indian on trial for crime is subject to the same laws as govern in the case of a white man. State v. Johnny, 29 Nev. 203 (87 P. 3).

It is not necessary for the indictment against one Indian for an offense against another to charge, or that the state prove, that the offense was committed off a reservation, since it is not necessary that a state prosecution negative the federal jurisdiction, nor for the state to prove more than that the offense was committed within the county. State v. Buckaroo Jack, 30 Nev. 326 (96 P. 497).

That a homicide occurred at a house about a quarter of a mile from an Indian day school is insufficient to show that it occurred on a reservation. Idem.

The burden is on an Indian, accused by the state of an offense against another Indian, to show that the offense was committed on a reservation, so as to give the federal courts exclusive jurisdiction, under the above section and the act of Congress (23 Stats. U. S. 385, sec. 9), excepting in cases where judicial notice will be taken of the existence of the reservation. Idem.

See State v. McKinney, 18 Nev. 182 (2 P. 171).

6271. Must be union of act and intention.

SEC. 6. In every crime or public offense, there must exist a union or joint operation of act and intention, or criminal negligence.

It is the character of the weapon and the manner in which it is used (not the purpose for which it is carried), taken in connection with the facts and circumstances of the assault, that indicates the intention of the defendant. State v. Davis, 14 Nev. 407.

The defendant in a criminal case has a right to have the jury consider declarations in his favor made by him at the trial, when a witness, in connection with his actions and words at the time of the commission of the alleged offense. It cannot be said as a fact in every case, or as a rule of law in any, that if a defendant's actions, when considered by themselves alone, are inconsistent with the declared intent, it is safer to draw a conclusion from his actions than from his sworn statement as a witness. State v. Maynard, 19 Nev. 285 (9 P. 514).

See State v. Ward, 19 Nev. 297 (10 P. 133).

An intent to murder cannot be conclusively inferred from the mere use of a deadly weapon; and an instruction to the jury to that effect in a murder trial, is error. When a deadly weapon is used in a manner likely to produce death, and death results, the presumptions are that the person used it intending to kill, and that such intent is a malicious one, but neither presumption is conclusive. An intent to take life is an essential element in the commission of a murder in the first degree, except where it is committed in the perpetration or attempt to perpetrate arson, rape, rob-

bery or burglary. State v. Newton, 4 Nev. 410.

See State v. Marks, 15 Nev. 33.

Where a specific intent is required by statute to constitute a crime, such specific intent enters into the nature of the act itself, and must be alleged and proved beyond a reasonable doubt. When the statute forbids the doing of a certain thing and is silent concerning the intent with which it is done, a person who does the forbidden act is not guiltless because he has no wrongful intent beyond that which is involved in the doing of the prohibited act. (State v. Gardner, 5 Nev. 377, overruled). State v. Zichfield, 23 Nev. 304, 94 P. 221, 62 A. S. 800, 34 L. R. A. 784.

To constitute the crime of burglary, it is just as essential to prove the intent as it is to prove the entry. State v. Cowell, 12 Nev. 337; State v. Ryan, 12 Nev. 401.

Where the assault is made in a manner calculated to produce death, the law presumes an intent to kill, and the burden of showing facts in justification or mitigation are thrown upon the defendant. Where an act in itself indifferent becomes criminal if done with a particular intent, then the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and, in failure thereof, the law implies a criminal intent unless the proof on the part of the prosecution sufficiently manifests that the accused was justified or excused in committing the assault. State v. Marks, 15 Nev. 33.

The wrongful intent being a necessary ingredient of the crime of receiving stolen goods, such intent must exist at the time of the buying or receiving of such stolen goods. State v. Pray, 30 Nev. 206 (94 P. 218).

Where a specific intent is a material element of an offense, it need not be proved by positive and direct evidence, but may be inferred from the conduct of the parties and other facts and circumstances disclosed by the evidence. State v. Thompson, 31 Nev. 209 (101 P. 557).

In a prosecution for extortion, evidence of similar offense committed about the same time is admissible to show intent. State v. Vertrees, 33 Nev. — (112 P. 42).

In a prosecution for escape, evidence to establish the acts of accused in making the attempted escape as charged in the indictment are admissible to prove his criminal intent, as the logical deduction is that a person intended to do what he did. State v. Clarke, 32 Nev. 145 (104 P. 593).

The crime of assault with intent to kill consists of two essential elements, the act of the assaulter, and the intent; and to convict one of this crime it is necessary that the intent to kill must be alleged and proved beyond a reasonable doubt. State v. Rodriguez, 31 Nev. 342 (102 P. 863).

6272. Intent, how manifested.

SEC. 7. Intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused.

An intent with which a person charged with embezzlement appropriates property to his own use, is a question of fact to be determined from the evidence in the particular case. State v. Trolson, 21 Nev. 419 (32 P. 930).

CHAPTER 3

PARTIES TO CRIMES

6273. Classified as principals and accessories.
6274. Principal defined.
6275. Accessory defined.
6276. Trial and punishment of accessories.

6273. Classified as principals and accessories.

SEC. 8. Parties to crimes are classified as:

1. Principals; and,
2. Accessories.

A feigned accomplice may not be an accessory. State v. Douglas, 26 Nev. 196 (99 A. S. 688, 65 P. 802); State v. Smith, 33 Nev.— (117 P. 19).

6274. Principal defined.

SEC. 9. Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured,

could not or did not entertain a criminal intent, shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing, or procuring him.

See secs. 7071, 7180.

An accessory before the fact to a crime, though not present and in fact out of the state at its commission, may be proceeded against in all respects as a principal. State v. Chapman, 6 Nev. 320.

See, also, State v. Hamilton, 13 Nev. 386.

Where a question is presented as to the sufficiency of the evidence to corroborate that of an accomplice, the question is one as to the character of the evidence, and not as to its weight. State v. Chapman, 6 Nev. 320.

It is not essential to the conviction of an accessory to first prove the guilt of the principal; it is only necessary to show that a crime has been committed and that the defendant aided and assisted or advised or encouraged it. State v. Jones, 7 Nev. 408.

Proof of the possession of the subject of a larceny is sufficient to corroborate the direct testimony of an accomplice. Where several confederates act in pursuance of a common plan in the commission of an offense, all are held to be present where the offense is committed and all are principals. State v. Hamilton, 13 Nev. 386.

Evidence that the defendant came with the robbers, left when they left, was present at the robbery and apparently acquiesced therein, held sufficient to justify a conviction. State v. O'Keefe, 23 Nev. 127 (62 A. S. 768, 43 P. 918).

An accomplice is not incompetent to give testimony, but the weight thereof is for the jury, under proper instructions subject to the restriction that a conviction cannot be had on the uncorroborated testimony of such accomplice. State v. Douglas, 26 Nev. 196 (99 A. S. 688, 65 P. 802).

Where there is no testimony of an accomplice, an instruction referring to such testimony is properly refused. State v. Burns, 27 Nev. 290 (74 P. 983).

Where a husband and wife were jointly tried for the crime of extortion and the evidence tended to show that the wife was an accessory before the fact, acts and declarations made by her in the consummation of the wrongful act are admissible against the husband. State v. Vertrees, 33 Nev. — (112 P. 42).

In a prosecution for larceny of ore, statements of an accomplice relating in part to the taking of the ore and its division according to agreement were admissible in evidence. A statement of an accomplice who conspired with accused to steal ore that he had made thousands of dollars for accused was inadmissible, it not appearing that the statement related to the conspiracy. A statement made by a conspirator after the conspiracy is ended is not admissible against a conspirator. State v. Smith, 33 Nev. — (117 P. 19); State v. Johnson, 16 Nev. 36.

See Ex Parte Smith, 34 Nev. — (111 P. 131, 938); State v. Mangana, 34 Nev. — (112 P. 698).

A statement made by one defendant, upon his preliminary examination, tending to exculpate himself and inculpate his codefendant, is inadmissible against any one but himself. State v. Soule, 14 Nev. 453.

After the death of the deceased, each of the defendants made statements in regard to the homicide, exculpating himself, and imputing the crime to the other. These statements were offered by the prosecution, and admitted by the court, to be considered by the jury as evidence only against the party making them: Held, that the respective statements were admissible for that purpose; that the prejudice resulting to the defendants, from their mutual recriminations, was an unavoidable evil, necessarily incident to their joint trial. State v. McLane, 15 Nev. 345.

The evidence to corroborate the testimony of an accomplice is sufficient if it tends to connect the defendant with the commission of the offense. State v. Lewis, 20 Nev. 333 (22 P. 241).

6275. Accessory defined.

SEC. 10. Every person not standing in the relation of husband or wife, brother or sister, parent or grandparent, child or grandchild, to the offender, who after the commission of a felony shall harbor, conceal or aid such offender with intent that he may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a felony or is liable to arrest, is an accessory to the felony.

See note to sec. 6274.

6276. Trial and punishment of accessories.

SEC. 11. Every accessory to a felony may be indicted, tried and convicted either in the county where he became an accessory, or where the principal felony was committed; and whether the principal offender has or has not been convicted, or is or is not amenable to justice, or has been pardoned or otherwise discharged after conviction; and, except where a different

punishment is specially provided by law, such accessory shall be punished by imprisonment in the state prison for not less than one year nor more than five years, or by a fine of not more than one thousand dollars, or by both.

CHAPTER 4

RIGHTS AND PRIVILEGES OF DEFENDANTS

6277. Presumption of innocence—Conviction of lowest degree, when.
6278. Convicts protected—Forfeitures abolished.
6279. Foreign conviction or acquittal.
6280. Conviction or acquittal in other county.
6281. Omission, when not punishable.
6282. Intoxication, when it may be considered in mitigation of offense.

6277. Presumption of innocence—Conviction of lowest degree, when.

SEC. 12. Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against him, and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest.

6278. Convicts protected—Forfeitures abolished.

SEC. 13. Every person sentenced to imprisonment in any penal institution shall be under the protection of the law, and any unauthorized injury to his person shall be punished in the same manner as if he were not so convicted or sentenced. A conviction of crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein. All forfeitures in the nature of deodands, or in case of suicide or where a person flees from justice, are abolished.

6279. Foreign conviction or acquittal.

SEC. 14. Whenever, upon the trial of any person for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted upon the merits, upon a criminal prosecution under the laws of such state or country, founded upon the act or omission with respect to which he is upon trial, such former acquittal or conviction is a sufficient defense.

6280. Conviction or acquittal in other county.

SEC. 15. Whenever, upon the trial of any person for a crime, it shall appear that the defendant has already been acquitted or convicted upon the merits, of the same crime, in a court having jurisdiction of such offense in another county of this state, such former acquittal or conviction is a sufficient defense.

6281. Omission, when not punishable.

SEC. 16. No person shall be punished for an omission to perform an act when such act has been performed by another acting in his behalf, and competent to perform it.

6282. Intoxication, when it may be considered in mitigation of offense.

SEC. 17. No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such purpose, motive or intent.

On a trial for murder instructions that drunkenness can only be considered for the purpose of determining the degree of the crime, and for this purpose must be received with great caution; that presumptively every killing is murder; that in cases of

premeditated murder the fact of drunkenness is immaterial; that the jury must discriminate between the condition of mind merely excited by intoxicating drink and yet capable of forming a deliberate intent to take life, and such a prostration of the faculties as renders a man incapable of forming the intent; that the evidence must convince the jury that the deliberate premeditated design to murder was intentionally formed; that, in considering whether such a design was formed, the jury must consider the evidence of drunkenness, and, if accused was too much intoxicated to form such a deliberate and premeditated purpose, he cannot be found guilty of murder in the first degree, correctly states the law on the defense of drunkenness. State v. Johnny, 29 Nev. 203 (87 P. 3).

See State v. O'Connor, 11 Nev. 416; State v. Thompson, 12 Nev. 140; State v. Casey, 33 Nev. — (117 P. 5).

CHAPTER 5

PUNISHMENTS FOR OFFENSES NOT OTHERWISE FIXED

6283. Punishment of felony when not fixed by statute.
6284. Punishment of gross misdemeanor when not fixed by statute.
6285. Punishment of misdemeanor when not fixed by statute.
6286. Penalty for misdemeanor by corporations when not fixed by statute.
6287. Conviction of public officer forfeits trust.
6288. Prohibited acts are misdemeanors.
6289. Failure of duty by public officer a misdemeanor.

6283. Punishment of felony when not fixed by statute.

SEC. 18. Every person convicted of a felony for which no punishment is specially prescribed by any statutory provision in force at the time of conviction and sentence, shall be punished by imprisonment in the state prison for not less than one year or more than ten years, or by a fine of not less than five hundred dollars or more than five thousand dollars, or by both.

6284. Punishment of gross misdemeanor when not fixed by statute.

SEC. 19. Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not less than six months or more than one year, or by a fine of not less than five hundred dollars or more than one thousand dollars, or by both.

6285. Punishment of misdemeanor when not fixed by statute.

SEC. 20. Every person convicted of a misdemeanor for which no punishment is prescribed by any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than six months, or by a fine of not more than five hundred dollars, or by both.

6286. Penalty for misdemeanor by corporations when not fixed by statute.

SEC. 21. In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable as for a misdemeanor, and there is no other punishment prescribed by law, such corporation is punishable by a fine not exceeding five hundred dollars.

6287. Conviction of public officer forfeits trust.

SEC. 22. The conviction of a public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his office, and shall disqualify him from ever afterwards holding any public office in this state.

6288. Prohibited acts are misdemeanors.

SEC. 23. Whenever the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the committing of such act shall be a misdemeanor.

6289. Failure of duty by public officer a misdemeanor.

SEC. 24. Whenever any duty is enjoined by law upon any public officer or

other person holding any public trust or employment, their wilful neglect to perform such duty, except where otherwise specially provided for, shall be a misdemeanor.

CHAPTER 6

CONVICTIONS FOR ATTEMPTS AND LESSER DEGREES

6290. Conviction of lesser crime.

SEC. 25. Upon the trial of an indictment, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

See sec. 7219.

See State v. Gray, 19 Nev. 213 (8 P. 456); State v. Brannan, 3 Nev. 238; State v. Pickett, 11 Nev. 255; State v. Thompson, 31 Nev. 209 (117 P. 17).

Where a defendant is indicted for murder, the jury may, in proper cases, return a verdict of involuntary manslaughter. Gibson v. Somers, District Judge, 31 Nev. 531 (103 P. 1073).

6291. Attempts, how punished.

SEC. 26. An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime; and every person who attempts to commit a crime, unless otherwise prescribed by statute, shall be punished as follows:

1. If the crime attempted is punishable by death or life imprisonment, the person convicted of the attempt shall be punished by imprisonment in the state prison for not more than twenty years;

2. In every other case he shall be punished by imprisonment in such manner as may be prescribed for the commission of the completed offense, for not more than half the longest term, or by a fine of not more than half the largest sum, prescribed upon conviction for the commission of the offense attempted, or by both such fine and imprisonment; but nothing herein shall protect a person who, in an unsuccessful attempt to commit one crime, does commit another and different one, from the punishment prescribed for the crime actually committed; and a person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court in its discretion shall discharge the jury and direct the defendant to be tried for the crime itself.

See secs. 6271, 6272.

An attempt to commit a crime contains three elements—the intent, the performance of the act toward its commission, and failure of consummation. State v. Thompson, 31 Nev. 209.

Evidence reviewed and held sufficient to warrant a conviction of attempting to commit grand larceny in feloniously attempting to sever gold-bearing ore from the realty of a mining claim (Norcross, C. J., dissenting). Idem.

See State v. Raymond, 34 Nev. — (117 P. 17).

See note to sec. 6271.

CHAPTER 7

6292. Habitual criminals.

SEC. 27. Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been twice convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been three times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be adjudged to be an habitual criminal and shall be punished by imprisonment in the state prison for not less than ten years.

Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been three times convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state prison for life.

6293. Prevention of procreation.

SEC. 28. Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, or of rape, or shall be adjudged to be an habitual criminal, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person, for the prevention of procreation; *provided,* the operation so directed to be performed shall not consist of castration.

CHAPTER 8

DEFINITIONS, CONSTRUCTION, MISCELLANEOUS

6294. Definition of terms.
6295. Rule of construction.
6296. Application to prior offenses.
6297. Application to existing civil rights.
6298. Proceedings to impeach preserved.
6299. Military tribunals and punishment for contempt not affected hereby.
6300. Common law to supplement statute.
6301. To be construed as continuation of former acts.
6302. Civil remedies preserved.

6294. Definition of terms.

SEC. 29. In construing the provisions of this act, save when otherwise plainly declared or clearly apparent from the context, the following rules shall be observed:

1. Each of the words "neglect," "negligence," "negligent," and "negligently" shall import a want of such attention to the nature or probable consequences of an act or omission as an ordinarily prudent man usually exercises in his own business.

2. Each of the words "corrupt" and "corruptly" shall import a wrongful desire to acquire or cause some pecuniary or other advantage to himself or another, by the person to whom applicable.

3. "Malice" and "maliciously" shall import an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty.

4. The word "knowingly" imports a knowledge that the facts exist which constitute the act or omission of a crime, and does not require knowledge of its unlawfulness; knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinary prudent man upon inquiry.

5. Whenever an intent to defraud constitutes a part of a crime, it is not necessary to aver or prove an intent to defraud any particular person.

6. The word "boat" shall include ships, steamers and other structures adapted to navigation or movement from place to place by water.

7. The word "signature" shall include any memorandum, mark, or sign made with intent to authenticate any instrument or writing, or the subscription of any person thereto.

8. The word "writing" shall include printing.

9. The word "property" shall include both real and personal property.

10. The term "real property" shall include every estate, interest and right in lands, tenements and hereditaments, corporeal or incorporeal.

11. The term "personal property" shall include dogs and all domestic animals and birds, water, gas and electricity, all kinds or descriptions of money, chattels and effects, all instruments or writings completed and ready to be delivered or issued by the maker, whether actually delivered or issued or not, by which any claim, privilege, right, obligation or authority, or any right or title to property real or personal, is, or purports to be, or upon the happening of some future event may be evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected, and every right and interest therein.

12. The word "bond" shall include an undertaking.

13. Words in the present tense shall include the future tense; and in the masculine shall include the feminine and neuter genders; and in the singular shall include the plural; and in the plural shall include the singular.

14. The word "person" shall include a corporation or joint-stock association; and whenever it is used to designate a party whose property may be the subject of an offense it shall also include the state, or any other state, government or country which may lawfully own property within this state.

15. The term "judge" shall include every judicial officer authorized, alone or with others, to hold or preside over a court of record.

16. Any person shall be deemed an "owner" of any property who has a general or special property in the whole or any part thereof, or lawful possession thereof, either actual or constructive.

17. The words "dwelling house" shall include every building or structure which shall have been usually occupied by a person lodging therein at night, and whenever it shall be so constructed as to consist of two or more parts or rooms occupied or intended to be occupied, whether permanently or temporarily, by different tenants separately by usually lodging therein at night, or for any other separate purpose, each part shall be deemed a separate dwelling house of the tenant occupying the same.

18. The word "building" shall include every house, shed, boat, water craft, railway car, tent or booth, whether completed or not, suitable for affording shelter for any human being, or as a place where any property is or shall be kept for use, sale or deposit.

19. The word "nighttime" shall include the period between sunset and sunrise; the word "daytime" the period between sunrise and sunset.

20. The word "break," when used in connection with the crime of burglary, shall include:

(a) Breaking or violently detaching any part, internal or external, of a building;

(b) Opening, for the purpose of entering therein, any outer door of a building or of any room, apartment or set of apartments therein separately used and occupied, or any window, shutter, scuttle or other thing used for covering or closing any opening thereto or therein, or which gives passage from one part thereof to another;

(c) Obtaining entrance into such building or apartment by any threat or artifice, used for that purpose, or by collusion with any person therein;

(d) Entering such building, room or apartment by or through any pipe, chimney or other opening, or by excavating or digging through or under a building or the walls or foundation thereof.

21. The word "enter," when constituting an element or part of a crime, shall include the entrance of the offender, or the insertion of any part of his body, or of any instrument or weapon held in his hand and used or intended to be used to threaten or intimidate a person, or to detach or remove property.

22. The term "railway" or "railroad" shall include all railways, railroads

and street railways, whether operated by steam, electricity or any other motive power.

23. The words "indicted" and "indictment" shall include "informed against" and "information"; and the words "informed against" and "information" shall include the words "indicted" and "indictment."

24. The words "officer" and "public officer" shall include all assistants, deputies, clerks and employees of any public officer and all persons exercising or assuming to exercise any of the powers or functions of a public officer.

25. The word "juror" shall include a talesman, and extend to jurors in all courts, whether of record or not.

26. The word "prisoner" shall include any person held in custody under process of law, or under lawful arrest.

27. The word "prison" shall mean any place designated by law for the keeping of persons held in custody under process of law, or under lawful arrest.

6295. Rule of construction.

SEC. 30. Every provision of this act shall be construed according to the fair import of its terms.

6296. Application to prior offenses.

SEC. 31. Nothing contained in any provision of this act shall apply to an offense committed or act done at any time before the day when this act shall take effect. Such an offense shall be punished according to, and such act shall be governed by, the provisions of law existing when it is done or committed, in the same manner as if this act had not been passed.

6297. Application to existing civil rights.

SEC. 32. Nothing in this act shall be deemed to affect any civil right or remedy existing at the time when it shall take effect by virtue of the common law or of the provision of any statute.

6298. Proceedings to impeach preserved.

SEC. 33. The omission to specify or affirm in this act any ground of forfeiture of a public office or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose or suspend any public officer or other person holding any trust, appointment or other special authority conferred by law, shall not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such impeachment, removal, deposition or suspension.

6299. Military tribunals and punishment for contempt not affected hereby.

SEC. 34. This act does not affect any power conferred by law upon any court-martial, or other military authority, or officer, to impose or inflict punishment, upon offenders; nor any power conferred by law upon any public body, tribunal, or officer, to impose or inflict punishment for a contempt.

6300. Common law to supplement statute.

SEC. 35. The provisions of the common law relating to the commission of crime and the punishment thereof, in so far as not inconsistent with the institutions and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the district courts of this state.

See secs. 323, 5474, 6827.

6301. To be construed as continuation of former acts.

SEC. 36. The provisions of this act, in so far as they are substantially

the same as existing statutes, shall be construed as continuations thereof and not as new enactments.

6302. Civil remedies preserved.

SEC. 37. The omission to specify or affirm in this act any liability to any damages, penalty, forfeiture or other remedy, imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, shall not affect any right to recover or enforce the same.

CHAPTER 9

MISCELLANEOUS

6303. Imprisonment on two or more convictions.
6304. Acts punishable under foreign law.
6305. Punishment for contempt.
6306. Intent to defraud.
6307. Sending letter, when complete—Venue.

6303. Imprisonment on two or more convictions.

SEC. 38. Whenever a person shall be convicted of two or more offenses before sentence has been pronounced for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction shall commence at the termination of the first or other prior term or terms of imprisonment to which he is sentenced; and whenever a person while under sentence of felony shall commit another felony and be sentenced to another term of imprisonment, such latter term shall not begin until the expiration of all prior terms.

See sec. 7256.

6304. Acts punishable under foreign law.

SEC. 39. An act or omission punishable as a crime in this state is not less so because it is also punishable under the laws of another state, government or country, unless the contrary is expressly declared in the law relating thereto.

6305. Punishment for contempt.

SEC. 40. A criminal act which at the same time constitutes contempt of court, and has been punished as such, may also be punished as a crime, but in such case the punishment for contempt may be considered in mitigation.

6306. Intent to defraud.

SEC. 41. Whenever an intent to defraud shall be made an element of an offense, it shall be sufficient if an intent appears to defraud any person, association or body politic or corporation whatsoever.

6307. Sending letter, when complete—Venue.

SEC. 42. Whenever any statute makes the sending of a letter criminal, the offense shall be deemed complete from the time it is deposited in any postoffice or other place, or delivered to any person with intent that it shall be forwarded; and the sender may be proceeded against in the county wherein it was so deposited or delivered, or in which it was received by the person to whom it was addressed.

CHAPTER 10

CRIMES AGAINST THE SOVEREIGNTY OF THE STATE TREASON

6308. Treason defined—Penalty.

SEC. 43. Treason against the people of the state consists in:

1. Levying war against the people of the state, or
2. Adhering to its enemies, or
3. Giving them aid and comfort.

Treason is punishable by death. No person shall be convicted for treason

unless upon the testimony of two witnesses to the same overt act or by confession in open court.

See Const., sec. 248.

6309. Levying war.

SEC. 44. To constitute levying war against the state an actual act of war must be committed. To conspire to levy war is not enough. When persons arise in insurrection with intent to prevent, in general, by force and intimidation, the execution of a statute of this state, or to force its repeal, they shall be guilty of levying war. But an endeavor, although by numbers and force of arms, to resist the execution of a law in a single instance, and for a private purpose, is not levying war.

6310. Misprision of treason.

SEC. 45. Every person having knowledge of the commission of treason, who conceals the same, and does not, as soon as may be, disclose such treason to the governor or a judge of the supreme court or a district court, shall be guilty of misprision of treason and punished by a fine of not more than one thousand dollars, or by imprisonment in the state penitentiary for not more than five years or in a county jail for not more than one year.

CHAPTER 11

CRIMES BY OR AGAINST PUBLIC OFFICERS—BRIBERY, CORRUPTION AND EXTORTION

6311. Bribery of public officer.
6312. Asking or receiving bribe—Extortion.
6313. Rebate or division of salary unlawful.
6314. Agreement to divide salary, unlawful.
6315. Liability for debt.
6316. Penalty.
6317. Offering reward for appointment.
6318. Bribing legislators, penalty.
6319. Offering legislative or election bribes, penalty.
6320. Juror and others, accepting bribe.
6321. Bribing witness.
6322. Witness accepting bribe.
6323. Influencing juror.
6324. Juror, arbitrator or referee promising verdict or decision or receiving communication.
6325. Misconduct of officer drawing jury.
6326. Soliciting jury duty.
6327. Misconduct of officer in charge of jury.
6328. Offender a competent witness.
6329. Interfering with public officer.
6330. Grafting.
6331. Misconduct of public officer.
6332. Intrusion into and refusal to surrender public office.
6333. Disturbing legislature, or intimidating member.
6334. Witness refusing to attend legislature or committee or to testify.
6335. Threats to induce extortion, penalty.
6336. Rescuing prisoner.
6337. Taking property from an officer.
6338. Escaped prisoner recaptured.
6339. Prisoner escaping.
6340. Aiding prisoner to escape.
6341. Custodian suffering escape.
6342. Ministerial officer permitting escape.
6343. Concealing escaped prisoner.
6344. Injury to public record.
6345. Injury to and misappropriation of record.
6346. Altering legislative measures.
6347. Altering enrolled bills.
6348. Offering false instrument for filing or record.
6349. False report by public officer.

6311. Bribery of public officer.

SEC. 46. Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any executive or administrative officer of the state, with intent to influence him with respect to any act, decision, vote, opinion or other proceeding, as such officer; or who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a member of the legislature, or attempt, directly or indirectly, by menace, deceit, suppression of truth or other corrupt means, to influence such member to give or withhold his vote or to absent himself from the house of which he is a member or from any committee thereof; or who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a judicial officer, juror, referee, arbitrator, appraiser,

assessor or other person authorized by law to hear or determine any question, matter, cause, proceeding or controversy, with intent to influence his action, vote, opinion or decision thereupon; or who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a person executing any of the functions of a public officer other than as hereinbefore specified, with intent to influence him with respect to any act, decision, vote or other proceeding in the exercise of his powers or functions, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both.

6312. Asking or receiving bribe—Extortion.

SEC. 47. Every executive or administrative officer or person elected or appointed to an executive or administrative office who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his vote, opinion or action upon any matter then pending, or which may by law be brought before him in his official capacity, shall be influenced thereby; and every member of either house of the legislature of the state who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his official vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner, or upon any particular side of any question or matter upon which he may be required to act in his official capacity; and every judicial officer, and every person who executes any of the functions of a public office not hereinbefore specified, and every person employed by or acting for the state or for any public officer in the business of the state, who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his vote, opinion, judgment, action, decision or other official proceeding shall be influenced thereby, or that he will do or omit any act or proceeding or in any way neglect or violate any official duty, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both.

6313. Rebate or division of salary unlawful.

SEC. 48. It shall be unlawful for any state, county or municipal officer to offer or agree to appoint, or for any person whomsoever to offer to procure, or to offer to aid in procuring, the appointment of any deputy officer or attache of the state, county or municipal government of this state, for any consideration contemplating any division or rebate of the salary of such deputy or attache during his term of office, or for any monetary or other valuable consideration whatsoever, or, after such appointment is made, to receive or to accept any portion of the salary of such deputy or attache, or to receive any money or other valuable reward whatsoever, as a consideration for retaining such deputy or attache, or as a consideration for procuring, or for aid in obtaining the procuring of, the retention of such deputy or attache in any position to which he may be or shall have been appointed, or for any purpose whatsoever except in payment of a bona fide debt as hereinafter provided.

6314. Agreement to divide salary, unlawful.

SEC. 49. It shall be unlawful for any deputy officer or attache of the state, county or municipal government of this state to rebate, refund, pay or divide, to or with his principal or to or with any person whomsoever, any part or portion of his salary or compensation now fixed, or that may hereafter be fixed or established, by law, as a consideration either for the

making or for the procuring of such appointment, or for aid in procuring the same, or for the retention, or for the procuring or aid in procuring the retention, of such an appointment as deputy or attache, or to make any division or payment out of his salary to this end, except in payment of a bona fide debt as hereinafter provided.

6315. Liability for debt.

SEC. 50. Nothing in the last two preceding sections shall be construed to relieve any deputy officer or attache from the payment of a bona fide debt, contracted for value received, for which a civil action would lie in a court of law, or to prevent such deputy officer or attache from paying the same out of his salary.

6316. Penalty.

SEC. 51. Any person violating any of the provisions of the two preceding sections shall be deemed guilty of bribery, and shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars, or by imprisonment in the state prison for not less than one nor more than seven years or by both.

6317. Offering reward for appointment.

SEC. 52. Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward, in consideration that he or another person shall be appointed to a public office or to a clerkship, deputation or other subordinate position in such office, or that he or any other person shall be permitted to exercise, perform or discharge any prerogative or duty or receive any emolument of such office, shall be guilty of a gross misdemeanor.

See secs. 1829, 2822.

6318. Bribing legislators, penalty.

SEC. 53. Every person who obtains or seeks to obtain money or other thing of value from another person upon a pretense, claim or representation that he can or will improperly influence in any manner the action of any member of a legislative body in regard to any vote or legislative action, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for a period of not less than two nor more than ten years.

6319. Offering legislative or election bribes, penalty.

SEC. 54. Every person who gives or offers a bribe to any officer or member of any caucus, political convention, committee, primary election, or political gathering of any kind, held for the purpose of nominating candidates for offices of honor, trust, or profit in this state, with intent to influence the person to whom such bribe is given or offered to be more favorable to one candidate than another, shall be guilty of felony, punishable by a fine not exceeding five thousand dollars or ten years' imprisonment in the state prison, or both such fine and imprisonment.

6320. Juror and others, accepting bribe.

SEC. 55. Every juror, referee, arbitrator, appraiser, assessor, or other person authorized by law to hear or determine any question, matter, cause, controversy or proceeding, who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his vote, opinion, action, judgment or decision shall be influenced thereby, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by fine of not more than five thousand dollars, or by both.

6321. Bribing witness.

SEC. 56. Every person who shall give, offer or promise, directly or indirectly any compensation, gratuity or reward to any witness or person who may be called as a witness, upon an agreement or understanding that the testimony of such witness shall be thereby influenced, or who shall wilfully attempt by any other means to induce any witness or person who may be called as a witness to give false testimony, or to withhold true testimony, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both.

6322. Witness accepting bribe.

SEC. 57. Every person who is or may be a witness upon a trial, hearing, investigation or other proceeding before any court, tribunal or officer authorized to hear evidence or take testimony, who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial, hearing or other proceeding, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both.

6323. Influencing juror.

SEC. 58. Every person who shall influence, or attempt to influence, improperly, a juror in a civil or criminal action or any proceeding, or any person chosen or appointed as an arbitrator or referee, in respect to his verdict, judgment, report, award or decision in any cause or matter pending or about to be brought before him, in any case or in any manner not hereinbefore provided for, shall be guilty of a gross misdemeanor.

There is no such crime known to the law as an attempt to commit embracery. Embracery is itself but an attempt to do wrong. It is a crime to solicit another to commit embracery. It is a crime in A to solicit B to attempt to corrupt a juror. State v. Sales, 2 Nev. 268.

6324. Juror, arbitrator or referee promising verdict or decision, or receiving communication.

SEC. 59. Every juror and every person chosen or appointed arbitrator or referee, who shall make any promise or agreement to give a verdict, judgment, report, award or decision for or against any party, or who shall wilfully receive any communication, book, paper, instrument or information relating to a cause or matter pending before him, except according to the regular course of proceeding upon the trial or hearing of such cause or matter, shall be guilty of a gross misdemeanor.

6325. Misconduct of officer drawing jury.

SEC. 60. Every person charged by law with the preparation of any jury list or list of names from which any jury is to be drawn, and every person authorized by law to assist at the drawing of a grand or petit jury to attend a court or term of court or to try any cause or issue, who shall:

1. Place in any such list any name at the request or solicitation, direct or indirect, of any person; or
2. Designedly put upon the list of jurors, as having been drawn, any name which was not lawfully drawn for that purpose; or
3. Designedly omit to place upon such list any name which was lawfully drawn; or
4. Designedly sign or certify a list of such jurors as having been drawn which were not lawfully drawn; or
5. Designedly and wrongfully withdraw from the box or other receptacle

for the ballots containing the names of such jurors any paper or ballot lawfully placed or belonging there and containing the name of a juror, or omit to place therein any name lawfully drawn or designated, or place therein a paper or ballot containing the name of a person not lawfully drawn and designated as a juror; or

6. In drawing or empaneling such jury, do any act which is unfair, partial or improper in any respect; shall be guilty of a felony.

6326. Soliciting jury duty.

SEC. 61. Every person who shall, directly or indirectly, solicit or request any person charged with the duty of preparing any jury list to put his name, or the name of any other person, on any such list, shall be guilty of a gross misdemeanor.

6327. Misconduct of officer in charge of jury.

SEC. 62. Every person to whose charge a jury shall be committed by a court or magistrate, who shall knowingly, without leave of such court or magistrate, permit them or any one of them to receive any communication from any person, to make any communication to any person, to obtain or receive any book, paper or refreshment, or to leave the jury room, shall be guilty of a gross misdemeanor.

6328. Offender a competent witness.

SEC. 63. Every person offending against any of the provisions of law relating to bribery or corruption shall be a competent witness against another so offending and shall not be excused from giving testimony tending to criminate himself, but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony.

6329. Interfering with public officer.

SEC. 64. Every person who, by means of any threat, force or violence, shall attempt to deter or prevent any executive or administrative officer from performing any duty imposed upon him by law, or who shall knowingly resist by force or violence any executive or administrative officer in the performance of his duty, shall be guilty of a gross misdemeanor.

See secs. 6804, 6828.

6330. Grafting.

SEC. 65. Every person who shall ask or receive any compensation, gratuity or reward, or any promise thereof, upon the representation that he can, directly or indirectly, or in consideration that he shall, or shall attempt to, directly or indirectly, influence any public officer, whether executive, administrative, judicial or legislative, to refuse, neglect, or defer the performance of any official duty; or who shall ask or receive any compensation, gratuity or reward, or any promise thereof, the right to retain or receive which shall be conditioned that such person shall, directly or indirectly, successfully influence by any means whatever any executive, administrative or legislative officer, in respect to any act, decision, vote, opinion or other proceeding, as such officer; or who shall ask or receive any compensation, gratuity or reward, or any promise thereof, upon the representation that he can, directly or indirectly, or in consideration that he shall, or shall attempt to, directly or indirectly, influence any public officer, whether executive, administrative, judicial or legislative, in respect to any act, decision, vote, opinion or other proceeding, as such officer, unless it be clearly understood and agreed in good faith between the parties thereto, on both sides, that no means or influence shall be employed except explanation and argument upon the merits, shall be guilty of a gross misdemeanor,

and, in any prosecution, under the third clause of this section, evidence of the means actually employed to influence such officer shall be admitted as proof of the means originally contemplated by the defendant.

6331. Misconduct of public officer.

SEC. 66. Every public officer who shall—

1. Ask or receive, directly or indirectly, any compensation, gratuity or reward, or promise thereof, for omitting or deferring the performance of any official duty; or for any official service which has not been actually rendered, except in case of charges for prospective costs or fees demandable in advance in a case allowed by law; or

2. Be beneficially interested, directly or indirectly, in any contract, sale, lease or purchase which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward from any other person beneficially interested therein; or

3. Employ or use any person, money or property under his official control or direction, or in his official custody, for the private benefit or gain of himself or another;

Shall be guilty of a gross misdemeanor, and any contract, sale, lease or purchase mentioned in subdivision 2 hereof shall be void.

Assessor, neglect of duty, section 1574.
City officer, interested in contract, section 812.
Commissioners, auditor and treasurer, neglecting duties of board of examiners, section 1551.
Commissioners, interested in contracts, section 1522.
Commissioners, voting on contract extending beyond term of office, sections 1537, 1538.
County and district recorders violating provisions of mining act, section 1638.
County officers, failure to keep open offices during office hours, section 1565.
County surveyor, neglect of duty, section 1673.
District attorney and partner, opposing each other in same action, section 1611.
District attorney, misfeasance or malfeasance in office, section 1606.
Drunkenness in office, sections 2861–2863.
Mayor or councilmen, malfeasance in office, section 808.
Municipal officer, refusing examination by or information to revenue examiner, section 983.
Officers authorized to take acknowledgments, failure to keep records of official acts, section 1099.
Public administrator, misdemeanor in office, section 1621.
Salaried officers, neglect to pay over fees, section 1698.
Sheriff, charging illegal fees, section 1654.
Town or city officials refusing inspection of town or city finances, section 983.
Voting for excessive municipal tax, section 976.
Voting for unlawful municipal indebtedness, section 981.

For other violations of official duty by various officers, see schedule of statutory offenses under other titles preceding this act.

6332. Intrusion into and refusal to surrender public office.

SEC. 67. Every person who shall falsely personate or represent any public officer, or who shall wilfully intrude himself into a public office to which he has not been duly elected or appointed, or who shall wilfully exercise any of the functions or perform any of the duties of such officer, without having duly qualified therefor, as required by law, or who, having been an executive or administrative officer, shall wilfully exercise any of the functions of his office after his right to do so has ceased, or wrongfully refuse to surrender the official seal or any books or papers appertaining to such office, upon the demand of his lawful successor, shall be guilty of a gross misdemeanor.

6333. Disturbing legislature or intimidating member.

SEC. 68. Every person who shall wilfully disturb the legislature of this state, or either house thereof, while in session, or who shall commit any dis-

orderly conduct in the presence or view of either house thereof, tending to interrupt its proceedings or impair the respect due to its authority, or who wilfully, by intimidation or otherwise, shall prevent any member of the legislature from attending any session of the house of which he shall be a member or any committee thereof, or from giving his vote upon any question which may come before such house or committee, or from performing any other official act, shall be guilty of a gross misdemeanor.

6334. Witness refusing to attend legislature or committee or to testify.

SEC. 69. Every person duly summoned to attend as a witness before either house of the legislature of this state, or any committee thereof authorized to summon witnesses, who shall refuse or neglect, without lawful excuse, to attend pursuant to such summons, or who shall wilfully refuse to be sworn or to affirm or to answer any material or proper question or to produce, upon reasonable notice, any material or proper books, papers or documents in his possession or under his control, shall be guilty of a gross misdemeanor.

6335. Threats to induce extortion, penalty.

SEC. 70. If any person, other than an officer, either verbally or by any written or printed communication, shall maliciously threaten any injury to the person or property of another, with intent thereby to extort money or any pecuniary advantage whatever, or to compel the person so threatened to pay any money or do any act against his or her will, he shall be punished, upon conviction thereof, by imprisonment in the county jail not less than six months nor more than one year, or by a fine not less than one hundred dollars nor more than five hundred dollars, or by both.

See secs. 173, 474 and 556 of this act.

6336. Rescuing prisoner.

SEC. 71. Every person who shall, by force or fraud, rescue from lawful custody, or from an officer or person having him in lawful custody, a prisoner held upon a charge, arrest, commitment, conviction or sentence for felony, shall be guilty of a felony; and every person who shall rescue a prisoner held upon a charge, arrest, commitment, conviction or sentence for a gross misdemeanor or misdemeanor shall be guilty of a misdemeanor.

6337. Taking property from an officer.

SEC. 72. Every person who shall take from the custody of any officer or other person any personal property in his charge under any process of law, or who shall wilfully injure or destroy such property, shall be guilty of a misdemeanor.

See sec. 7173.

6338. Escaped prisoner recaptured.

SEC. 73. Every person in custody, under sentence of imprisonment for any crime, who shall escape from custody, may be recaptured and imprisoned for a term equal to the unexpired portion of the original term.

6339. Prisoner escaping.

SEC. 74. Every prisoner confined in a prison, or being in the lawful custody of an officer or other person, who shall escape or attempt to escape from such prison or custody, by force or fraud, if he is held on a charge, conviction or sentence of a felony, shall be guilty of a felony; if held on a charge, conviction or sentence of a gross misdemeanor or misdemeanor, he shall be guilty of a misdemeanor.

Before any person can be found guilty of prison breaking, the imprisonment from which he attempted to break must be shown to be lawful. It is the legality of the imprisonment and not the guilt or innocence of the defendant which determines the law-

fulness of his confinement. Ex Parte Ah Bau, 10 Nev. 264.

If a person with or without force goes away from his place of lawful custody without authority of law, the offense of escaping from jail is complete. Defendant offered to prove in excuse and mitigation of his act that the condition of the jail was intolerable, without offering to show that he had used any lawful means of relief before escaping therefrom: Held, that the testimony as to the condition of the jail was properly excluded. State v. Davis, 14 Nev. 439.

Sufficiency of indictment for an attempt to escape from prison considered in State v. Angelo, 18 Nev. 425 (4 P. 1080).

See State v. Clark, 32 Nev. 145.

The punishment which the prisoner received at the hands of the prison authorities after his recapture, having nothing to do with the question of guilt or innocence, was properly excluded. State v. Angelo, 18 Nev. 425 (4 P. 1080).

Where a person is confined in a jail under an indictment regularly brought against him for a crime and he attempts to escape, he commits a crime, although the bench warrant under which he was arrested was irregularly issued, but, when the imprisonment is unlawful, the right to liberty is absolute, and the one who is confined is not guilty of the offense of escape by regaining it. State v. Clark, 32 Nev. 145 (104 P. 593).

Questions of fact as to the intention of accused in making an attempted escape with which he was charged were for the jury. State v. Grady, 32 Nev. 154 (104 P. 596).

See State v. Ryan, 10 Nev. 261.

6340. Aiding prisoner to escape.

SEC. 75. Every person who, with intent to effect or facilitate the escape of a prisoner, whether such escape shall be effected or attempted or not, shall convey or send to a prisoner any information or aid, or convey or send into a prison any disguise, instrument, weapon or other thing, or aid or assist a prisoner in escaping or attempting to escape from the lawful custody of a sheriff or other officer or person, shall be guilty of a felony if such prisoner is held upon a charge, arrest, commitment, conviction or a sentence for felony, and shall be guilty of a misdemeanor if such prisoner is held upon a charge, arrest, commitment, conviction or sentence for a gross misdemeanor or misdemeanor.

6341. Custodian suffering escape.

SEC. 76. Every person who shall allow a prisoner lawfully in his custody to escape, or shall connive at or assist such escape, or shall omit any act or duty by reason of which omission such escape is occasioned, contributed to or assisted, shall, if he connive at or assist such escape, be guilty of a felony; and in any other case, of a gross misdemeanor.

Sheriff or jailer permitting escape, sec. 1657.

6342. Ministerial officer permitting escape.

SEC. 77. Every officer who shall ask or receive, directly or indirectly any compensation, gratuity or reward, or promise thereof, to procure, assist, connive at or permit any prisoner in his custody to escape, whether such escape shall be attempted or not, or shall commit any unlawful act tending to hinder justice, shall be guilty of a gross misdemeanor.

6343. Concealing escaped prisoner.

SEC. 78. Every person who shall conceal, or harbor for the purpose of concealment, a prisoner who has escaped or is escaping from custody, shall be guilty of a felony if the prisoner is held upon a charge or conviction or sentence of felony, and of a misdemeanor if the prisoner is held upon a charge or conviction of a gross misdemeanor or misdemeanor.

6344. Injury to public record.

SEC. 79. Every person who shall wilfully and unlawfully remove, alter, mutilate, destroy, conceal or obliterate a record, map, book, paper, document or other thing filed or deposited in a public office, or with any public officer, by authority of law, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars, or by both.

Stealing, altering or defacing records, sec. 2817.

6345. Injury to and misappropriation of record.

SEC. 80. Every officer who shall mutilate, destroy, conceal, erase, obliterate or falsify any record or paper appertaining to his office, or who shall fraudulently appropriate to his own use or to the use of another person, or secrete with intent to appropriate to such use, any money, evidence of debt or other property intrusted to him by virtue of his office, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both.

6346. Altering legislative measures.

SEC. 81. Every person who fraudulently alters the drafts of any bill or resolution which has been presented to either of the houses composing the legislature to be passed or adopted, with intent to procure it to be passed or adopted by either house in language different from that intended by such house, is guilty of felony, and upon conviction thereof shall be fined in a sum not less than five hundred dollars nor more than two thousand dollars, or confined in the state prison for a period not less than one year nor more than five years, or both.

6347. Altering enrolled bills.

SEC. 82. Every person who fraudulently alters the enrolled copy of any bill or resolution which has been passed or adopted by the legislature of this state, with intent to procure it to be approved by the governor, or certified by the secretary of state, or printed or published by the printer of the statutes in language different from that in which it was passed or adopted by the legislature is guilty of felony, and shall be punished as provided in the preceding section.

6348. Offering false instrument for filing or record.

SEC. 83. Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than five thousand dollars, or by both.

6349. False report by public officer.

SEC. 84. Every public officer who shall knowingly make any false or misleading statement in any official report or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor.

CHAPTER 12

CRIMES AND OFFENSES AGAINST PUBLIC JUSTICE

6350. Perjury and subornation.
6351. Attempt to suborn perjury.
6352. Conviction and execution of innocent person by perjury, deemed murder.
6353. "Oath" and "swear" defined.
6354. Irregularity in administering oath, or incompetency of witness no defense.
6355. Deposition, when complete.
6356. Statement of what one does not know to be true.
6357. Offering false evidence.
6358. Destroying evidence.
6359. Tampering with witness.
6360. Neglect or refusal to receive a person into custody.
6361. Refusal to make arrest or to aid officer.
6362. Resisting public officer.
6363. Compounding crimes.
6364. Intimidating public officer.
6365. Malicious prosecution—Penalties.
6366. Inducing law suit, penalty.
6367. Buying or promising reward by justice or constable.
6368. Criminal contempt.
6369. Grand juror acting after challenge allowed.
6370. Production of pretended heir.
6371. Substitution of child.
6372. Instituting suit in name of another.
6373. Unauthorized communication with prisoner.
6374. Disclosing transaction of grand jury.
6375. Public officer making false certificate.
6376. False auditing and paying claims.
6377. Conspiracy.
6378. Overt act not necessary.

6350. Perjury and subornation.

SEC. 85. Every person having taken a lawful oath, or made affirmation in a judicial proceeding, or in any other matter where, by law, an oath or affirmation is required, who shall wilfully and corruptly make an unqualified statement of that which he does not know to be true, or who shall swear or affirm wilfully, corruptly and falsely, in a matter material to the issue or point in question, or who shall suborn any other person to make such unqualified statement, or to swear or affirm, as aforesaid, shall be deemed guilty of perjury, or subornation of perjury, as the case may be, and, upon conviction thereof, shall be punished by imprisonment in the state prison for any term not less than one or more than fourteen years.

It is perjury to verify an answer in a civil case which contains denials of facts known by the person making the verification to be unquestionably true. Roeder v. Stein, 23 Nev. 92 (42 P. 867).

See schedule of statutory offenses under other titles, "Perjury," preceding this act.

6351. Attempt to suborn perjury.

SEC. 86. Every person who, without giving, offering or promising a bribe, shall incite or attempt to procure another to commit perjury, or to offer any false evidence, or to withhold true testimony, though no perjury be committed or false evidence offered or true testimony withheld, shall be guilty of a gross misdemeanor.

6352. Conviction and execution of innocent person deemed murder.

SEC. 87. Every person who, by wilful and corrupt perjury or subornation of perjury, shall procure the conviction and execution of any innocent person, shall be deemed and adjudged guilty of murder, and, upon conviction thereof, shall suffer the punishment of death.

Cited, Sias v. Hallock, 14 Nev. 335.

6353. "Oath" and "swear" defined.

SEC. 88. The term "oath" shall include an affirmation and every other mode authorized by law of attesting the truth of that which is stated. A person who shall state any matter under oath shall be deemed to "swear" thereto.

6354. Irregularity in administering oath or incompetency of witness no defense.

SEC. 89. It shall be no defense to a prosecution for perjury that an oath was administered or taken in an irregular manner or that the defendant was not competent to give the testimony, deposition, certificate or affidavit of which falsehood is alleged. It shall be sufficient that he actually gave such testimony or made such deposition, certificate or affidavit.

6355. Deposition, when complete.

SEC. 90. The making of a deposition, certificate or affidavit shall be deemed to be complete when it is subscribed and sworn to or affirmed by the defendant with intent that it be uttered or published as true.

6356. Statement of what one does not know to be true.

SEC. 91. Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false.

6357. Offering false evidence.

SEC. 92. Every person who, upon any trial, hearing, inquiry, investigation or other proceeding authorized by law, shall offer or procure to be offered in evidence, as genuine, any book, paper, document, record or other instrument in writing, knowing the same to have been forged or fraudulently altered, shall be punished by imprisonment in the state penitentiary for not more than ten years.

6358. Destroying evidence.

SEC. 93. Every person who, with intent to conceal the commission of any felony, or to protect or conceal the identity of any person committing the same, or with intent to delay or hinder the administration of the law or to prevent the production thereof at any time, in any court or before any officer, tribunal, judge or magistrate, shall wilfully destroy, alter, erase, obliterate or conceal any book, paper, record, writing, instrument or thing, shall be guilty of a gross misdemeanor.

6359. Tampering with witness.

SEC. 94. Every person who shall wilfully prevent or attempt to prevent, by persuasion, threats or otherwise, any person from appearing before any court, or officer authorized to subpena witnesses, as a witness in any action, proceeding or investigation, with intent thereby to obstruct the course of justice, shall be guilty of a gross misdemeanor.

6360. Neglect or refusal to receive a person into custody.

SEC. 95. Every officer who, in violation of any legal duty, shall wilfully neglect or refuse to receive a person into his official custody or into a prison under his charge, shall, in a case where no other punishment is specially provided by law, be guilty of a gross misdemeanor.

See sec. 2820.

6361. Refusal to make arrest or to aid officer.

SEC. 96. Every person who, after having been lawfully commanded by any magistrate to arrest another person, shall wilfully neglect or refuse so to do; and every person who, after having been lawfully commanded to aid an officer in arresting any person, or in retaking any person who has escaped from lawful custody, or in executing any lawful process, shall wilfully negect or refuse to aid such officer, shall be guilty of a misdemeanor.

See secs. 2833, 6863, 6956.
Failure to aid fish warden on command, sec. 2070.
Refusal to aid state police, sec. 4290.
Refusing to join posse comitatus, sec. 6606.

6362. Resisting public officer.

SEC. 97. Every person who, in any case or under any circumstances not otherwise specially provided for, shall wilfully resist, delay or obstruct a public officer in discharging or attempting to discharge any legal duty of his office, shall be guilty of a misdemeanor.

Molestation of state police in discharge of duty, sec. 4291.

6363. Compounding crimes.

SEC. 98. Every person who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that he will compound or conceal a crime or violation of a statute, or abstain from testifying thereto, delay a prosecution therefor or withhold any evidence thereof, except in a case where a compromise is allowed by law, shall be guilty—

1. Of a felony and punished by imprisonment in the state penitentiary for not more than five years, where the agreement or understanding relates to a felony;

2. Of a misdemeanor, where the agreement or understanding relates to a gross misdemeanor or misdemeanor, or to a violation of statute for which a pecuniary penalty or forfeiture is prescribed.

In any proceeding against a person for compounding a crime, it shall not be necessary to prove that any person has been convicted of the crime or violation of statute in relation to which an agreement or understanding herein prohibited was made.

6364. Intimidating public officer.

SEC. 99. Every person who shall directly or indirectly, address any threat or intimidation to a public officer or to a juror, referee, arbitrator, appraiser or assessor, or to any other person authorized by law to hear or determine any controversy or matter, with intent to induce him, contrary to his duty to do or make or to omit or delay any act, decision or determination, shall be guilty of a misdemeanor.

6365. Malicious prosecution—Penalties.

SEC. 100. Every person who shall, maliciously and without probable cause therefor, cause or attempt to cause another to be arrested or proceeded against for any crime of which he is innocent—

1. If such crime be a felony, shall be punished by imprisonment in the state penitentiary for not more than five years; and,

2. If such crime be a gross misdemeanor or misdemeanor, shall be guilty of a misdemeanor.

6366. Inducing law suit, penalty.

SEC. 101. Every person who shall on his behalf bring or instigate, incite or encourage another to bring, any false suit at law or in equity, in any court of this state, with intent thereby to distress or harass a defendant therein, shall be guilty of a misdemeanor.

6367. Buying or promising reward by justice or constable.

SEC. 102. Every justice of the peace or constable who shall, directly or indirectly, buy or be interested in buying anything in action for the purpose of commencing a suit thereon before a justice of the peace, or who shall give or promise any valuable consideration to any person as an inducement to bring, or as a consideration for having brought, a suit before a justice of the peace, shall be guilty of a misdemeanor.

See sec. 2821.

6368. Criminal contempt.

SEC. 103. Every person who shall commit a contempt of court of any one of the following kinds shall be guilty of a misdemeanor:

1. Disorderly, contemptuous or insolent behavior committed during the sitting of the court, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due to its authority; or,

2. Behavior of like character in the presence of a referee, while actually engaged in a trial or hearing pursuant to an order of court, or in the presence of a jury while actually sitting in the trial of a cause or upon an inquest or other proceeding authorized by law; or,

3. Breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of a court, jury or referee; or,

4. Wilful disobedience to the lawful process or mandate of a court; or

5. Resistance, wilfully offered, to its lawful process or mandate; or,

6. Contumacious and unlawful refusal to be sworn as a witness or, after being sworn, to answer any legal and proper interrogatory; or,

7. Publication of a false or grossly inaccurate report of its proceedings; or,

8. Assuming to be an attorney or officer of a court or acting as such without authority.

See sec. 2834.

6369. Grand juror acting after challenge allowed.

SEC. 104. Every grand juror who, with knowledge that a challenge interposed against him by a defendant has been allowed, shall be present

at, or take part, or attempt to take part, in the consideration of the charge against the defendant who interposed such challenge, or the deliberations of the grand jury thereon, shall be guilty of a misdemeanor.

6370. Production of pretended heir.

SEC. 105. Every person who shall fraudulently or falsely pretend that any infant child was born of a parent whose child is or would be entitled to inherit real property or to receive any personal property, or who shall falsely represent himself or another to be a person entitled to an interest or share in the estate of a deceased person as executor, administrator, husband, wife, heir, legatee, devisee, next of kin or relative of such deceased person, shall be punished by imprisonment in the state penitentiary for not more than ten years.

6371. Substitution of child.

SEC. 106. Every person to whom a child has been confided for nursing, education or any other purpose, who, with intent to deceive a person, guardian or relative of such child, shall substitute or produce to such parent, guardian or relative, another child or person in the place of the child so confided, shall be punished by imprisonment in the state penitentiary for not more than ten years.

6372. Instituting suit in name of another.

SEC. 107. Every person who shall institute or prosecute any action or other proceeding in the name of another, without his consent and contrary to law, shall be guilty of a gross misdemeanor.

6373. Unauthorized communication with prisoner.

SEC. 108. Every person who, not being authorized by law or by any officer authorized thereto, shall have any verbal communication with any prisoner in any jail, prison or other penal institution, or shall bring into or convey out of the same any writing, clothing, food, tobacco or any article whatsoever, shall be guilty of a misdemeanor.

6374. Disclosing transaction of grand jury.

SEC. 109. Every judge, grand juror, prosecuting attorney, clerk, stenographer or other officer who, except in the due discharge of his official duty, shall disclose the fact that a presentment has been made or indictment found or ordered against any person, before such person shall be in custody; and every grand juror, clerk or stenographer who, except when lawfully required by a court or officer, shall disclose any evidence adduced before the grand jury, or any proceeding, discussion or vote of the grand jury or any member thereof, shall be guilty of a misdemeanor.

See sec. 7031.

6375. Public officer making false certificate.

SEC. 110. Every public officer who, being authorized by law to make or give a certificate or other writing, shall knowingly make and deliver as true such a certificate or writing containing any statement which he knows to be false, in a case where the punishment thereof is not expressly prescribed by law, shall be guilty of a gross misdemeanor.

6376. Falsely auditing and paying claims.

SEC. 111. Every public officer, or person holding or discharging the duties of any public office or place of trust under the state or in any county, town or city, a part of whose duty it is to audit, allow or pay, or take part in auditing, allowing or paying, claims or demands upon the state or such county, town or city, who shall knowingly audit, allow or pay, or, directly or indirectly, consent to or in any way connive at the auditing, allowance or

payment of any claim or demand against the state or such county, town or city, which is false or fraudulent or contains any charge, item or claim which is false or fraudulent, shall be guilty of a gross misdemeanor.

6377. Conspiracy.

SEC. 112. Whenever two or more persons shall conspire—

1. To commit a crime; or,

2. Falsely and maliciously to procure another to be arrested or proceeded against for a crime; or,

3. Falsely to institute or maintain any action or proceeding; or,

4. To cheat or defraud another out of any property by unlawful or fraudulent means; or,

5. To prevent another from exercising any lawful trade or calling, or from doing any other lawful act, by force, threats or intimidation, or by interfering or threatening to interfere with any tools, implements or property belonging to or used by another, or with the use or employment thereof; or,

6. To commit any act injurious to the public health, public morals, trade or commerce, or for the perversion or corruption of public justice or the due administration of the law; or,

7. To accomplish any criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means;

Every such person shall be guilty of a gross misdemeanor.

See sec. 6801.

Neither at common law nor under statutes modifying the common-law doctrine is it lawful for workmen to combine to injure another's business by causing his employees to leave his services by intimidation, threats, molestation, or coercion, and such a combination constitutes an indictable conspiracy. The term "boycott" ordinarily means a confederation, generally secret, of many persons whose intent is to injure another by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators. Branson v. I. W. W., 30 Nev. 270 (95 P. 354).

See State v. Hennessy, 29 Nev. 320 (90 P. 221).

6378. Overt act not necessary.

SEC. 113. In any such proceeding for violation of section 112 of this act, it shall not be necessary to prove that any overt act was done in pursuance of such unlawful conspiracy or combination.

CHAPTER 13

CRIMES AGAINST THE PERSON

6379. Suicide defined.
6380. Attempting suicide, penalty.
6381. Aiding suicide, manslaughter.
6382. Abetting attempt at suicide.
6383. Incapacity of person aided no defense.
6384. Murder defined.
6385. Express malice defined.
6386. Degrees of murder—Punishment.
6387. Manslaughter defined.
6388. Voluntary manslaughter defined.
6389. When punished as murder.
6390. Involuntary manslaughter defined.
6391. Manslaughter, punishment.
6392. Death within a year and a day.
6393. Place of trial for homicide.
6394. Justifiable homicide defined.
6395. What necessary for defense.
6396. Justifiable homicide by public officer.
6397. What considered justifiable or excusable homicide.
6398. Homicide by other person, when justifiable.
6399. Mitigating circumstances, who to prove.
6400. Excusable homicide by misadventure.
6401. Appearing justifiable, acquittal.
6402. Killing in self-defense.
6403. Killing unborn quick child.
6404. Administering poison.
6405. Woman taking drugs to procure miscarriage.
6406. Killing by overloading passenger vessel.
6407. Owner of vicious animal may become guilty of manslaughter.
6408. Reckless operation of steamboat or engine.
6409. Keeping explosive unlawfully.
6410. Liability of intoxicated physician.
6411. Assault and intimidation.
6412. Assault defined.
6413. Assault with intent to commit crime.
6414. Assault and battery defined, penalty.
6415. Provoking assault.

6416. Mayhem defined, penalty.
6417. Idem—Instrument or manner of maiming.
6418. Idem—Recovery from injury, when a defense.
6419. Kidnaping defined—How punished.
6420. Selling services of person kidnaped.
6421. Idem—Venue—Effect of consent.
6422. Dueling—Death by, deemed murder.
6423. Disfranchisement for dueling.
6424. Competent witness in trial for dueling.
6425. Posting for not fighting duel, penalty.
6426. Penalty for dueling—Acting as second—Deemed manslaughter.
6427. Robbery defined, penalty.
6428. Libel defined, penalty.
6429. Publication defined.
6430. Liability of editors and others.
6431. Venue—Punishment restricted.
6432. Furnishing libelous information.
6433. Threatening to publish libel.
6434. Slander of women.
6435. Testimony necessary to convict.
6436. Slandering character of woman.
6437. Extortion by threats—Penalty.
6438. Threatening letters or writing—Penalty.
6439. Drawing deadly weapon—Duties of officers.
6440. False imprisonment.
6441. Unlawful to keep vicious dog.

R '13 362

6379. Suicide defined.

SEC. 114. Suicide is the intentional taking of one's own life.

6380. Attempting suicide, penalty.

SEC. 115. Every person who, with intent to take his own life, shall commit upon himself any act dangerous to human life, or which, if committed upon or toward another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, shall be punished by imprisonment in the state penitentiary for not more than two years, or by a fine of not more than one thousand dollars.

See State v. Lindsey, 19 Nev. 47 (3 A. S. 776, 5 P. 822).

6381. Aiding suicide, manslaughter.

SEC. 116. Every person who, in any manner, shall wilfully advise, encourage, abet or assist another in taking his own life shall be guilty of manslaughter.

6382. Abetting attempt at suicide.

SEC. 117. Every person who, in any manner, shall wilfully advise, encourage, abet or assist another person in attempting to take the latter's life shall be punished by imprisonment in the state penitentiary for not more than ten years.

6383. Incapacity of person aided no defense.

SEC. 118. The fact that the person attempting to take his own life was incapable of committing crime shall not be a defense to a prosecution under either of sections 116 or 117 of this act.

6384. Murder defined.

SEC. 119. Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

See sec. 7174.

To convict one on trial for murder it is necessary, not only to prove the prisoner committed the offense charged, but committed it within the territorial jurisdiction of the court and grand jury where the indictment is found. The defendant under all circumstances is entitled to an instruction embodying these two principles of law. On a trial for murder, the good character of the defendant may be proved to explain the motive when the fact of the killing is not denied. People v. Gleason, 1 Nev. 173.

Length of time for deliberation is not an essential ingredient in murder in the first degree. It is sufficient if the design to murder was formed before the striking of the fatal blow. Where there is a preconceived design to commit some felony other than murder, and the result of the attempt, unintentional on the part of the felon, proves fatal to a human being, this premeditated felony would make malice aforethought at common law. But this would not be wilful, deliberate, premeditated killing under our statute, because of the absence of intent to take life. State v. Millain, 3 Nev. 409. (See dissenting opinion of Lewis, J.) Idem.

Where the pistol with which the crime was committed belongs to defendant and was found in the defendant's bedroom

shortly after a homicide: Held, that these facts tended to establish one link in the chain of circumstantial evidence and the court was not authorized to withdraw its consideration from the jury. The fact that other parties had access to the room might have the tendency to weaken the force of this link, but it would not of itself destroy it. State v. Larkin, 11 Nev. 314.

There may be murder without any intent to kill. A voluntary killing which is committed in the prosecution of a felonious intent, is murder; and if the felony attempted is arson, rape, robbery, or burglary, it is murder in the first degree. Taking money from the person of another, is not necessarily robbery and it is inaccurate to say in an instruction that killing "in the attempt to take money" is murder in the first degree. State v. Lopez, 15 Nev. 407.

An instruction that to constitute malice aforethought it was only necessary that there should be a formed intention to kill; that malice aforethought means the intention to kill: Held, error, as murder is an inference to be drawn from all the facts in the case and is not established by mere proof of an intentional killing, for there may be an intentional killing in justifiable self-defense or where the crime only amounts to manslaughter. State v. Vaughan, 22 Nev. 285 (39 P. 733).

A murder not perpetrated by means of poison, lying in wait, or torture, nor in the perpetration, or attempt to perpetrate, arson, rape, robbery or burglary, can only become murder in the first degree by being wilful, deliberate and premeditated; an instruction which ignores these conditions, and informs the jury that, if they find that the defendant unlawfully and with malice aforethought killed the deceased, their verdict must be murder in the first degree, is erroneous. The words "wilful, deliberate and premeditated," as used in the statute, defining murder in the first degree, are not synonymous with "malice aforethought." State v. Wong Fun, 22 Nev. 336 (40 P. 95).

See State v. Thompson, 12 Nev. 140.

A surgeon who has held an autopsy may give his opinion regarding the course of the bullet and incidentally as to the relative position of the parties at the time the fatal shot was fired. State v. Buralli, 27 Nev. 41 (71 P. 532).

Where a homicide occurred as a part of a continuous assault about two minutes after the robbery and was for the apparent purpose of preventing detection, defendant was guilty of murder in the first degree. State v. Williams, 28 Nev. 395 (82 P. 363).

In a murder case, decedent was shot twice, and accused admitted firing both shots. The first shot he contended was fired in self-defense, and the second as the result of an accidental discharge of his weapon. A witness who saw the shooting subsequently performed an autopsy, and testified, describing the course of each bullet, and that the wound from either shot was sufficient to cause death: Held, that if it was error to permit the witness to give his opinion as to which was the first wound received, it was not prejudicial. A charge that it is only necessary that the act of unlawful killing be preceded by a concurrence of the will, deliberation, and premeditation on the part of the slayer, if erroneous for omitting the words "and the result of," after "preceded by," it was not prejudicial, where accused was convicted of second-degree murder. State v. Jackman, 31 Nev. 511 (104 P. 13).

The statute making all murder by poison, lying in wait, or torture, or any other kind of wilful, deliberate and premeditated killing, or that committed in the perpetration or attempt to perpetrate any robbery or other enumerated felony, murder in the first degree, and under an indictment charging a killing with malice aforethought, accused may be convicted of either wilful, deliberate, and premeditated killing, or of a killing committed in the perpetration of a robbery, whether wilful, deliberate, and premeditated or not; but if the indictment should allege that a killing was committed in the perpetration of a robbery, and the evidence should indicate that the killing was premeditated, but not in the perpetration of robbery, the variance would be fatal. A killing committed in the perpetration of a robbery is presumed to have been wilful, deliberate and premeditated. State v. Mangana, 33 Nev. — (112 P. 693).

The words "deliberate" and "premeditated," as used in our statutory definition of murder, are of similar import—each implies the other, and it makes no difference whether they are used conjunctively or disjunctively. During the trial defendant moved the court, upon an affidavit showing the materiality of the testimony, to order an examination of the body of the deceased, and to have the bullets found in his head extracted and produced in court: Held, that the court did not err in denying the motion. State v. McLane, 15 Nev. 346.

Charging the homicide to have been with "malice aforethought" is tantamount to an averment that the act was "wilful, deliberate, and premeditated." State v. Hing, 16 Nev. 307.

Where evidence is offered to prove a certain state of facts, and the claim is made that they are proved, the court should, if requested so to do, charge the jury what the law is applicable to the facts claimed to be proved. In reviewing an instruction: Held, that it mattered not which of the parties owned the ore, or was in possession of it, lawfully or unlawfully, since the verdict was manslaughter only; that in any event the defendant was guilty of that unless, without his own fault, he had reason to believe, and did believe, as a reasonable man, at the time of the fatal shot, that he was in serious danger of receiving great bodily injury or of losing his life at the hands of deceased. When the character of a weapon is not doubtful and does not depend upon its use, as, for instance, a

loaded pistol, the court has the right to declare it a deadly weapon. The court, of its own motion, instructed the jury: "If you believe from the evidence that the defendant is guilty, then, if the defendant has proved a previous good character for peace and quietness, such good character would be of no avail to him, and would not authorize an acquittal": Held, not erroneous. Testimony as to the previous good character of a defendant is admissible in evidence and should always be considered by the jury in connection with all the other facts and circumstances; but if the jury believe from the evidence that the defendant is guilty, they must so find, notwithstanding his good character. State v. Levigne, 17 Nev. 435 (30 P. 1084).

When a defendant is convicted of the crime of murder, alleged to have been committed by the administering of poison, the jury may find the defendant guilty of murder in the second degree, for the reason that the statute leaves the question of degree to be settled by the jury. If the jury fix the crime at murder in the second degree, in a case where the law and the facts make it murder in the first degree, it is an error in favor of the prisoner, of which the law will not take any cognizance, and of which the prisoner ought not to complain. Instructions to the effect that in the event of the defendant's preparing poison with suicidal intent and the deceased person having drank the same by mistake that the defendant would be "liable for the consequences," in the same connection stating correctly what the consequences would be, are not erroneous or misleading. State v. Lindsey, 19 Nev. 47 (3 A. S. 776, 5 P. 822).

If an intent to commit a felony be abandoned voluntarily and freely before the act is put in process of final execution, there being no outside cause prompting such abandonment, this is a defense, but if such abandonment is caused by fear of detection, it is no defense if the attempt progresses sufficiently towards execution to be per se indictable before such abandonment. Where a party, while attempting to perpetrate a robbery, shoots and kills the party attempted to be robbed, he is guilty of murder in the first degree. The jury may be instructed that if they find that the accused shot and killed the deceased while attempting to perpetrate a robbery on him, they had "no option but to find the perpetrator guilty of murder in the first degree." State v. Gray, 19 Nev. 213 (8 P. 456).

See State v. Pierce, 8 Nev. 291; State v. Smith, 10 Nev. 106; State v. Thompson, 12 Nev. 140.

6385. Express malice defined.

SEC. 120. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

Express malice necessarily renders any murder murder of the first degree. State v. Lopez, 15 Nev. 408.

6386. Degrees of murder—Punishment.

SEC. 121. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart. All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree; but, if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly. Every person convicted of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury trying the same; or upon a plea of guilty the court shall determine the same; and every person convicted of murder of the second degree shall suffer imprisonment in the state prison for a term of not less than ten years, and which may be extended to life.

See note to sec. 6384.

See secs. 6352, 6422, 6819.

See State v. Mangana, 33 Nev.—(112 P. 693); State v. Millain, 3 Nev. 410, 441, 442, 472; State v. Little, 6 Nev. 283; State v. Rover, 10 Nev. 390, 391; State v. Thompson, 12 Nev. 145; State v.

Lopez, 15 Nev. 408, 413, 415; State v. Hing, 16 Nev. 308; State v. Lindsey, 19 Nev. 49, 50 (3 A. S. 776, 5 P. 822); State v. Gray, 19 Nev. 219 (8 P. 456); Ex Parte Curnow, 21 Nev. 35 (24 P. 430); State v. Wong Fun, 22 Nev. 341 (40 P. 95); Ex Parte Dela, 25 Nev. 353 (83 A. S. 603, 60 P. 217).

6387. Manslaughter defined.

SEC. 122. Manslaughter is the unlawful killing of a human being, without malice express or implied, and without any mixture of deliberation. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible; or, involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.

Where there is no evidence tending to reduce a homicide to the grade of manslaughter, it is not error for the court to refuse instructions upon the law of manslaughter. State v. Johnny, 29 Nev. 203 (87 P. 3), citing to same effect State v. Donovan, 10 Nev. 36; State v. Millain, 3 Nev. 409.

See State v. Smith, 10 Nev. 106.

6388. Voluntary manslaughter defined.

SEC. 123. In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

6389. When punished as murder.

SEC. 124. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for, if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder.

6390. Involuntary manslaughter defined.

SEC. 125. Involuntary manslaughter shall consist in the killing of a human being, without any intent so to do, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner; *provided,* that where such involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder.

There is no such crime known to the law as an attempt to commit embracery. Embracery is itself but an attempt to do wrong. It is a crime to solicit another to commit embracery. State v. Sales, 2 Nev. 268.

Under an indictment for murder a defendant may be lawfully convicted of an assault with intent to kill. Ex Parte Curnow, 21 Nev. 33 (24 P. 430).

Where the evidence shows defendant to be guilty of robbery, he cannot complain that he was convicted of an attempt to commit the crime. State v. O'Keefe, 23 Nev. 127 (62 A. S. 768, 43 P. 918).

This section applies to all offenses then or thereafter defined by statute, and therefore one charged under a later statute with selling liquor to an Indian may be convicted of an attempt to commit that offense. Ex Parte Finnegan, 27 Nev. 57 (71 P. 642).

The word "attempt" used in an indictment charging a defendant with an attempt to escape from jail implies both an intent and an endeavor to accomplish such escape. State v. Clark, 32 Nev. 145 (104 P. 593).

An attempt to commit a crime contains three elements—the intent, the performance of some act toward its commission, and failure of consummation. State v. Thompson, 31 Nev. 209 (101 P. 557).

See State v. Raymond, 33 Nev. — (117 P. 1); State v. Kelly, 1 Nev. 227; State v. Harris, 12 Nev. 422; State v. Lopez, 15 Nev. 408, 413, 415; State v. Gray, 19 Nev. 220 (8 P. 456); State v. Hartley, 22 Nev. 362 (28 L. R. A. 33, 40 P. 372).

6391. Manslaughter, punishment.

SEC. 126. Every person convicted of the crime of manslaughter shall be punished by imprisonment in the state prison for a term not exceeding ten years.

6392. Death within a year and a day.

SEC. 127. In order to make the killing either murder or manslaughter, it is requisite that the party die within a year and a day after the stroke received, or the cause of death administered, in the computation of which the whole of the day on which the act was done shall be reckoned the first.

An indictment charging that a mortal wound was inflicted on a date about four months before the finding of the indictment, and that deceased died from it in the meantime, sufficiently charges that death occurred within a year and a day after the infliction of the wound. State v. Williams, 31 Nev. 360 (102 P. 974).

See State v. Huff, 11 Nev. 20.

6393. Place of trial for homicide.

SEC. 128. If the injury be inflicted in one county, and the party die within another county, or without the state, the accused shall be tried in the county where the act was done, or the cause of death administered. If the party killing shall be in one county, and the party killed in another county, at the time the cause of death shall be administered, the accused may be tried in either county.

6394. Justifiable homicide defined.

SEC. 129. Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, property, or person, against one who manifestly intends, or endeavors, by violence or surprise, to commit a felony, or against any person or persons who manifestly intend and endeavor, in a violent, riotous, or tumultuous manner, to enter the habitation of another, for the purpose of assaulting or offering personal violence to any person dwelling or being therein.

See secs. 6384, 6395, 6859–6861.

A requested instruction, on a trial for murder, wherein it was contended that the killing was in defense, not only of defendant, but also of another, that the law makes it the duty of everyone who sees a felony attempted by violence to prevent it, if possible, and that one may kill in the defense of another under the same circumstances that he would have a right to kill in defense of himself, should have been given, notwithstanding an instruction was given which was substantially the statutory definition of justifiable homicide. State v. Hennessy, 29 Nev. 320 (90 P. 221).

Threats by decedent to kill defendant the first time he saw him, made within an hour before the shooting, are admissible, although they were not communicated to defendant, on the issue of who was the aggressor. State v. Jackman, 29 Nev. 403 (91 P. 143).

While the burden of establishing self-defense is on accused, he is not required to establish such fact beyond a reasonable doubt; an instruction requiring such a degree of proof is prejudicial error. State v. Skinner, 32 Nev. 70 (104 P. 223).

See State v. Smith, 10 Nev. 106; State v. Hartley, 22 Nev. 362 (28 L. R. A. 33, 40 P. 372); State v. Stewart, 9 Nev. 121.

6395. What necessary for defense.

SEC. 130. A bare fear of any of these offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears and not in a spirit of revenge.

See secs. 6384, 6394.

Where a person, without voluntary seeking, provoking, inviting, or willingly engaging in a difficulty of his own free will, is attacked by an assailant, and it is necessary for him to take the life of his assailant to protect his own, then he need not flee for safety, but has the right to stand his ground and slay his adversary. State v. Grimet, 33 Nev. — (112 P. 273).

The character of the deceased can only be brought in issue where the circumstances are such as to raise a doubt whether the homicide was committed in malice or was prompted by the instinct of self preservation: Held, upon a review of the facts, that no evidence as to the character of the deceased would have justified defendant's action, or had any tendency to reduce the offense. State v. Pearce, 15 Nev. 188; State v. Levigne, 17 Nev. 435 (30 P. 1084); State v. Harrington, 12 Nev. 136; State v. Stewart, 9 Nev. 121; State v. Smith, 10 Nev. 106; State v. Hartley, 22 Nev. 362 (28 L. R. A. 33, 40 P. 372).

6396. Justifiable homicide by public officer.

SEC. 131. Homicide is justifiable when committed by a public officer, or person acting under his command and in his aid, in the following cases:

1. In obedience to the judgment of a competent court.

2. When necessary to overcome actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty.

3. When necessary in retaking an escaped or rescued prisoner who has been committed, arrested for, or convicted of a felony; or in arresting a person who has committed a felony and is fleeing from justice; or in attempting, by lawful ways or means, to apprehend a person for a felony actually committed; or in lawfully suppressing a riot or preserving the peace.

See State v. Ferguson, 9 Nev. 106.

6397. What considered justifiable or excusable homicide.

SEC. 132. All other instances which stand upon the same footing of reason and justice as those enumerated, shall be considered justifiable or excusable homicide.

6398. Homicide by other person, when justifiable.

SEC. 133. Homicide is also justifiable when committed either—

1. In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or,

2. In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode, in which he is.

See secs. 6859-6861.
See State v. Hennessy, 29 Nev. 320 (90 P. 221), under sec. 6394.

6399. Mitigating circumstances, who to prove.

SEC. 134. The killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified, or excused in committing the homicide.

See State v. Skinner, 32 Nev. 70 (104 P. 223); State v. McCluer, 5 Nev. 137; State v. Pierce, 8 Nev. 302; State v. Marks, 15 Nev. 37.

6400. Excusable homicide by misadventure.

SEC. 135. Excusable homicide by misadventure, is when a person is doing a lawful act, without any intention of killing, yet unfortunately kills another, as where a man is at work with an ax, and the head flies off and kills a bystander, or where a parent is moderately correcting his child, or a master his pupil, or an officer punishing a criminal, and happens to occasion death, it is only a misadventure, for the act of correction was lawful; but if a parent or master exceed the bounds of moderation, or the officer the sentence under which he acts, either in the manner, the instrument, or quantity of punishment, and death ensue, it will be manslaughter or murder, according to the circumstances of the case.

6401. Appearing justifiable, acquittal.

SEC. 136. The homicide appearing to be justifiable or excusable, the person indicted shall, upon his trial, be fully acquitted and discharged.

6402. Killing in self-defense.

SEC. 137. If a person kill another in self-defense, it must appear that the danger was so urgent and pressing, that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given.

See State v. Grimet, 33 Nev.— (112 P. 273), under sec. 6395; State v. Forsha, 8 Nev. 140; State v. Smith, 10 Nev. 122.

6403. Killing unborn quick child.

SEC. 138. The wilful killing of an unborn quick child, by any injury committed upon the mother of such child, is manslaughter.

6404. Administering poison.

SEC. 139. Every person who shall wilfully and maliciously administer, or cause to be administered to or taken by any person, any poison, or other noxious or destructive substance or liquid, with the intention to cause the death of such person, and being thereof duly convicted, shall be punished by imprisonment in the state prison for a term not less than ten years, and which may extend to life.

6405. Woman taking drugs to procure miscarriage.

SEC. 140. Every woman quick with child who shall take or use, or submit to the use of, any drug, medicine or substance, or any instrument or other means, with intent to procure her own miscarriage, unless the same is necessary to preserve her own life or that of the child whereof she is pregnant, and thereby causes the death of such child, shall be guilty of manslaughter.

6406. Killing by overloading passenger vessel.

SEC. 141. Every person navigating a vessel for gain who shall wilfully or negligently receive so many passengers or such a quantity of other lading on board, that by means thereof such vessel shall sink, be overset or injured, and thereby a human being shall be drowned or otherwise killed, shall be guilty of manslaughter.

6407. Owner of vicious animal may become guilty of manslaughter.

SEC. 142. If the owner or custodian of any vicious or dangerous animal, knowing its propensities, shall wilfully or negligently allow it to go at large, and such animal while at large shall kill a human being not himself in fault, such owner or custodian shall be guilty of manslaughter.

6408. Reckless operation of steamboat or engine.

SEC. 143. Every person having charge of a steamboat used for the conveyance of passengers, or of a boiler or engine thereof, who, from ignorance, recklessness or gross negligence, or for the purpose of excelling another boat in speed, shall create or allow to be created such an undue quantity of steam as to burst the boiler or other apparatus in which it is generated or contained, or to break any apparatus or machinery connected therewith, whereby the death of a human being is occasioned; and every engineer or other person having charge of a steam boiler, steam engine or other apparatus for generating or applying steam, who, wilfully or from ignorance or gross negligence, shall create or allow to be created such an undue quantity of steam as to burst the boiler, engine or apparatus, or to cause any other accident, whereby the death of a human being is occasioned, shall be guilty of manslaughter.

6409. Keeping explosive unlawfully.

SEC. 144. Every person who shall make or keep gunpowder, or any other explosive substance, in a city or village, in any quantity or manner prohibited by law or by ordinance of such municipality, if an explosion thereof shall occur whereby the death of a human being is occasioned, shall be guilty of manslaughter.

See secs. 1947, 6560.

6410. Liability of intoxicated physician.

SEC. 145. Every physician or surgeon, or person practicing as such, who, being in a state of intoxication, or under the influence of any narcotic drug, shall prescribe or administer any poison, drug or medicine, or do any other act as a physician, to another person, which, though done without design, shall cause the death of the latter, shall be guilty of manslaughter.

6411. Assault and intimidation.

SEC. 146. If any person shall assault and beat another with a cowhide, stick, or whip, having at the time, in his possession, a pistol or other deadly weapon, with intent to intimidate and prevent the person assaulted from defending himself, such person shall, on conviction thereof, be imprisoned in the state prison not less than one or more than ten years.

6412. Assault defined.

SEC. 147. An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another, and every person convicted thereof shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months.

See note to sec. 6413.

See State v. O'Connor, 11 Nev. 423; State ex rel. Quinn v. District Court, 16 Nev. 76; State v. Warren, 18 Nev. 463 (5 P. 134).

6413. Assault with intent to commit a crime.

SEC. 148. An assault with intent to kill, commit rape, the infamous crime against nature, mayhem, robbery, or grand larceny, shall subject the offender to imprisonment in the state prison for a term not less than one year, nor more than fourteen years; *provided*, that if an assault with intent to commit rape be made, and if such crime be accompanied with acts of extreme cruelty and great bodily injury inflicted, the person guilty thereof shall be punished by imprisonment in the state prison for a term of not less than fourteen years, or he shall suffer death, if the jury by their verdict affix the death penalty. An assault with a deadly weapon, instrument or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant heart, shall subject the offender to imprisonment in the state prison not less than one year or exceeding two years, or to a fine not less than one thousand, nor exceeding five thousand dollars, or to both such fine and imprisonment.

In an indictment for assault with a deadly weapon with intent to inflict upon the person of another a bodily injury, which is in other respects good, the mere addition of the words "did strike and stab" are simply surplusage and do not vitiate. In a prosecution for an assault with a deadly weapon with intent to inflict upon the person of another a bodily injury, properly charged, a verdict of "guilty" is in effect a verdict of guilty as charged in the indictment. Acts occurring a day or two prior to the assault and known to the defendant cannot of themselves alone be shown as evidence of a provocation for the assault. In cases where a provocation either mitigates or justifies an act of violence, such an act must be the immediate result of and closely follow the provocation. As a general rule, the determination as to what length of time may intervene between an act of provocation and the commission of a crime should be left to the jury, when the provocation is not so far distant as to leave no doubt. The simple exercise of a legal right, no matter how offensive to another, is never in law

deemed provocation sufficient to justify or mitigate an act of violence. Under the statute relating to the crime of assault with a deadly weapon with intent to inflict upon the person of another a bodily injury, a court has no authority to impose a fine of any sum less than one thousand dollars, though the sentence may also be for imprisonment. Where the court below in a criminal case imposed a less fine than that fixed by statute, it was on appeal stricken out from the sentence. State v. Lawry, 4 Nev. 161.

An intent to murder cannot be conclusively inferred from the mere use of a deadly weapon; and an instruction to the jury to that effect in a murder trial, is error. When a deadly weapon is used in a manner likely to occasion the death of another, and death is the result, the presumptions are that the person using it intended to kill, and that such intent is a malicious one, but neither presumption is conclusive. State v. Newton, 4 Nev. 410.

To constitute the crime of assault with a deadly weapon with intent to inflict a bodily injury, there must be an unlawful attempt with a weapon, deadly either in its nature or capable of being used in a deadly manner, to inflict a bodily injury, and with the present ability so to do. Where, on a trial for assault with a deadly weapon with intent to inflict a bodily injury, it appeared that defendant, within shooting, but not within striking distance, held a capped pistol in his hand, pointed it at the prosecutor, and attempted to discharge it: Held, that there could be no conviction without proof that the pistol was loaded. A pistol may be a deadly weapon under some circumstances without being loaded, but not so unless it can be used in some other deadly manner beside shooting. The fact that an attempt was made to use a pistol as if it were loaded is not of itself sufficient to warrant an inference that it was loaded. To warrant a conviction for assault with a deadly weapon with intent to inflict a bodily injury, there must be a showing of both ability and intention to commit the offense. State v. Napper, 6 Nev. 113.

It cannot be said that an indictment, which charges "an assault with a deadly weapon with intent to kill," does not charge the statutory offense of "an assault with intent to kill" merely because it describes the means or instrument of the assault. It is not necessary to include in an indictment a formal statement of the crime of which the defendant is accused according to the statutory designation; a statement of the acts constituting the offense is sufficient. It is not necessary in charging an assault to allege a present ability to kill or inflict injury. As a general rule, the question whether a particular weapon is deadly or not is one of law for the court and not of fact for the jury. State v. Rigg, 10 Nev. 284.

Malice or deliberate purpose on the part of the defendant is not a necessary element of the crime of assault with intent to kill. State v. Tickel, 13 Nev. 502; State v. O'Connor, 11 Nev. 424.

The crime of assault with intent to kill consists of two essential elements, the act of the assaulter and the intent; and to convict one of this crime it is necessary that the intent to kill must be alleged and proved beyond a reasonable doubt. State v. Rodriguez, 31 Nev. 342 (102 P. 863).

It is the character of the weapon and the manner in which it is used (not the purpose for which it is carried), taken in connection with the facts and circumstances of the assault, that indicates the intention of the defendant. Where the character of the weapon, whether deadly or not, is doubtful, or where its character depends upon the particular manner in which it was used, the question is one of fact, and should be submitted to the jury. State v. Davis, 14 Nev. 407.

The court instructed the jury that "an assault with intent to kill, is an unlawful attempt, coupled with a present ability, to kill another person under such circumstances as would constitute an unlawful killing, had the death of the person assaulted actually resulted": Held, correct. State v. Marks, 15 Nev. 33.

The sufficiency of an indictment must be determined with reference to the crime charged, and if the indictment is good for the crime of "an assault with intent to kill," it is sufficient to sustain a conviction of "an assault with a deadly weapon, with intent to inflict bodily injury." The graver charge includes the less. In an indictment for an assault with intent to kill it is not necessary to allege in direct terms that the instrument used was a deadly weapon. The means of effecting the criminal intent, or the circumstances of evincing the design with which the assault was made, are matters of evidence, and need not be set forth in the indictment. When there is any doubt as to whether the instrument used in committing the assault was a deadly weapon, it is a question for the court and jury to decide. State v. Collyer, 17 Nev. 275 (30 P. 891).

Declarations, made by the person assaulted, to persons who were present a few minutes after the difficulty, to the effect that the defendant made the assault, are not admissible as part of the res gestæ. State v. Dougherty, 17 Nev. 376 (30 P. 1074).

See State v. Roderigas, 7 Nev. 328, 329; State v. Robey, 8 Nev. 321; State v. Johnson, 9 Nev. 175, 178; State v. Pickett, 11 Nev. 259; Ex Parte Tani, 29 Nev. 388, 401, 13 L. R. A. (N. S.) 518, 91 P. 137.

6414. Assault and battery defined, penalty.

SEC. 149. Assault and battery is the unlawful beating of another, and a person duly convicted thereof shall be fined in any sum not exceeding five

hundred dollars, or imprisoned in the county jail for a term not exceeding six months.

6415. Provoking assault.

SEC. 150. Every person who shall by word, sign or gesture, wilfully provoke, or attempt to provoke, another person to commit an assault or breach of the peace, shall be guilty of misdemeanor.

6416. Mayhem defined. penalty.

SEC. 151. Mayhem consists of unlawfully depriving a human being of a member of his or her body, or disfiguring or rendering it useless. If any person shall cut out or disable the tongue, put out an eye, slit the nose, ear, or lip, or disable any limb or member of another, or shall voluntarily, or of purpose, put out an eye or eyes, every such person shall be guilty of mayhem. The crime of mayhem shall be punishable by imprisonment in the state prison for a term not exceeding fourteen years.

6417. Idem—Instrument or manner of maiming.

SEC. 152. To constitute mayhem it is immaterial by what means or instrument or in what manner the injury was inflicted.

6418. Idem—Recovery from injury, when a defense.

SEC. 153. Whenever upon a trial for mayhem it shall appear that the injury inflicted will not result in any permanent disfiguration of appearance, diminution of vigor, or other permanent injury, no conviction for maiming shall be had, but the defendant may be convicted of assault in any degree.

6419. Kidnaping defined—How punished.

SEC. 154. Every person who shall wilfully—

1. Seize, confine, or inveigle another with intent to cause him without authority of law to be secretly confined or imprisoned, or in any way held to service, or with intent to extort or obtain money or reward for his return, release, or disposition, or to lead, take, entice away, or detain, a child under the age of sixteen years with intent to conceal him from his parent, guardian or other person having lawful care or control of him, or to steal any article upon his person; or,

2. Abduct, entice, or by force or fraud unlawfully take or carry away another to or from a place without the state, and shall afterwards send, bring or keep such person, or cause him to be kept or secreted within this state;

Shall be guilty of kidnaping, and punished by imprisonment in the state penitentiary for not less than five years.

6420. Selling services of person kidnaped.

SEC. 155. Every person, who within this state or elsewhere, shall sell or in any manner transfer for any term, the services or labor of any person who has been forcibly taken, inveigled, or kidnaped in or from this state, shall be punished by imprisonment in the state penitentiary for not more than ten years.

6421. Idem—Venue—Effect of consent.

SEC. 156. Any proceeding for kidnaping may be instituted either in the county where the offense was committed or in any county through or in which the person kidnaped or confined was taken or kept while under confinement or restraint. Upon a trial for violation of section 154 or 155 of this act, the consent thereto of the person kidnaped or confined shall not be a defense unless it appears satisfactorily to the jury that such person was

above the age of sixteen years and that his consent was not extorted by threats, duress or fraud.

6422. Dueling—Death by deemed murder.

SEC. 157. If any person shall, by previous appointment or agreement, fight a duel with a rifle, shotgun, pistol, bowie knife, dirk, smallsword, backsword, or other dangerous weapon, and in so doing shall kill his antagonist, or any person or persons, or shall inflict such wound as that the party or parties injured shall die thereof within one year thereafter, every such offender shall be deemed guilty of murder in the first degree, and upon conviction thereof shall be punished accordingly.

See sec. 2823.

6423. Disfranchisement for dueling.

SEC. 158. Any person who shall engage in a duel with any deadly weapon, although no homicide ensue, or shall challenge another to fight such duel, or shall send or deliver any verbal or written message purporting or intending to be such challenge, although no duel ensue, shall be punished by imprisonment in the state prison not less than two nor more than ten years, and shall be incapable of voting or holding any office of trust or profit under the laws of this state.

See secs. 250, 370, 371.

6424. Competent witness in trial for dueling.

SEC. 159. Any and every person who shall be present at the time of fighting any duel with deadly weapons, either as second, aid, surgeon, or spectator, or who shall advise or give assistance to such duel, shall be a competent witness against any person offending against any of the provisions of section 157 or 158, and may be compelled to appear and give evidence before any justice of the peace, grand jury, or court, in the same manner as other witnesses; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying.

6425. Posting for not fighting duel, penalty.

SEC. 160. If any person shall post another, or, in writing, or print, or orally shall use any reproachful or contemptuous language to, or concerning another, for not fighting a duel, or for not sending or accepting a challenge, he shall be imprisoned in the state prison for a term not less than six months nor more than one year, and fined in any sum not less than five hundred nor exceeding one thousand dollars.

6426. Penalty for dueling—Acting as second—Deemed manslaughter.

SEC. 161. If any person or persons, with or without deadly weapons, upon previous concert and agreement, fight one with the other or give or send, or authorize any other person to give or send, a challenge verbally or in writing, to fight any other person, the person or persons giving, sending or accepting a challenge to fight any other person, with or without weapons, upon conviction thereof shall be punished by imprisonment in the state prison not less than two years, or more than five years; and every person who shall act for another in giving, sending, or accepting, either verbally or in writing, a challenge, to fight any other person, upon conviction thereof they, or either, or any of them, shall be punished by imprisonment in the state prison not less than two years or more than five years. Should death ensue to any person in such fight, or should any person die from any injuries received in such fight within one year and one day, the person or persons causing, or having any agency in causing such death, either by fighting or by giving or sending for himself, or for any other person, or in receiving

for himself, or for any other person, such challenge to fight, shall be deemed guilty of manslaughter, and punished accordingly.

See sec. 2823.
See Ex Parte Finlen, 20 Nev. 141 (18 P. 827).

6427. Robbery defined—Penalty.

SEC. 162. Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. If used merely as a means of escape, it does not constitute robbery. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear. Every person who shall commit robbery shall be punished by imprisonment in the state penitentiary for not less than five years; providing such robbery is committed upon any train traveling upon any railroad within this state the jury may, in its discretion, impose the penalty of death or the court in the event of a plea of guilty, may impose such death penalty.

It was not definitely shown that defendant participated in the robbery, other than he came with the robbers, and left when they left, was present at the robbery, and apparently acquiesced therein. Held, that the evidence would have justified the jury in finding him guilty of the robbery. State v. O'Keefe, 23 Nev. 127 (62 A. S. 768, 43 P. 918).

The phrase "in pursuance of," according to Webster, means "in accordance with; in prosecution or fulfilment of"; and an indictment alleging that defendant assaulted prosecutor with a deadly weapon and "in pursuance of said assault" attempted to rob him, etc., means "in fulfilment of," rendering the indictment sufficient to charge an assault with intent to rob. In an indictment alleging that defendant assaulted the prosecutor and attempted to feloniously rob him, the word "feloniously" means "done with intent to commit" the crime. The custom of manufacturers of guns and revolvers of placing a distinguishing number on each instrument, may be shown by a hardware merchant who also deals in firearms, and has gained his knowledge in the course of trade and through the statements of others engaged in the business. State v. Hughes, 31 Nev. 270 (102 P. 562).

It is unnecessary to prove both violence and intimidation; and, if the fact be attended with the circumstance of terror, such threatening word or gesture as in common experience is likely to create apprehension of danger, and induce a man to part with his property for the safety of his person, it is robbery, and it is unnecessary to prove actual fear, as the law will presume it in such case. In a prosecution for robbery, evidence held sufficient to warrant the jury in finding defendant guilty, on the view that the money was taken by intimidation. State v. Luhano, 31 Nev. 278 (102 P. 260).

See State v. Chapman, 6 Nev. 320.

6428. Libel defined—Penalty.

SEC. 163. A libel is a malicious defamation, expressed either by printing, or by signs, or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or publish the natural defects of one who is alive, and thereby to expose him or her to public hatred, contempt, or ridicule; every person, whether the writer or the publisher, convicted of the offense, shall be fined in a sum not exceeding five thousand dollars, or imprisoned in the county jail not exceeding one year, or in the state prison not exceeding five years. In all prosecutions for libel the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motive and for justifiable ends, the party shall be acquitted, and the jury shall have the right to determine the law and the fact.

6429. Publication defined.

SEC. 164. Any method by which matter charged as libelous may be communicated to another shall be deemed a publication thereof.

6430. Liability of editors and others.

SEC. 165. Every editor or proprietor of a book, newspaper or serial, and every manager of a copartnership or corporation by which any book, newspaper or serial is issued, is chargeable with the publication of any matter contained in any such book, newspaper or serial, but in every prosecution for libel the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes by another who had no authority from him to make such publication, and was retracted by him as soon as known with an equal degree of publicity.

6431. Venue, punishment restricted.

SEC. 166. Every other person publishing a libel in this state may be proceeded against in any county where such libelous matter was published or circulated, but a person shall not be proceeded against for the publication of the same libel against the same person in more than one county.

6432. Furnishing libelous information.

SEC. 167. Every person who shall wilfully state, deliver or transmit by any means whatever, to any manager, editor, publisher, reporter or other employee of a publisher of any newspaper, magazine, publication, periodical or serial, any statement concerning any person or corporation, which, if published therein, would be a libel, shall be guilty of a misdemeanor.

6433. Threatening to publish libel.

SEC. 168. Every person who shall threaten another with the publication of a libel concerning the latter, or his spouse, parent, child, or other member of his family, and every person who offers to prevent the publication of a libel upon another person upon condition of the payment of, or with intent to extort money or other valuable consideration from any person, shall be guilty of a gross misdemeanor.

6434. Slander of woman.

SEC. 169. Every person who, in the presence or hearing of any person other than the female slandered, whether she be present or not, shall maliciously speak of or concerning any female of the age of twelve years or upwards, not a common prostitute, any false or defamatory words or language which shall injure or impair the reputation of any such female for virtue or chastity or which shall expose her to hatred, contempt or ridicule, shall be guilty of a misdemeanor. Every slander herein mentioned shall be deemed to be malicious unless justified, and shall be justified when the language charged as slanderous, false or defamatory is true and fair, and was spoken with good motives and for justifiable ends.

6435. Testimony necessary to convict.

SEC. 170. No conviction shall be had under the provisions of section 169 of this act, upon the testimony of the woman slandered unsupported by other evidence.

6436. Slandering character of woman.

SEC. 171. Every male person who shall in any language or words whatsoever, either truthfully or falsely, orally declare, in the presence of two or more other persons, of good general reputation, in the locality in which they reside that he has had carnal knowledge of any certain female person other than his lawful wife, except when under oath in a court of justice, or elsewhere with or without oath in the matter of a preparation for a judicial

proceeding, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a period of not less than ninety days, nor more than six months, or by a fine of not less than two hundred nor exceeding five hundred dollars.

6437. Extortion by threats—Penalty.

SEC. 172. If any person, either verbally or by any written or printed communication, shall maliciously threaten any injury to the person or property of another, with intent thereby to extort money, or any pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be punished, upon conviction thereof, by imprisonment, not more than one year, nor less than six months, and by a fine not exceeding five hundred nor less than one hundred dollars.

See sec. 6739, 6821.
See State v. Vertrees, 33 Nev.— (112 P. 42).

6438. Threatening letters or writing—Penalty.

SEC. 173. If any person shall knowingly send or deliver any letter or writing threatening to accuse another of a crime or misdemeanor, or to expose or publish any of his infirmities or failings, with intent to extort money, goods, chattels, or other valuable thing; or threatening to maim, wound, kill, or murder, or to burn or destroy his or her house or other property, or to accuse another of a crime or misdemeanor, or expose or publish any of his or her infirmities, though no money, goods, chattels, or other valuable thing be demanded; or writes and sends, or writes and delivers, either through the mail, express, by private parties, or otherwise any anonymous letter, or any letter bearing a fictitious name, charging any person with crime, or writes and sends any anonymous letter or letters bearing a fictitious name, containing vulgar or threatening language, obscene pictures, or containing reflections upon his or her standing in society or in the community, such person so offending shall, on conviction, be fined in a sum not exceeding five hundred dollars, and imprisoned in the county jail not exceeding six months.

See secs. 70, 474 and 556 of this act.

6439. Drawing deadly weapons—Duties of officers.

SEC. 174. Any person in this state having, carrying, or procuring from another person any dirk, dirk-knife, sword, sword-cane, pistol, gun, or other deadly weapon, who shall, in the presence of two or more persons, draw or exhibit any of said deadly weapons, in a rude, angry, or threatening manner, not in necessary self-defense, or who shall in any manner unlawfully use the same in any fight or quarrel, the person or persons so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five hundred dollars, or shall be imprisoned in the county jail for a term not exceeding six months; *provided, nevertheless,* that no sheriff, deputy sheriff, marshal, constable, or other peace officer, shall be held to answer, under the provisions of this section, for drawing or exhibiting any of the weapons hereinbefore mentioned, while in the lawful discharge of his or their duties.

See State v. Anderson, 3 Nev. 254; State v. Levigne, 17 Nev. 435 (30 P. 1084).

6440. False imprisonment.

SEC. 175. False imprisonment is an unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority. Any person convicted of false imprisonment shall pay all damages sustained by the person so imprisoned, and be fined in any sum not exceeding five thousand dollars or imprisoned in the state prison for a term not exceeding one year.

6441. Unlawful to keep vicious dog.

SEC. 176. It is hereby made unlawful for any person in this state to own or keep any vicious dog. And if any person shall hereafter own or keep any such dog, and such dog shall injure any person, such owner or keeper of such dog shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine in a sum not exceeding five hundred dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, as the court shall adjudge.

CHAPTER 14

CRIMES AGAINST MORALITY AND DECENCY

6442. Rape defined—Penalty.
6443. Sexual intercourse and carnal knowledge defined.
6444. Forcing woman to marry.
6445. Placing female in house of prostitution—Penalty.
6446. Abandonment of wife or child.
6447. Abortion defined.
6448. Selling drugs to produce miscarriage.
6449. Evidence.
6450. Concealing birth.
6451. Advertising goods to prevent conception.
6452. Idem—Advertising of services to prevent conception.
6453. Idem—Penalty for advertising.
6454. Idem—Liability of publisher.
6455. Idem—Circulation of publications containing prohibited matter forbidden.
6456. Bigamy defined—Penalty.
6457. Marrying a married person.
6458. Incest defined.
6459. Crime against nature defined.
6460. Lewdness.
6461. Obscene literature.
6462. Advertising for divorce business.
6463. Swindling.
6464. Bunco-steering.
6465. Pawn broker—Duty to record transactions.
6466. Inspection of records and goods.
6467. Report to chief of police.
6468. Retention of property.
6469. Penalty.
6470. Rates of interest and sale of pledged property.
6471. "Pawn broker" defined.
6472. "Second-hand dealer" defined.
6473. Dissection, when permitted.
6474. Burial or cremating.
6475. Opening grave — Stealing body — Receiving same.
6476. Interfering with dead body or funeral.
6477. Opening road through cemetery.
6478. Disturbing religious meeting.
6479. Unlawful to marry person without license.
6480. Idem—Penalty.
6481. Failure to support wife and children misdemeanor—Penalty.
6482. Justice to issue warrant and conduct hearing.
6483. Wife competent witness.
6484. Keeping disorderly house.
6485. Selling opium, felony.
6486. Use and sale prohibited.
6487. Opium smoking—Punishment.
6488. Liability of property owner.
6489. Unlawful to resort.
6490. Lessor liable.
6491. Judgment, lien on property.
6492. Forfeiture of lease.
6493. Fee of district attorney.
6494. Lotteries defined.
6495. Lottery drawing—Penalty.
6496. Selling of tickets, misdemeanor.
6497. Aiding sale of tickets, misdemeanor.
6498. Keeping tickets, misdemeanor.
6499. Insuring or guaranteeing ticket, misdemeanor.
6500. Property forfeited to state.
6501. Idem—Letting use of building, misdemeanor.
6502. Unlawful to sell tobacco to minors—Penalty.
6503. Idem—Dealer to forfeit license.
6504. Sale of liquor within half mile of state prison unlawful—Penalty.
6505. Liquors prohibited in capitol building—Penalty.
6506. Selling liquor to minors or imbeciles, or allowing minors in billiard halls—Employing minor as barkeeper.
6507. Providing Indian liquor, felony.
6508. Federal government to prosecute—Terms defined.
6509. Idem—Arresting officer to receive fees.
6510. Houses of ill-fame, location of.
6511. Property not to be rented for hurdy house.
6512. Idem—Penalty.
6513. Idem—Competent evidence.
6514. Marriages between Caucasian and other races prohibited.
6515. Penalty for contracting parties.
6516. Penalty for minister.
6517. Fornication between certain races prohibited—Penalty.
6518. All gambling prohibited—Penalty.
6519. Penalty for person permitting games.
6520. Penalty for having gambling implements in possession.
6521. Duty of officer to seize gambling paraphernalia.
6522. Witness not exempt from testifying, but cannot be prosecuted.

6523. Selling liquor to drunkards—Penalty for drunkenness.
6524. Horse meat—Misdemeanor to sell.
6525. Horse meat—Seller must exhibit hide.
6526. Duties of manufacturers.
6527. Substitute for butter stamped or branded.
6528. Letters for brands.

6442. Rape defined—Penalty.

SEC. 177. Rape is the carnal knowledge of a female, forcibly and against her will, and a person duly convicted thereof shall be punished by imprisonment in the state prison for a term of not less than five years and which may extend to life; *provided*, that if such crime be accompanied with acts of extreme violence and great bodily injury inflicted, the person guilty thereof shall be punished by imprisonment in the state prison for a term not less than twenty years, or he shall suffer death, if the jury by their verdict affix the death penalty. And any person of the age of sixteen years or upwards who shall have carnal knowledge of any female child under the age of sixteen years, either with or without her consent, shall be adjudged guilty of the crime of rape, and be punished as before provided.

An attempt to commit rape does not constitute an assault when the female actually consents to what is done, whether she be within the age of twelve years or not. An assault is a necessary ingredient of every rape or attempted rape, but it is not a necessary ingredient of the crime of carnally knowing a child under the age of twelve years with or without her consent, which under the statute of this state is also called rape. As an assault implies force and resistance, the crime of "carnally knowing a child," etc., may be committed, or at least attempted, without an assault, if there is actual consent on the part of the female. There can be no assault upon a consenting female, although there may be what the statute designates a rape. The defendant might have been convicted of an "attempt to commit rape," even if the child consented to all he did, but it was error to instruct the jury that he could under such circumstances be convicted of "assault with intent to commit rape." State v. Pickett, 11 Nev. 255 (21 A. R. 754).

The slightest proof of penetration will justify submitting the question to the jury, and such proof can be inferred from circumstances. In this case there was proof of penetration. State v. Depoister, 21 Nev. 107 (25 P. 1000).

In the crime of rape, the force necessary to complete the offense may be constructive. Such constructive force exists where sexual intercourse is had with a woman who is unconscious or mentally unable to fairly comprehend the nature and consequences of the sexual act. When a woman's consent to the sexual act is induced by fraud it is not rape. To constitute the crime of attempt to commit rape by the use of constructive force, the defendant must have intended to either destroy the woman's power of resistance by the administration of liquors or drugs, or else to take advantage of the fact that she was already in a condition in which either the mental or physical ability to resist is wanting. An act to constitute an attempt must go further than mere preparation. It must be a direct movement towards the commission of the offense after the preparation is made and must be adequate to its commission. The attempted administration of cantharides to a woman for the purpose of having sexual intercourse with her, but without any offer or effort at sexual connection, is mere preparation, is not an act adequate to the commission of the crime, and does constitute an attempt to commit a rape upon her. A charge in an indictment that the defendant attempted to commit a crime only argumentatively charges that he intended to commit it, and is sufficient. State v. Lung, 21 Nev. 209, 210 (37 A. S. 505, 29 P. 235).

Upon an indictment and trial for murder, and a verdict adjudging defendant guilty of rape, the court has no jurisdiction to sentence and imprison defendant for such crime of rape, since the constitution (art. 1, sec. 8) requires presentment and indictment for the particular offense before conviction is had, and, further, because the defendant is thereby deprived of his liberty without due process of law. Ex Parte Dela, 25 Nev. 346 (83 A. S. 803, 60 P. 217).

Statements made by prosecutrix the day after an alleged rape are too remote to constitute part of the res gestæ. On a preliminary examination on a charge of rape, evidence by a medical expert that from an examination of prosecutrix soon after the alleged offense he thought she had had intercourse with some one, and by other witnesses that they had seen marks of violence on her person, was sufficient, when coupled with an admission by defendant shortly after the offense that he had committed it, to justify the commitment of defendant to answer for the crime. In re Kelly, 28 Nev. 491 (83 P. 223).

On a trial for rape, the court properly excluded evidence as to particular instances of unchastity on the part of the prosecutrix, not connected with the case on trial. A witness testifying to the general reputation of the prosecutrix may, upon cross-examination, have his attention directed to particular acts of unchastity for the purpose of ascertaining the weight to be

attached to his testimony. On a trial for rape, it is error to admit evidence of the statements made by prosecutrix at the time of making complaint, her testimony not being attacked. State v. Campbell, 20 Nev. 122 (17 P. 620).

6443. Sexual intercourse and carnal knowledge defined.

SEC. 178. Any sexual penetration, however slight, is sufficient to complete sexual intercourse or carnal knowledge.

See sec. 7171.

6444. Forcing woman to marry.

SEC. 179. Every person who shall take any woman unlawfully, against her will, and by force, menace, or duress, compel her to marry him, or to marry any other person, or to be defiled, and shall be thereof convicted, shall be punished by imprisonment in the state prison for a term not less than two nor more than fourteen years; and the record of such conviction shall operate as a divorce to the party so married.

6445. Placing female in house of prostitution—Penalty.

SEC. 180. Every person who—

1. Shall place a female in the charge or custody of another person for immoral purposes, or in a house of prostitution, with intent that she shall live a life of prostitution, or who shall compel any female to reside with him or with any other person for immoral purposes, or for the purposes of prostitution, or shall compel any such female to reside in a house of prostitution or to live a life of prostitution; or,

2. Shall ask or receive any compensation, gratuity or reward, or promise thereof, for or on account of placing in a house of prostitution or elsewhere any female for the purpose of causing her to cohabit with any male person or persons not her husband; or,

3. Shall give, offer, or promise any compensation, gratuity or reward, to procure any female for the purpose of placing her for immoral purposes in any house of prostitution, or elsewhere, against her will; or,

4. Being the husband of any woman, or the parent, guardian or other person having legal charge of the person of a female under the age of eighteen years, shall connive at, consent to, or permit her being or remaining in any house of prostitution or leading a life of prostitution; or,

5. Shall live with or accept any earnings of a common prostitute, or entice or solicit any person to go to a house of prostitution for any immoral purposes, or to have sexual intercourse with a common prostitute; or,

6. Shall decoy, entice, procure or in any manner or way to induce any female to become a prostitute or to become an inmate of a house of ill-fame or prostitution, for purposes of prostitution, or for purposes of employment, or for any purpose whatever, when she does not know that the house is one of prostitution; or,

7. Shall decoy, entice, procure or in any manner or way to induce any person, under the age of twenty-one years, to go into or visit, upon any pretext or for any purpose whatever, any house of ill-fame or prostitution, or any room or place inhabited or frequented by any prostitute, or used for purposes of prostitution;

Shall be punished by imprisonment in the state prison for not more than five years or by fine of not more than two thousand dollars.

6446. Abandonment of wife or child.

SEC. 181. Every person who shall wilfully and without lawful excuse desert, or wilfully neglect or refuse to provide for the support and maintenance of his wife, or child under the age of sixteen years, either said wife or child being in necessitous circumstances, shall be punished by imprisonment in the state prison for not more than three years, or in the

county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment; *provided,* that, before trial, with the consent of the defendant, or after conviction, the court may, in its discretion, require the defendant to enter into a recognizance in such amount as the court may fix, with or without sureties, conditioned that such defendant will faithfully pay weekly, such sum and for such a time as the court may direct, to or for the benefit of such wife or child, and so long as the defendant shall faithfully comply with the conditions of such recognizance, all proceedings in such action, or upon such judgment, shall be stayed; but if the defendant shall fail to comply with the conditions of such recognizance, or shall fail to comply with any order for his appearance in said court, such proceeding shall be revived and continued as if no stay had taken place.

Abandonment or neglect of illegitimate child, sec. 766.
See Ex Parte Lewis, 33 Nev.— (115 P. 729); Ex Parte Hose, 33 Nev.— (116 P. 417).

6447. Abortion defined.

SEC. 182. Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall—

1. Prescribe, supply, or administer to a woman, whether pregnant or not, or advise or cause her to take any medicine, drug or substance; or,

2. Use, or cause to be used, any instrument or other means;

Shall be guilty of abortion, and punished by imprisonment in the state prison for not more than five years, or in the county jail for not more than one year.

6448. Selling drugs to produce miscarriage.

SEC. 183. Every person who shall manufacture, sell or give away any instrument, drug, medicine, or other substance, knowing or intending that the same may be unlawfully used in procuring the miscarriage of a woman, shall be guilty of a gross misdemeanor.

6449. Evidence.

SEC. 184. In any prosecution for abortion, attempting abortion, or selling drugs unlawfully, no person shall be excused from testifying as a witness on the ground that said testimony would tend to incriminate himself, but such testimony shall not be used against him in any criminal prosecution except for perjury in giving such testimony.

6450. Concealing birth.

SEC. 185. Every person who shall endeavor to conceal the birth of a child by any disposition of its dead body, whether the child died before or after its birth, shall be guilty of a gross misdemeanor.

See secs. 2986, 2987, 2972.

6451. Advertising goods to prevent conception.

SEC. 186. It shall not be lawful for any person to advertise or publish, or cause to be advertised or published in a newspaper, pamphlet, handbill, book, or otherwise, within this state, any medicine, nostrum, drug, substance, or device for the prevention of human propagation, or which purports to be, or is represented to be, a preventive of conception or pregnancy in women.

6452. Idem—Advertising of services to prevent conception.

SEC. 187. It shall not be lawful for any person to advertise or publish, or cause to be advertised or published in the manner mentioned in the next preceding section or otherwise, any medicine, nostrum, drug, substance,

instrument, or device, to produce the miscarriage or premature delivery of a woman pregnant with child, or which purports to be, or is represented to be, productive of such miscarriage or premature delivery, nor to advertise in any manner his or her services, aid, assistance, or advice, or the services, assistance, or advice of any other person, in the procurement of such miscarriage or premature delivery.

6453. Idem—Penalty for advertising.

SEC. 188. Every person who shall violate the provisions of section 186 or section 187 of this act shall be deemed guilty of a gross misdemeanor, and on conviction thereof be punished by a fine of not less than one thousand dollars or more than three thousand dollars, or by imprisonment in the county jail not less than six months or more than one year, or both.

6454. Idem—Liability of publisher.

SEC. 189. The proprietor or proprietors, and the manager or managers of any newspaper, periodical or other printed sheet published or printed within this state, which shall contain any advertisement prohibited by sections 186 and 187 of this act, shall, for each publication of such advertisement, be deemed guilty of a gross misdemeanor, and, on conviction thereof, be punished in the same manner as is provided in section 188 of this act.

6455. Idem—Circulation of publications containing prohibited matter forbidden.

SEC. 190. Every person who shall knowingly sell, distribute, give away, or in any manner dispose of or exhibit to another person any newspaper, pamphlet, book, periodical, handbill, printed slip, or writing, or cause the same to be so sold, distributed, disposed of, or exhibited, containing any advertisement prohibited in sections 186 or 187 of this act, or containing any description or notice of, or reference to, or information concerning, or direction how or where to procure any medicine, drug, nostrum, substance, device, instrument, or service, the advertisement of which is herein prohibited or declared to be unlawful, shall, on conviction thereof, be liable to the same punishment as prescribed in section 187 of this act; *provided*, that nothing in this act shall be construed to interfere with or apply to legally licensed physicians in the legitimate practice of their profession.

6456. Bigamy defined—Penalty.

SEC. 191. Bigamy consists in the having of two wives or two husbands at one and the same time, knowing that the former husband or wife is still alive. If any person or persons within this state being married, or who shall hereafter marry, do at any time marry any person or persons, the former husband or wife being alive, the person so offending shall, on conviction thereof, be punished by a fine not exceeding one thousand dollars, and be imprisoned in the state prison not less than one year nor more than five years. It shall not be necessary to prove either of the said marriages by the register and certificate thereof, or other record evidence, but the same may be proved by such evidence as is admissible to prove a marriage in other cases; and when such second marriage shall have taken place without this state cohabitation in this state after such second marriage shall be deemed the commission of the crime of bigamy. Nothing herein contained shall extend to any person or persons whose husband or wife shall have been continually absent from such person or persons for the space of five years together prior to the said second marriage, and he or she not knowing such husband or wife to be living within that time. Also, nothing herein contained shall extend to any person that is or shall be, at the time of such second marriage, divorced by lawful authority from the

bonds of such former marriage, or to any person where the former marriage hath been by lawful authority declared void.

What is known as a common-law marriage by contract per verba de præsenti is valid in this state. Defendant was married in 1893 to S. by written contract, without the services of any of the persons authorized by the statutes to join persons in marriage. Subsequently the parties separated by mutual consent, and thereafter the defendant, while he was so married and knowing that the said S. was still alive, was formally married to L. by a justice of the peace of Washoe County, this state. Held, that the marriage to S. was a valid marriage, and that the subsequent marriage to L. constituted bigamy in defendant. In a prosecution for bigamy, evidence was not admissible to show that defendant, by his second marriage, had no criminal intent, he believing that the first marriage had been annulled by agreement between him and his wife. State v. Zichfeld, 23 Nev. 304 (94 P. 221, 62 A. S. 800, 34 L. R. A. 784).

6457. Marrying a married person.

SEC. 192. If any man or woman, being unmarried, shall knowingly marry the husband or wife of another, such man or woman shall, on conviction, be fined not less than one thousand dollars or imprisoned in the state prison not less than one nor more than two years.

6458. Incest defined.

SEC. 193. Persons being within the degree of consanguinity within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit fornication or adultery with each other, shall, on conviction, be punished by imprisonment in the state prison not less than one nor exceeding ten years.

6459. Crime against nature defined.

SEC. 194. The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the state prison for a term not less than five years, and which may extend to life.

6460. Lewdness.

SEC. 195. Every person who shall lewdly and viciously cohabit with another not the husband or wife of such person, and every person who shall be guilty of open or gross lewdness, or make any open and indecent or obscene exposure of his person, or of the person of another, and every male person who shall habitually resort in any house of prostitution, shall be guilty of a gross misdemeanor.

6461. Obscene literature.

SEC. 196. Every person who—

1. Shall sell, lend, or give away, or have in his possession with intent to sell, lend, give away or show any obscene or indecent book, magazine, pamphlet, newspaper, story paper, writing, picture, drawing, photograph, or any article or instrument of indecent or immoral character; or who shall design, copy, draw, photograph, print, utter, publish or otherwise prepare such a book, picture, drawing, paper or other article; or write or print any circular, advertisement or notice of any kind, or give oral information stating when, where, how or of whom such an indecent or obscene article or thing can be purchased or obtained; or,

2. Shall sell, lend, give away or have in his possession with intent to sell, lend, give away or show any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, or largely made up of criminal news, police reports, accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust or crime; or,

3. Shall exhibit within the view of any minor any of the books, papers or other things hereinbefore enumerated; or,

4. Shall hire, use or employ, or having custody or control of his person

shall permit any minor to sell, give away, or in any manner distribute any article hereinbefore mentioned; or,

5. Shall cause to be performed or exhibited, or engage in the performance or exhibition of any obscene, indecent or immoral show, act or performance;

Shall be guilty of a gross misdemeanor.

6462. Advertising for divorce business.

SEC. 197. Every person who shall cause to be published in any newspaper, magazine or other publication, or who shall cause or allow to be posted or distributed in any place frequented by the public any card or notice offering to procure or obtain, or to aid in procuring or obtaining any divorce or the dissolution or nullification of any marriage, or offering to appear or act as attorney or counsel in any suit for divorce, alimony, or the dissolution or nullification of any marriage, either in this state or elsewhere, shall be guilty of a misdemeanor.

See In re Schnitzer, 33 Nev.—.

6463. Swindling.

SEC. 198. Every person who, by color, or aid of any trick or sleight-of-hand performance, or by any fraud or fraudulent scheme, cards, dice, or device, shall win for himself or for another any money or property, or representative of either, shall be punished by imprisonment in the state prison for not more than ten years.

See sec. 6518.

6464. Bunco-steering.

SEC. 199. Every person who shall entice, or induce another, upon any pretense, to go to any place where any gambling game, scheme or device, or any trick, sleight-of-hand performance, fraud or fraudulent scheme, cards, dice or device, is being conducted or operated; or while in such place shall entice or induce another to bet, wager or hazard any money or property, or representative of either, upon any such game, scheme, device, trick, sleight-of-hand performance, fraud or fraudulent scheme, cards, dice, or device, or to execute any obligation for the payment of money, or delivery of property, or to lose, advance, or loan any money or property, or representative of either, shall be punished by imprisonment in the state prison for not more than ten years.

6465. Pawn broker—Duty to record transactions.

SEC. 200. It shall be the duty of every pawn broker and second-hand dealer doing business in any city of the population of 4,000 or over in this state to maintain in his place of business a book or other permanent record in which shall be legibly written in the English language, at the time of each loan, purchase or sale, a record thereof containing—

1. The date of the transaction;

2. The name of the person or employee conducting the same;

3. The name, age, street and house number, and a general description of the dress, complexion, color of hair, and facial appearance of the person with whom the transaction is had;

4. The name and street and house number of the owner of the property bought or received in pledge;

5. The street and house number of the place from which the property bought or received in pledge was last removed;

6. A description of the property bought or received in pledge, which in the case of watches shall contain the name of the maker and the number of both the works and the case, and in the case of jewelry shall contain a description of all letters and marks inscribed thereon; *provided,* that when

the article bought or received is furniture, or the contents of any house or room actually inspected on the premises, a general record of the transaction shall be sufficient;

7. The price paid or the amount loaned;

8. The names and street and house numbers of all persons witnessing the transaction; and

9. The number of any pawn ticket issued therefor.

Sale of merchandise in violation of bulk act, sec. 3910.

6466. Inspection of records and goods.

SEC. 201. Such record, and all goods received, shall at all times during the ordinary hours of business be open to the inspection of the district attorney or of any peace officer.

6467. Report to chief of police.

SEC. 202. Every pawn broker and second-hand dealer doing business in any city of the population of 4,000 or over shall, before noon of each day, furnish, in duplicate, to the chief of police of such city, on such forms as such chief of police may provide therefor, a full, true and correct transcript of the record of all transactions had on the preceding day, and, having good cause to believe that any property in his possession has been previously lost or stolen, he shall forthwith report such fact to the chief of police, together with the name of the owner, if known, and the date when, and the name of the person from whom the same was received by him. On receipt of the report provided for herein the chief of police shall immediately forward a copy thereof to the superintendent of the Nevada state police, and the same shall be filed of record in the office of such superintendent.

6468. Retention of property.

SEC. 203. No property bought or received in pledge by any pawn broker or second-hand dealer shall be removed from his place of business, except when redeemed by the owner thereof, within four days after the receipt thereof shall have been reported to the chief of police as herein provided.

6469. Penalty.

SEC. 204. Every pawn broker or second-hand dealer, and every clerk, agent or employee of such pawn broker or second-hand dealer, who shall—

1. Fail to make an entry of any material matter in his book or record kept as provided for in section 200 of this act; or,

2. Make any false entry therein; or,

3. Falsify, obliterate, destroy or remove from his place of business such book or record; or,

4. Refuse to allow the prosecuting attorney or any peace officer to inspect the same, or any goods in his possession, during the ordinary hours of business; or,

5. Report any material matter falsely to the chief of police; or,

6. Fail to report forthwith to the chief of police the possession of any property which he may have good cause to believe has been lost or stolen, together with the name of the owner, if known, and the date when, and the name of the person from whom the same was received by him; or,

7. Remove, or allow to be removed from his place of business, except upon redemption by the owner thereof, any property received, within four days after the receipt thereof shall have been reported to the chief of police; or,

8. Receive any property from any person under the age of twenty-one years, any common drunkard, any habitual user of narcotic drugs, any habitual criminal, any person in an intoxicated condition, any known thief

or receiver of stolen property, or any known associate of such thief or receiver of stolen property, whether such person be acting in his own behalf or as the agent of another;

Shall be guilty of a misdemeanor.

6470. Rates of interest and sale of pledged property.

SEC. 205. All pawn brokers are authorized to charge and receive interest at the rate of three per cent a month for money loaned on the security of personal property actually received in pledge, and every person who shall ask or receive a higher rate of interest or discount on any such loan, or on any actual or pretended sale, or redemption of personal property, or who shall sell any property held for redemption within ninety days after the period for redemption shall have expired, shall be guilty of a misdemeanor.

6471. "Pawn broker" defined.

SEC. 206. Every person engaged, in whole or in part, in the business of loaning money on the security of pledges, deposits or conditional sales of personal property, shall be deemed to be a pawn broker.

6472. "Second-hand" dealer defined.

SEC. 207. Every person engaged in whole or in part in the business of buying or selling second-hand personal property, metal junk, or melted metals, shall be deemed to be a second-hand dealer.

6473. Dissection, when permitted.

SEC. 208. The right to dissect the dead body of a human being shall be limited to cases specially provided by statute or by the direction or will of the deceased; cases where a coroner is authorized to hold an inquest upon the body, and then only as he may authorize dissection; and cases where the husband, wife or next of kin charged by law with the duty of burial shall authorize dissection for the purpose of ascertaining the cause of death, and then only to the extent so authorized. Every person who shall make, cause or procure to be made any dissection of the body of a human being, except as hereinbefore provided, shall be guilty of a gross misdemeanor.

6474. Burial or cremating.

SEC. 209. Except in cases of dissection provided for in the last section, and where a dead body shall rightfully be carried through or removed from the state for the purpose of burial elsewhere, every dead body of a human being lying within this state, and the remains of any dissected body, after dissection, shall be decently buried, or cremated within a reasonable time after death.

See sec. 6519.

6475. Opening grave—Stealing body—Receiving same.

SEC. 210. Every person who shall remove the dead body of a human being or any part thereof, from a grave, vault, or other place where the same has been buried or deposited awaiting burial or cremation, without authority of law, with intent to sell the same, or for the purpose of securing a reward for its return, or for dissection, or from malice or wantonness, shall be punished by imprisonment in the state prison for not more than five years, or by a fine of not more than one thousand dollars, or by both. Every person who shall purchase or receive, except for burial or cremation, any such dead body, or any part thereof, knowing that the same has been removed contrary to the foregoing provisions, shall be punished by imprisonment in the state prison for not more than three years, or by a fine of not more than one thousand dollars, or by both. Every person who

shall open a grave or other place of interment, temporary or otherwise, or a building where such dead body is deposited while awaiting burial or cremation, with intent to remove said body or any part thereof, for the purpose of selling or demanding money for the same, for dissection, from malice or wantonness, or with intent to sell or remove the coffin or of any part thereof, or anything attached thereto, or any vestment, or other article interred, or intended to be interred with the body, shall be punished by imprisonment in the state prison for not more than three years, or by a fine of not more than one thousand dollars, or by both.

6476. Interfering with dead body or funeral.

SEC. 211. Every person who shall arrest or attach the dead body of a human being upon a debt or demand, or shall detain or claim to detain it for any debt or demand, or upon any pretended lien or charge; or who, without authority of law, shall obstruct or detain a person engaged in carrying or accompanying the dead body of a human being to a place of burial or cremation, shall be guilty of a misdemeanor.

6477. Opening road through cemetery.

SEC. 212. Every person who shall make or open any road, or construct any railway, turnpike, canal, or other public easement over, through, in or upon, such part of any inclosure as may be used for the burial of the dead, without authority of law or the consent of the owner thereof, shall be guilty of a misdemeanor.

6478. Disturbing religious meeting.

SEC. 213. Every person who shall wilfully disturb, interrupt, or disquiet any assemblage of people met for religious worship—

1. By noisy, rude or indecent behavior, profane discourse, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting; or,

2. By exhibiting shows or plays, or promoting any racing of animals, or gaming of any description, or engaging in any boisterous or noisy amusement; or,

3. By disturbing in any manner, without authority of law within one mile thereof, free passage along a highway to the place of such meeting, or by maliciously cutting or otherwise injuring or disturbing a harness, conveyance, tent or other property belonging to any person in attendance upon such meeting;

Shall be guilty of a misdemeanor.

See sec. 6597.

6479. Unlawful to marry person without license.

SEC. 214. It shall be unlawful for any judge of a district court in his district, or justice of the peace in his county, or minister of any religious society or congregation, within this state, to join together as husband and wife, persons allowed by law to be joined in marriage, until the persons proposing such marriage shall exhibit to him a license from the county clerk as now provided by law.

Failure to deliver or record certificate of marriage, sec. 2346.
False marriage certificate, gross misdemeanor, sec. 2347.
Marriage ceremony by unauthorized person or where known legal impediment, see. 2348.
See State v. Zichfield, under sec. 6456.

6480. Idem—Penalty.

SEC. 215. Any judge of a district court, or justice of the peace, or minister violating the provisions of the next preceding section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be

fined in a sum not exceeding five hundred dollars or imprisonment in the county jail for a period not exceeding six months, or both.

6481. Failure to support wife and children misdemeanor—Penalty.

SEC. 216. It shall be unlawful for any man residing in this state to wilfully neglect, fail or refuse to provide reasonable support and maintenance for his wife or minor child or children; and any person guilty of such neglect, failure or refusal, upon complaint of the wife or any member of the board of county commissioners of the county where such wife or children reside, and upon due conviction thereof shall be adjudged guilty of a misdemeanor and shall be committed to the county jail for the period of not more than sixty days, unless it shall appear that owing to physical incapacity or other good cause he is unable to furnish such support; *provided,* that in cases of conviction for the offense aforesaid, the court before which such conviction is had, may, in lieu of the penalty herein provided, accept from the person convicted a bond to the board of county commissioners of the county in which such conviction is had, with good and sufficient surety conditioned for the support of his wife, child or children, as the case may be, for the term of six months after the date of said conviction; and the court may accept such bond at any time after such conviction, and order the release of the person so convicted.

See Ex Parte Lewis, 33 Nev.— (115 P. 729); Ex Parte Hose, 33 Nev.— (116 P. 417).

6482. Justice to issue warrant and conduct hearing.

SEC. 217. Any justice of the peace of the county in which the offense defined in the preceding section is committed, may, upon complaint being made under oath, issue a warrant for the arrest of any person charged with such offense, and the justice of the peace before whom such person is brought under such warrant shall hear and determine the cause, subject to the right of appeal as provided by law in other cases.

6483. Wife competent witness.

SEC. 218. In all prosecutions under the two preceding sections a wife shall be a competent witness against her husband with or without his consent.

6484. Keeping disorderly house.

SEC. 219. Any person in this state who shall keep any disorderly house, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood, or of any family thereof, is habitually disturbed, or who shall keep any inn in a disorderly manner, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months, or by both.

See Breckenridge v. Lamb, 34 Nev.—; Moore v. Orr, 30 Nev. 458 (98 P. 398).

6485. Selling opium, felony.

SEC. 220. Any person who shall sell, barter, exchange, or in any manner dispose of any opium, morphine, yen shee, cocaine, or any by-product thereof, or any spirituous or malt liquor or beverage to any person lawfully confined in the state prison or any county or city jail or public institution for the insane, or other public institutions where persons are lawfully confined, shall be deemed guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for a period of not less than one nor more than five years. This section shall not apply to any physician prescribing or furnishing any such drug or liquor to any such person, when said drugs are prescribed or furnished for medicinal purposes only.

See State v. Ching Gang, 16 Nev. 62.

6486. Use and sale prohibited.

SEC. 221. It shall be unlawful for any person or persons to have in his, her or their possession any opium pipe, or part thereof, or to smoke opium, or to sell or give away for such purpose, or otherwise dispose of any opium in this state, except druggists and apothecaries; and druggists and apothecaries shall sell it only on the prescription of legally practicing physicians.

See secs. 6543, 6544; State v. On Gee How, 15 Nev. 184; State v. Ah Chew, 16 Nev. 50.

6487. Opium smoking—Punishment.

SEC. 222. Any person who shall be found guilty of violating the provisions of the preceding section, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months, or both, and the court pronouncing a judgment of conviction shall declare such opium and pipes contraband and unlawful, and direct and order that all opium and all pipes and utensils used in smoking opium, taken and found, destroyed by the officer or person having the possession thereof as soon as the same is no longer necessary for the purposes of evidence.

See note to sec. 6489.

6488. Liability of property owner.

SEC. 223. Any person who shall keep, or who, being the owner thereof, shall knowingly permit to be kept, any house, room, apartment, or other place of any kind, to be used for the purpose of a resort by any person or for the purpose of indulging in the use of opium, or any preparation containing opium, by smoking or otherwise, shall be guilty of a misdemeanor, and on conviction thereof, be punished accordingly.

6489. Unlawful to resort.

SEC. 224. It shall be unlawful for any person to resort to any house, room, or apartment, or other place kept for any of the purposes forbidden by the four next preceding sections, for the purpose of indulging in the use of opium, or any preparation containing opium, by smoking or otherwise, and any person who shall violate the provisions of this section, shall be guilty of a misdemeanor.

The word "resort," as used in the opium act, means to go once or more to a place kept for opium smoking. A room where all the apparatus for opium smoking is found, and a number of persons, white men and Chinamen, are present, is a place of resort within the meaning of those words as used in the statute. State v. Ah Sam, 15 Nev. 27.

It is the intent to use opium that gives character to the act. The mode of using it "by smoking or otherwise" is unessential, and need not be stated in the indictment.

An indictment, under section 6 of the opium act, must charge the defendant with going to a house, room, or apartment kept "to be used as a place of resort" by some person or persons for the purpose of using opium. The omission of the words "as a place of resort" held, a fatal defect. State v. On Gee How, 15 Nev. 184.

See State v. McCormick, 14 Nev. 348.

6490. Lessor liable.

SEC. 225. If any person shall lease any house, room, apartment, or other place to be used as a place of resort, to any person for the purpose of indulging in the use of opium, or any preparation containing opium, knowing the purposes for which said house, room, or apartment are to be used, any judgment obtained as provided in section 223, shall be a lien upon such house, room, apartment, or other place of business so leased.

6491. Judgment, lien on property.

SEC. 226. Any judgment obtained under the provisions of the last four preceding sections, for a fine and costs, or either, shall be a lien on the property wherein the offense was committed, which lien shall not be discharged until such judgment shall have been paid, or otherwise legally satisfied; *provided,* that such lien shall not attach in cases where it shall

appear that the owner of the property was not a party to the commission of the offense, and had no knowledge thereof before its commission.

6492. Forfeiture of lease.

SEC. 227. If any person shall use any house, room, apartment, or other place leased to him or her for any of the purposes forbidden by sections 220 to 226, both inclusive, such illegal use shall, at the option of the lessor, operate as a forfeiture of such lease, and of all rights given thereby, whether the same be expressed or not in such lease.

6493. Fee of district attorney.

SEC. 228. In all cases when fines and costs shall be paid by the defendant under the provisions of the two last preceding sections, the fee of the district attorney shall be twenty-five dollars, and the fee of the informer shall be fifteen dollars; but neither of said fees shall in any case be a charge against or be paid by the county in which the offense was committed, or in which the defendant was convicted of the crime, but shall be taxed as costs against the defendant.

6494. Lotteries defined.

SEC. 229. A lottery is any scheme for the disposal or distribution of property, by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or any interest in such property upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle or gift enterprise, or by whatever name the same may be known.

Lotteries are prohibited by Const., sec. 282.
See State v. Overton, 16 Nev. 136; Ex Parte Blanchard, 9 Nev. 101.

6495. Lottery drawing—Penalty.

SEC. 230. Every person who contrives, prepares, sets up, proposes, or draws any lottery, is guilty of a misdemeanor.

6496. Selling of tickets, misdemeanor.

SEC. 231. Every person who sells, gives or in any manner whatever furnishes or transfers to or for any other person any ticket, chance, share, or interest, or any paper, certificate or instrument purporting or understood to be or to represent any ticket, chance, share, or interest in or depending upon the event of any lottery, is guilty of a misdemeanor.

6497. Aiding sale of tickets, misdemeanor.

SEC. 232. Every person who aids or assists, either by printing, writing, advertising, publishing, or otherwise, in setting up, managing, or drawing any lottery, or in selling or disposing of any ticket, chance, or share therein, is guilty of a misdemeanor.

6498. Keeping tickets, misdemeanor.

SEC. 233. Every person who opens, sets up, or keeps by himself or by any other person, any office or other place for the sale of or for registering the number of any ticket in any lottery, or who by printing, writing, or otherwise advertises or publishes the setting up, opening, or using of any such office, is guilty of a misdemeanor.

6499. Insuring or guaranteeing ticket, misdemeanor.

SEC. 234. Every person who insures or receives any consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn or to be drawn within this state or not, or who receives any valuable consideration upon any agreement to repay any sum or deliver the same, or any other property, if any lottery ticket or number of any

ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn at any particular time or in any particular order, or who promises or agrees to pay any sum of money, or to deliver any goods, things in action or property, or to forbear to do anything for the benefit of any person, with or without consideration, upon any event or contingency dependent upon the drawing of any ticket in any lottery, or who publishes any notice or proposal of any of the purposes aforesaid, is guilty of a misdemeanor.

6500. Property forfeited to state.

SEC. 235. All moneys and property offered for sale or distribution in violation of any of the provisions of sections 229 to 234, both inclusive, are forfeited to the state, and may be recovered by information filed or by an action brought by the attorney-general, or by any district attorney, in the name of the state. Upon the filing of the information or complaint, the clerk of the court, or if the suit be in a justice's court, the justice must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property, and is issued in the same manner as attachments from the district courts in civil cases.

6501. Idem—Letting use of building misdemeanor.

SEC. 236. Every person who lets or permits to be used any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing, or drawing any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor.

6502. Unlawful to sell tobacco to minors—Penalty.

SEC. 237. It shall be unlawful for any person or persons within this state to sell or give to any minor, under the age of twenty-one years, any cigarette or cigarettes, or any tobacco of any description, except that upon the written order of the parent or guardian of the minor, the person applied to may give or sell to the minor, for the use of the guardian or parent, tobacco or cigars; said written request to be kept on file by the seller or giver of the article so sold or given away. Any person who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and, on conviction thereof shall be punished by a fine in any sum not exceeding five hundred dollars and not less than one hundred dollars, or by imprisonment in the county jail for a period not exceeding six months nor less than fifty days, or both. The justice of the peace shall also tax as costs fifty dollars, in addition to the fine, which sum shall be paid to the informer.

Unlawful to sell or give away cigarettes or cigarette papers to minors, secs. 3874, 3875.

6503. Idem—Dealer to forfeit license.

SEC. 238. If any dealer in cigarettes, cigars and tobacco shall be convicted twice for the commission of the offense described in the preceding section, he shall forfeit his license or licenses for carrying on his business, and no license shall be again granted to him to carry on a like business in this state.

6504. Sale of liquor within half mile of state prison unlawful—Penalty.

SEC. 239. It shall be unlawful for any person or persons to sell by wholesale or retail any spirituous or malt liquors, wine or cider, within one-half mile of the state prison, and no license shall be granted authorizing the sale of any spirituous or malt liquors, wine, or cider, within one-half mile of said state prison. A violation of the provisions of this section shall, on conviction, be punished by a fine of not less than fifty dol-

lars, nor more than five hundred dollars, or by imprisonment in the county jail not less than twenty-five days, nor exceeding six months.

Sale of liquor near construction camp, secs. 6839-6841.

6505. Liquors prohibited in capitol building—Penalty.

SEC. 240. Any person who shall sell, barter, give, or in any way dispose of, any spirituous or malt liquors, wines or cider, of any description whatever, within the capitol building of this state, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined in any sum, not less than one hundred dollars, and not exceeding five hundred dollars, or be imprisoned in the county jail for any time, not less than one month and not exceeding six months, or both.

6506. Selling liquor to minors or imbeciles, or allowing minors in billiard halls—Employing minor as barkeeper.

SEC. 241. Every person who shall sell or give to any person under the age of twenty-one years, or to any one known to be an imbecile, any intoxicating drink or drinks or who shall employ a minor as a barkeeper, and every minor who shall falsely represent himself to be twenty-one years of age in order to obtain such intoxicating drink or drinks, is guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment in the county jail not less than fifty days, nor more than six months, or by both such fine and imprisonment; *provided,* that nothing in this section shall be deemed to apply to parents of such minors and imbeciles, or guardian of their wards, or physicians. Every person owning or having in charge any saloon, or public hall, or public room, where one or more billiard tables or pool tables are kept, and every person owning or having in charge any billiard or pool table kept for hire or for the purpose of charging persons who play thereon, or for the use of persons who may buy drinks, cigars or tobacco in the building in which such table or tables are kept, who shall allow any minor under the age of twenty-one years to play billiards or pool upon any such table, or to frequent the room where such table is kept, without the written consent of the parent or guardian of such minor, is guilty of a misdemeanor.

See subdivision 11 of sec. 6619.
See secs. 6842, 6843.
Sale of liquor near construction camp, secs. 6839-6841.
"Saloon" defined. Ex Parte Livingston, 20 Nev. 282 (4 L. R. A. 732, 21 P. 322).

6507. Providing Indian liquor, felony.

SEC. 242. It shall be unlawful for any person to sell, barter, give or in any manner dispose of ardent, spirituous or malt liquors, or any intoxicating liquors, liquids, drug or substance whatsoever, to any Indian within this state; and any such person or persons so unlawfully disposing of such intoxicants, within this state, to an Indian who is not a ward of the government of the United States shall be deemed guilty of a felony, and upon conviction thereof, shall be fined in any sum not less than five hundred dollars, nor more than one thousand dollars, or be imprisoned in the state prison for a term not less than one year nor more than five years, or both.

The introduction of intoxicating liquors into Indian reservations, or the selling or giving of the same to Indians who are wards of the government, is prohibited by the United States. See U. S. Rev. Stat. (1878), sec. 2139; 27 U. S. Stat. L. 260, 29 U. S. Stat. L. 506.

See State v. Finnegan, 27 Nev. 57 (71 P. 642); State v. Niblett, 31 Nev. 246 (102 P. 229); State v. Murphy, 23 Nev. 390 (48 P. 628).

6508. Federal government to prosecute—Terms defined.

SEC. 243. Any person who shall, within this state, so unlawfully dispose of any such intoxicants, as set forth in section 242, to any Indian who

shall be a ward of the government of the United States, and for which offense the government has enacted, or may hereafter enact, laws against, with punishments therefor, may be arrested by any peace officer and delivered to the United States authorities, for punishment under the laws of the United States. Upon such arrest, the arresting officer shall immediately notify the nearest proper United States official (United States commissioner, United States district attorney, or United States marshal, for the District of Nevada) that such offense has been committed, and that the offender has been so arrested and shall request such United States officials, so notified, to take charge of such offender, to be prosecuted under the laws of the United States. Such arresting officer shall hold and detain, or cause to be held and detained, such offender, in the same manner as holding and detaining other offenders against the laws of the state or city, for a reasonable length of time, to enable the authorities of the United States to respond to such notification and request, and to take charge of the offender; and upon request of a proper United States official, the state or local authority having him in charge shall at once deliver the offender into the custody of such United States official, to be proceeded against under the laws of the United States, and shall furnish him with all information and evidence he may possess for the prosecution of the offender. The term "ward of the government of the United States," for the purposes of this and the preceding section, shall be construed to mean any Indian over whose tribe or person the government of the United States assumes any superintendency, guardianship or wardship, whether the same arises from government Indian reservation, holding lands in allotment, or from any other cause.

See State v. Niblett, 31 Nev. 246 (102 P. 229).

6509. Idem—Arresting officer to receive fees.

SEC. 244. The holding of such offender to answer before a United States court, by a proper United States authority, or the conviction of such offender in a United States court, shall be considered sufficient warrant for his arrest and detention by such state or local officer or officers, and upon and after such holding to answer, or conviction, such state or local officer or officers, making and causing such arrest and detention of such offenders set forth in section 243 shall be entitled to receive from the county wherein such offense was committed the same fees, in the same manner, for such arrest and all actual expenses which he or they necessarily incur in such arrest and detention, as he or they would receive under the state laws, were such offender to be prosecuted under the laws of the state. All of which fees and expenses may be included in his or their usual bills presented against the county for official services.

6510. Houses of ill-fame, location of.

SEC. 245. It shall be unlawful for any owner, or agent of any owner, or any other person to keep any house of ill-fame, or to let or rent to any person whomsoever, for any length of time whatever, to be kept or used as a house of ill-fame, or resort for the purposes of prostitution, any house, room or structure situated within four hundred yards of any school house or school room used by any public or common school in the State of Nevada, or within four hundred yards of any church edifice, building or structure erected for and used for devotional services or religious worship in this state.

Location of house of prostitution, see secs. 3457-3459. See Ex Parte Ah Pah, 34 Nev.—.

6511. Certain property not to be rented for hurdy house, or prostitution.

SEC. 246. It shall be unlawful for any owner or agent of any owner

or any other person to keep, let or rent for any length of time, or at all, any house fronting on the principal business street or thoroughfare of any of the towns of this state, for the purpose of prostitution or for the purpose of keeping any dance house or house commonly called a hurdy house, or house where wine, beer or spirituous liquors are sold or served by females or female waiters or attendants, or where females are used or employed to attract or solicit custom, nor shall any entrance or exit way to any house referred to in this section be made or used from the principal business street or thoroughfare of any of the towns of this state.

6512. Idem—Penalty.

SEC. 247. Any person violating the provisions of the last two preceding sections shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than twenty-five dollars nor more than three hundred dollars, or be imprisoned in the county jail not less than five nor more than sixty days, or by both such fine and imprisonment, in the discretion of the court.

6513. Idem—Competent evidence.

SEC. 248. In the trial of all cases arising under the provisions of sections 245 to 247, inclusive, evidence of general reputation shall be deemed competent evidence as to the question of the ill-fame of any house alleged to be so kept, and to the question of the ill-fame of such woman.

6514. Marriages between Caucasian and other races prohibited.

SEC. 249. It shall be unlawful for any person of the Caucasian or white race to intermarry with any person of the Ethiopian or black race, Malay or brown race, Mongolian or yellow race, or the American Indian or red race, within the State of Nevada.

6515. Penalty for contracting parties.

SEC. 250. All persons marrying contrary to the provisions of the last preceding section shall be guilty of a gross misdemeanor.

6516. Penalty for minister.

SEC. 251. Any officer, minister, priest or other person authorized by the laws of the State of Nevada to perform ceremonies of marriage, who shall knowingly perform, or knowingly assist in the performance within the State of Nevada of any ceremony of marriage between any person of the Caucasian or white race and any person of any other race contrary to the provisions of section 249, shall be guilty of a gross misdemeanor.

6517. Fornication between certain races prohibited—Penalty.

SEC. 252. If any white person shall live and cohabit with any black person, mulatto, Indian, or any person of the Malay or brown race or of the Mongolian or yellow race, in a state of fornication, such person so offending shall, on conviction thereof, be fined in any sum not exceeding five hundred dollars, and not less than one hundred dollars, or be imprisoned in the county jail not less than six months or more than one year, or both.

6518. All gambling prohibited—Penalty.

SEC. 253. It shall be unlawful for any person to deal, play or carry on, open or conduct in any capacity whatever, any game of faro, monte, roulette, lansquenet, rouge et noir, rondo, tan, fantan, stud-horse poker, seven-and-a-half, twenty-one, hokey-pokey, craps, klondyke, poker, or any banking or percentage game played with cards, dice, or any device, for money, property, checks, credit or any representative of value; or any gambling game in which any person keeping, conducting, managing or permitting the same to be carried on receives, directly or indirectly, any

A '13 235

compensation or reward, or any percentage or share of the money or property played, for keeping, running, carrying on or permitting the said game to be carried on; or to play, maintain or keep any slot machine played for money or for checks or tokens redeemable in money, or played for chance; or to buy, sell or deal in pools or make books on horse races; and any person who violates any of the provisions of this section shall be guilty of a felony and upon conviction thereof shall be imprisoned in the state prison for a period of not less than one year nor more than five years.

See secs. 6463, 6464, 6561.

See Scott v. Courtney, 7 Nev. 419; Evans v. Cook, 11 Nev. 69; Burke v. Buck, 31 Nev. 74, 22 L. R. A. (N. S.) 627, 99 P. 1078; Menardi v. Wacker, 32 Nev. 169 (105 P. 287); State ex rel. Patterson v. Donovan, 20 Nev. 75 (15 P. 783).

6519. Penalty for person permitting games.

SEC. 254. Every person who knowingly permits any of the games or slot machines mentioned in the preceding section to be played, conducted, dealt, or maintained in any house, building or part thereof owned or rented by such person, shall be punished as provided in the preceding section, and every day of the violation of any of the provisions of sections 253 to 257, both inclusive, shall be deemed a separate offense.

6520. Penalty for having gambling implements in possession.

SEC. 255. If any person shall keep, exhibit, or have in his possession, any cards, tables, checks, wheels, slot machines or gambling devices of any nature used or kept for the purpose of playing any of the games mentioned in section 253, or shall aid, assist or permit others to do the same, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than one month nor more than six months, or by both.

6521. Duty of officer to seize gambling paraphernalia.

SEC. 256. It shall be the duty of all sheriffs, constables, police and other peace officers whenever it shall come to the knowledge of such officer that any person has in his possession any cards, tables, checks, balls, wheels, slot machines or gambling devices of any nature or kind used or kept for the purpose of playing at any of the games mentioned in section 253, or that any cards, tables, checks, balls, wheels, slot machines or gambling devices used or kept for the purposes aforesaid may be found in any place, to seize and take such cards, tables, checks, balls, wheels, slot machines or other gambling devices, and convey the same before a magistrate of the county in which said devices shall be found; and it shall be the duty of such judge to inquire of such witnesses as he shall summon or as may appear before him in that behalf, touching the nature of such gambling devices, and if such judge shall determine that the same are used or kept for the purpose of being used at any game or games of chance described in section 253, it shall be his duty to destroy the same. It shall be lawful for officers in executing the duties imposed upon them by this section to break open doors for the purpose of obtaining possession of any such gambling devices; and all persons having such possession of any of the articles aforesaid, shall be conveyed before a magistrate of such county and held or committed for appearance to answer any complaint which may be preferred against them for violation of sections 253 to 257, both inclusive.

6522. Witness not exempt from testifying but cannot be prosecuted.

SEC. 257. No person, otherwise competent as a witness, shall be exempt from testifying as such concerning offenses of gambling, as set forth in sections 253 to 257, both inclusive, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified.

6523. Selling liquor to drunkards—Penalty for drunkenness.

SEC. 258. It shall be unlawful for the proprietor, bartender, or person in charge of any saloon or bar, to sell or give, or to permit to be sold or given, any intoxicating liquor to any person who is drunk, or to any person known by such proprietor, bartender or person in charge to be an habitual drunkard, or dipsomaniac, or to any habitual drunkard or dipsomaniac, after being notified by the wife, father or mother, son or daughter of such habitual drunkard or dipsomaniac, or by any peace officer, nor to sell or give liquor to such habitual drunkard or dipsomaniac. The proprietor, bartender, or person in charge of any saloon or bar, may post behind the bar, where the same may be readily seen by the bartender, but may not be seen by the persons in front of the bar, a list of the names of habitual drunkards, or person to whom intoxicating liquors are not to be sold. It shall be unlawful for any habitual drunkard, dipsomaniac, or drunken person, after being refused intoxicating liquor, to again demand the same on the same day from the person refusing to sell or to give him intoxicating liquors. It shall be unlawful for any person to sell any intoxicating liquor to any husband or father whose wife, or minor child or children, are in destitute circumstances and who are not supplied with the common necessaries of life by such husband or father, after notice, from the wife or minor child of such husband or father, or from any peace officer, not to sell any intoxicating liquor to such husband or father, and that such husband or father fails to provide his wife or minor child with the common necessaries of life. Any person violating the foregoing provisions of this section or who, as a result of the use of intoxicating liquors shall abuse or fail properly to support or care for his wife or any minor child lawfully in his custody, shall be guilty of a misdemeanor.

See secs. 6836, 6838.

6524. Horse meat—Misdemeanor to sell without informing.

SEC. 259. It shall be unlawful for any person to sell the meat of any equine animal, without informing the purchaser thereof, at the time of such sale, that said meat is the meat of an equine animal. Any person violating the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by fine in a sum not exceeding fifty dollars, or be imprisoned in the county jail not more than twenty-five days, or both.

6525. Horse meat—Seller must exhibit hide.

SEC. 260. It shall be unlawful for any person peddling the meat of any equine animal, who is not the keeper of any shop or meat market, to sell such meat without having in his possession then and there, and upon request exhibiting the hide of such animal containing the brand and other marks thereon. Any person violating the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be punished as prescribed in the next preceding section.

6526. Duties of manufacturers.

SEC. 261. Every person who shall manufacture for sale any article or substance in semblance of butter, that is not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which the oil or fat of animals, not produced from milk, enters as a component part, or into which melted butter, or any oil thereof has been introduced, to take the place of cream, unless the package containing such article or substance shall be labeled or branded with the word "oleomargarine," as provided in the next following section shall be deemed guilty of a misdemeanor.

See secs. 3486, 3508.

6527. Substitute for butter stamped or branded.

SEC. 262. Every person who shall sell, or offer, or expose for sale, or have in his or her possession with intent to sell any of the said article or substance mentioned in the next preceding section, shall distinctly mark, brand or label every package containing such substance, whether at wholesale or retail, with the word "oleomargarine," and every person who shall sell, or offer for sale, such substance not so branded, marked, or labeled, shall be guilty of a misdemeanor.

See secs. 3486, 3508.

6528. Letters for brands.

SEC. 263. The branding or marking required in the two next preceding sections, if on rolls or prints, shall be in letters not less than one-fourth of an inch square, and if on tubs or other packages, the letters shall not be less than one-half inch square.

CHAPTER 15

CRIMES AGAINST PUBLIC HEALTH

6529. Conveying venereal diseases—Police to be notified.
6530. Exposing contagious diseases.
6531. Diseased animals.
6532. Diseased animals — Disposal of carcasses.
6533. Bedding used about contagious diseases not to be used again.
6534. Hospital, unlawful near school.
6535. Selling diseased flesh.
6536. Selling impure milk.
6537. Adulteration and quality of milk.
6538. Idem—Sale of skimmed milk.
6539. Adulterations of milk, what are.
6540. Furnishing impure water.
6541. Wilfully poisoning food.
6542. Person omitting to label drugs, or labeling them wrongfully.
6543. Regulating the sale of narcotic drugs.
6544. Fraudulent prescription by physician.
6545. Presenting fraudulent prescription.
6546. Deposit of unwholesome substance.
6547. Polluting waters.
6548. Shearing sheep within cities and towns prohibited.
6549. Burial of dead—Certificate of physician—Coroner's permit to issue.
6550. To present certificate — Coroner to issue permit.
6551. Physician issuing false certificate.
6552. Exhuming remains of deceased person.
6553. Idem—Commissioners to issue permits.
6554. Hours of labor in underground mines.
6555. Hours of labor in smelters and mills.
6556. Idem—Mines and mills—Penalty.
6557. Hours of labor in open mines.
6558. Idem—Penalty.
6559. Hours of labor in plaster and cement mills.
6560. Idem—Penalty.

6529. Conveying venereal diseases—Police to be notified.

SEC. 264. Every person afflicted with any infectious or contagious venereal disease which may be conveyed to another, who shall have sexual intercourse with any other person, is guilty of a misdemeanor, and any physician, or other person, knowing that any common prostitute is afflicted with any infectious or contagious venereal disease, who fails to immediately notify the police authorities of the town, city or place, where such prostitute is at the time of the discovery of the existence of such disease, is guilty of a misdemeanor.

6530. Exposing contagious disease.

SEC. 265. Every person afflicted with any infectious or contagious disease, who shall wilfully expose himself to another, and any person who shall wilfully expose any animal affected with any contagious or infectious disease, in any public place or thoroughfare, except upon his or its necessary removal in a manner not dangerous to the public health or to the health of other animals; and every person so affected who shall wilfully expose any other person thereto without his knowledge, shall be guilty of a misdemeanor.

Health officer failing to enforce act, sec. 2972.

6531. Diseased animals.

SEC. 266. Every owner or person having charge thereof, who shall import or drive into this state, or who shall turn out or suffer to run at large upon any highway or unenclosed lands, or upon any lands adjoining the enclosed lands kept by any person for pasture; or who shall keep or allow to be kept in any barn with other animals, or water or allow to be watered at any public drinking fountain or watering place, any animal having any contagious or infectious disease; or who shall sell, let or dispose of any such animal knowing it to be so diseased, without first apprising the purchaser or person taking it of the existence of such disease, shall be guilty of a misdemeanor.

See sec. 6815.
Bringing diseased animals into state, selling diseased animals, poultry, fish, etc., sec. 2995.
Misdemeanor to expose infected sheep or permit to run at large, sec. 2310.
Violating sheep inspection act, sec. 4602.
See note to sec. 6532.

6532. Diseased animals—Disposal of carcasses.

SEC. 267. Every person owning or having in charge any animal that has died or been killed on account of disease, shall immediately bury the carcass thereof at least three feet underground, or cause the same to be consumed by fire. No person shall sell or offer to sell or give away the carcass of any animal which died or was killed on account of disease, or convey the same along any public road or land not his own in a manner dangerous to the public health or the health of other animals. Every violation of any provision of this section shall be a misdemeanor.

Bringing stock from infected state or district in violation of quarantine, sec. 2271.
Diseased or infected animals on public highways, secs. 2266, 2268, 2272.
Failing to burn or bury stock dying of contagious diseases, secs. 2272, 2273.
See note to sec. 6531.

6533. Bedding used about contagious diseases not to be used again.

SEC. 268. Any person who shall knowingly have or use about his premises, or who shall convey, or cause to be conveyed, into any neighborhood, any clothing, bedding, or other substance, used by or in taking care of any person afflicted with small-pox or other infectious or contagious disease, or infected thereby, or shall do any other act with the intent to, or necessarily tending to the spread of such disease into any neighborhood or locality; every person so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof shall be punished by fine in any sum not more than five hundred dollars, or by imprisonment in the county jail not exceeding six months, or both; and the court trying any such offender, may also include in any judgment rendered an order to the effect that the clothing or other property infected be burned or otherwise destroyed, and shall have power to carry such order into effect.

6534. Hospital, unlawful near school.

SEC. 269. It shall be unlawful for any person, persons, firm, corporation, or association, to locate or maintain any hospital for the treatment of diseased or injured persons within three hundred feet of any public school building; *provided,* that nothing in this section shall apply to hospitals now being operated. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than fifty dollars nor more than three hundred dollars.

6535. Selling diseased flesh.

SEC. 270. Any person who shall knowingly sell any flesh of any diseased animal is guilty of a gross misdemeanor and shall be punished accordingly.

See sec. 2995.

6536. Selling impure milk.

SEC. 271. Any person who shall knowingly sell or exchange, or expose for sale or exchange, any impure, adulterated or unwholesome milk, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail for not more than six months, or both.

See pure food law, secs. 3486-3510.

6537. Adulteration and quality of milk.

SEC. 272. Any person who shall adulterate milk with the view of offering the same for sale or exchange, or shall keep cows for the production of milk for market, or for sale or exchange, in a crowded or unhealthy condition, or feed the same on food that produces impure, diseased or unwholesome milk, or who shall sell or exchange or offer to sell or exchange any milk as pure, from which the cream or any portion thereof has been taken, except as provided in the next following section, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail not exceeding six months, or both.

See pure food law, secs. 3436-3510.

6538. Idem—Sale of skimmed milk.

SEC. 273. Nothing in the next preceding section shall be construed to prevent the sale of skimmed milk, provided the person or persons selling the same shall first make known the fact that it is skimmed milk, and shall sell it as such.

6539. Adulterations of milk, what are.

SEC. 274. The addition of water or any substance is hereby declared any adulteration; any milk that is obtained from animals that are fed on distillery, brewery, hotel, or restaurant waste, usually called "swill," or upon any substance in a state of putrefaction, or upon impure matter from stalls, and stables, is hereby declared to be impure and unwholesome, and any person or persons offending, as aforesaid, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars or be imprisoned in the county jail for not more than six months, or both.

See pure food law, secs. 3486-3510.

6540. Furnishing impure water.

SEC. 275. Every owner, agent, manager, operator or other person having charge of any waterworks furnishing water for public or private use, who shall knowingly permit any act or omit any duty or precaution by reason whereof the purity or healthfulness of the water supplied shall become impaired, shall be guilty of a gross misdemeanor.

See secs. 2047, 4720, 6547.

6541. Wilfully poisoning food.

SEC. 276. Every person who shall wilfully mingle poison in any food, drink or medicine intended or prepared for the use of a human being, and every person who shall wilfully poison any spring, well or reservoir of water, shall be punished by imprisonment in the state prison for not less than five years.

6542. Person omitting to label drugs, or labeling them wrongly.

SEC. 277. Every person who, in putting up any drug, medicine, or food, or preparation used in medical practice, or making up any prescription, or

filling any order for drugs, medicines, food or preparation shall put any untrue label, stamp or other designation of contents upon any box, bottle or other package containing a drug, medicine, food or preparation used in medical practice, or substitute or dispense a different article for or in lieu of any article prescribed, ordered, or demanded, or put up a greater or less quantity of any ingredient specified in any such prescription, order or demand than that prescribed, ordered, or demanded, or otherwise deviate from the terms of the prescription, order, or demand by substituting one drug for another, shall be guilty of a misdemeanor; *provided, however,* that, except in the case of physicians' prescriptions, nothing herein contained shall be deemed or construed to prevent or impair or in any manner affect the right of an apothecary, druggist, pharmacist or other person to recommend the purchase of an article other than that ordered, required or demanded, but of a similar nature, or to sell such other article in place or in lieu of an article ordered, required or demanded, with the knowledge and consent of the purchaser.

Adulteration of drugs, sec. 4511.
Retailing poisons without label, sec. 4512.
See pure food law, secs. 3486-3510.

6543. Regulating the sale of narcotic drugs.

SEC. 278. It shall be unlawful for any person to sell, furnish or dispose of any opium, morphine, alkaloid-cocaine, or alpha or beta eucaine, or any derivative, except upon the signed prescription of a physician, dentist or veterinary surgeon, duly licensed under the laws of this state, and the proprietor or manager of the store shall keep all such prescriptions in a permanent file, and shall be filled but once and of which no copy shall be taken by any person, and shall at any time allow the same to be inspected, and copies thereof to be made by any peace officer, the district attorney of the county where sold, or any authorized inspector of drugs; *provided,* that nothing herein contained shall prohibit any manufacturer or licensed druggist from selling or delivering any of the drugs named to a person known to be a licensed druggist, licensed physician, licensed dentist or veterinary surgeon, nor prohibit a physician or dentist from dispensing the same in good faith to his patients, nor prohibit the sale of patent or proprietary medicines containing opium or any of its derivatives in combination or compound with other active elements when the dose of opium or any derivative thereof is less than one-quarter grain; nor to the sales of any mixture of the above drugs recognized in the United States pharmacopia or national formulary. Every person who shall violate any of the provisions of this section shall be guilty of a misdemeanor.

See secs. 3486, 4511, 6486, 6493.

6544. Fraudulent prescription by physician.

SEC. 279. Every physician who shall sell or give to or prescribe for any person any opium, morphine, alkaloid-cocaine, or alpha or beta eucaine, or any derivative, mixture or preparation of any of them, except to a patient believed in good faith to require the same for medicinal use, and in quantities proportioned to the needs of such patient, shall be guilty of a gross misdemeanor.

Pollution of streams, detrimental to fish, sec. 2047.
See sec. 4720.

6545. Presenting fraudulent prescription.

SEC. 280. Every person who shall falsely make, forge or alter, or, knowing the same to have been falsely made, forged or altered, shall present to any druggist a physician's prescription with intent by means thereof to procure from such druggist any opium, morphine, alkaloid-

cocaine, or alpha or beta eucaine, or any derivative, mixture or preparation of any of them, shall be guilty of a misdemeanor.

6546. Deposit of unwholesome substance.

SEC. 281. Every person who shall deposit, leave or keep, on or near a highway or route of public travel, on land or water, any unwholesome substance; or who shall establish, maintain or carry on, upon or near a highway or route of public travel, on land or water, any business, trade or manufacture which is detrimental to the public health; or who shall deposit or cast into any lake, creek or river, wholly or partly in this state, the offal from or the dead body of any animal, shall be guilty of a gross misdemeanor.

6547. Polluting waters.

SEC. 282. Any person or persons, firm, company, corporation or association in this state, or the managing agent of any person or persons, firm, company, corporation or association in this state, or any duly elected, appointed or lawfully created state officer of this state, or any duly elected, appointed or lawfully created officer of any county, city, town, municipality, or municipal government in this state, who shall deposit, or who shall permit or allow any person or persons in their employ or under their control, management or direction to deposit in any of the waters of the lakes, rivers, streams, springs or ditches in this state any sawdust, rubbish, filth, or poisonous, or deleterious substance or substances, liable to affect the health of person, fish, or live stock, or injure ditches, or agricultural lands, or place or deposit any such deleterious substance or substances in any place where the same may be washed or infiltered into any of the waters herein named, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty dollars, nor more than five hundred dollars; *provided*, that in cases of state institutions, municipalities, towns, incorporated towns or cities, when, owing to the magnitude of the work, immediate correction of the evil is impracticable, then in such cases the authorities shall adopt all new work, and as rapidly as possible reconstruct the old systems of drainage sewerage so as to conform with the provisons of this section; *and provided further*, that all such new and reconstructed systems shall be completed before March 20, 1917; *provided*, that nothing in this section shall be so construed as to prevent mining or milling companies or persons engaged in the operation of ore reduction plants from dumping tailings directly into any stream in this state in such manner as will not prevent or impede the natural flow of such stream and will not damage agricultural lands or other property and will not poison or injure persons or animals.

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Obstructing or polluting streams, sec. 4718.
Furnishing impure water, sec. 6540.
Injury to dam, bridge or flume, sec. 6757.
Misdemeanor to flood highway or to fail to construct bridges over ditches, secs. 3045, 3046.

6548. Shearing sheep within cities and towns prohibited.

SEC. 283. It shall be unlawful for any sheep to be penned, housed or fed for the purpose of being sheared, or to be sheared, within the ordinary limits of any city or town of this state during any period of the year. This shall not apply to any place not within one-half mile of a residence. Any person, corporation, or agent, being owner of or having control or charge of any sheep, who shall wilfully violate any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars or imprisonment not exceeding fifty days, or both.

Herding or grazing sheep within three miles of any town or village, secs. 2317, 2318.
Permitting swine, sheep or goats to run at large in towns or cities, sec. 2330.

6549. Burial of dead—Certificate of physician—Coroner's permit to issue.

SEC. 284. It shall be unlawful for any undertaker or other person within the State of Nevada to bury any deceased person who has died within the limits of any incorporated town or city in said state without first having procured a certificate from the physician who attended the said deceased person during his or her last illness, setting forth the name, nativity, sex, age, time of death, place of death and cause of death of said deceased person, as near as can be ascertained by said physician; *provided*, that in cases where no physician has attended said deceased person during his or her last illness, no such certificate shall be required, but the coroner's permit mentioned in the next succeeding section shall be obtained, and shall be sufficient authority for the burial of such deceased person.

Altering certificate of birth or death, sec. 2972.
Failure of physician to issue certificate of cause of death, or false certificate, secs. 2972, 2987.
See secs. 4454, 6473, 6474, 6476, 6814.

6550. To present certificate—Coroner to issue permit.

SEC. 285. It shall be the duty of any undertaker or other person obtaining the certificate mentioned in this or the next preceding section before burying such deceased person to present such certificate to the coroner of the county within which such deceased person shall have died. The said coroner, after being satisfied of the truth of the facts set forth in said certificate, shall issue a permit to the person presenting such certificate to bury the deceased person named in said certificate, or shall take such action under the law as the facts set forth in said certificate shall warrant. Said permit shall be in writing, signed by the coroner, and shall set forth the facts under which it was issued. Said coroner shall file in his office all physicians' certificates so presented to him, and shall keep a record of the same and a memorandum of all permits so issued by him, which records and memoranda he shall turn over to his successor in office as a part of the public records of his office. Any person wilfully violating any of the provisions of this or the next preceding section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than one month nor more than six months, or both.

Burial or removal permit, not obtaining, sec. 2972.
False certificate of death, sec. 2987.

6551. Physician issuing false certificate.

SEC. 286. Any physician who shall wilfully issue or sign, or cause to be issued or signed, any certificate, as provided for in the two next preceding sections, knowing the facts set forth in said certificate to be false, shall be deemed guilty of a felony, and, upon conviction thereof, shall be imprisoned in the state prison for a term not less than one year and not more than five years.

Altering certificate of birth or death, sec. 2972.
Failure to record certificate, sec. 2986.
Physician, failure to issue certificate of cause of death, or false certificate, secs. 2972, 2987.

6552. Exhuming remains of deceased person.

SEC. 287. Any person or persons, company, association or corporation in this state who shall exhume or disinter, or who shall cause to be exhumed or disinterred, any human remains, or any part of such remains which have been buried in the ground in this state, for the purpose of transporting the same to any other state or foreign country, except under the conditions provided in the next following section, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine in any

sum not less than three hundred dollars nor more than five hundred dollars for each and every such offense, or shall be imprisoned in the county jail for any period not less than three months nor more than six months, or both.

Burial or removal permit, not obtaining, sec. 2972.

6553. Idem—Commissioners to issue permits.

SEC. 288. The county commissioners of the several counties in this state, in which said human remains are buried or interred, as provided in section 287 of this act, are hereby authorized to grant and to issue written permits for the disinterment and removal of any such human remains referred to in section 287 of this act, whenever in their judgment the public health will not be endangered by such disinterment and removal; *provided, however,* that no such permit shall be granted or issued under any circumstances or at any time where the party or parties buried or interred have died from or with any contagious or loathsome disease.

Burial or removal permit, not obtaining, sec. 2972.
Altering certificate of birth or death, sec. 2972.
Transportation company shipping body without certificate of death, sec. 2972.

6554. Hours of labor in underground mines.

SEC. 289. The period of employment of working men in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

For schedule of acts regarding employer and employee, see sec. 1915.
Eight-hour day for top men of underground mine, secs. 1941, 1942.
The above section was held constitutional in Ex Parte Boyce, 27 Nev. 299 (95 P. 215, 361, 65 L. R. A. 47).

6555. Hours of labor in smelters and mills.

SEC. 290. The period of employment of working men in smelters and in all other institutions for the reduction or refining of ores or metals shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

See secs. 1941–1942.
Above section was held constitutional in Ex Parte Kair, 28 Nev. 127, 425 (103 A. S. 817, 80 P. 463).

6556. Idem—Mines and mills—Penalty.

SEC. 291. Any person who violates either of the two preceding sections, or any person, corporation, employer or his or its agent, who hires, contracts with, or causes any person to work in an underground mine or other underground workings, or in a smelter or any other institution or place for the reduction or refining of ores or metals for a period of time longer than eight hours during one day unless life and property shall be in imminent danger, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, or imprisonment in the county jail not more than six months, or both.

This act is not in conflict with Const., sec. 21, art. 4 (sec. 279, ante). Nor is it inimical to the fourteenth amendment to the federal constitution (sec. 185, ante). The legislature has inherent authority, under the general police power of the state, to enact laws for the promotion of the health, safety and welfare of the people, and its arm cannot be stayed when exercised for these purposes. If the restriction of the hours of labor be deemed a regulation or limitation on the right to acquire property, the occupations to which the act applies are not considered heathful; and it was therefore within the power and discretion of the legislature to enact the statute for the protection of the health and prolongation of the lives of the working men affected, and the resulting welfare of the state. Ex Parte Boyce, 27 Nev. 299, 328, 333, 335, 352, 360 (65 L. R. A. 47, 75 P. 1).

In an attack on the constitutionality of this act on the ground that the labor therein mentioned was not dangerous to health,

evidence that particular reduction works and mills, including the one in which petitioner worked, were healthful, as distinguished from the healthfulness of mills in general throughout the country, was held inadmissible. Ex Parte Kair, 28 Nev. 425 (82 P. 453).

Cited, In re Chartz, 29 Nev. 112, 5 L. R. A. (N. S.), 124 A. S. 15, 85 P. 352.

This act is not void under Const., art. 1, sec. 1 (sec. 230, ante), but is sustainable as a valid health regulation under the police power. Nor does it violate the eighth amendment to the federal constitution (sec. 178, ante). The statute being sustainable as a valid health regulation within the police power, owing to the fact that prolonged labor in such places is injurious, as a matter of common knowledge, evidence that defendant's occupation was not injurious is not admissible in a prosecution under this section. Where one is imprisoned on a conviction under a statute entirely void, the remedy is habeas corpus. Ex Parte Kair, 28 Nev. 127, 140 (113 A. S. 817, 80 P. 463).

6557. Hours of labor in open mines.

SEC. 292. The period of employment of working men in open-pit and open-cut mines shall not exceed eight hours in any twenty-four hours, except in cases of emergency where life or property is in imminent danger.

6558. Idem—Penalty.

SEC. 293. Any person who violates any provision of the preceding section, or any person, persons, corporation, employer or his agent, who hires, contracts with, or causes any person to labor in any open-pit or open-cut mines, for a period of time longer than eight hours within any twenty-four hours, except in cases of emergency where life or property is in imminent danger, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or both.

6559. Hours of labor in plaster and cement mills.

SEC. 294. The period of employment of all persons engaged or employed in any mill or other institution wherein plaster or cement is manufactured shall not exceed eight hours in any twenty-four hours except in cases of emergency where life is in imminent danger, or the product of such mill or institution liable to loss or damage by delay in treatment.

6560. Idem—Penalty.

SEC. 295. Any person who violates any provision of the preceding section, or any person, persons, corporation, employer or agent who hires, contracts with or causes any person to be engaged or employed in any mill or other institution where plaster or cement is manufactured, for a period of time longer than eight hours in any twenty-four hours except in cases where life is in imminent danger or the product of such mill or institution liable to loss or damage by delay in treatment, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or both.

See secs. 1941–1942, ante.

CHAPTER 16

CRIMES AGAINST PUBLIC SAFETY

6561. Public nuisance defined.
6562. Unequal damage.
6563. Maintaining or permitting nuisance.
6564. Abatement of nuisance.
6565. Keeping explosives unlawfully.
6566. Transporting explosives.
6567. Setting spring gun.
6568. Concealed weapons, carrying of, unlawful.
6569. Discharging firearms unlawful, when.
6570. Idem—Duties of officers.
6571. Infernal machines.
6572. Destruction of buildings by explosives.
6573. Idem—Conspirators.
6574. Dealers in explosives, duty of.
6575. Idem—Penalty.
6576. Obstruction of extinguishment of fire.
6577. Obstructing firemen.
6578. Smoking—Where prohibited.
6579. Negligent fires.

6580. Operating dangerous engine.
6581. Doors of public buildings to swing outward.
6582. Engineer who cannot read.
6583. Intoxication of employees.
6584. Failure to ring bell.
6585. Other violations of duty.
6586. Obstructing and delaying train.
6587. Liability of person handling steamboat or steam boiler.
6588. Endangering life by refusal to labor.
6589. Disturbance on highway.
6590. Dangerous exhibitions.
6591. Allowing vicious animal at large.

6561. Public nuisance defined.

SEC. 296. A public nuisance is a crime against the order and economy of the state. Every place—

1. Wherein any gambling, swindling game or device, book-making, pool-selling, or bucket-shop or any agency therefor shall be conducted, or any article, apparatus or device useful therefor shall be kept; or,

2. Wherein any fighting between animals or birds shall be conducted; or,

3. Wherein any intoxicating liquors are kept for unlawful use, sale or distribution; or,

4. Where vagrants resort; and,

Every act unlawfully done and every omission to perform a duty, which act or omission

1. Shall annoy, injure or endanger the safety, health, comfort, or repose of any considerable number of persons; or,

2. Shall offend public decency; or,

3. Shall unlawfully interfere with, befoul, obstruct, or tend to obstruct, or render dangerous for passage, a lake, navigable river, bay, stream, canal, ditch, mill-race or basin, or a public park, square, street, alley, bridge, causeway, or highway; or,

4. Shall in any way render a considerable number of persons insecure in life or the use of property;

Shall be a public nuisance.

Obstructing highway, sec. 3009.

6562. Unequal damage.

SEC. 297. An act which affects a considerable number of persons in any of the ways specified in the next preceding section is not less a public nuisance because the extent of the damage is unequal.

Failure of commissioners or district attorney to abate nuisance, sec. 1562.

6563. Maintaining or permitting nuisance.

SEC. 298. Every person who shall commit or maintain a public nuisance, for which no special punishment is prescribed; or who shall wilfully omit or refuse to perform any legal duty relating to the removal of such nuisance; and every person who shall let, or permit to be used, any building or boat, or portion thereof, knowing that it is intended to be, or is being used, for committing or maintaining any such nuisance, shall be guilty of a misdemeanor.

6564. Abatement of nuisance.

SEC. 299. Any court or magistrate before whom there may be pending any proceeding for a violation of the next preceding section, shall, in addition to any fine or other punishment which it may impose for such violation, order such nuisance abated, and all property unlawfully used in the maintenance thereof destroyed by the sheriff at the cost of the defendant.

6565. Keeping explosives unlawfully.

SEC. 300. Every person who shall make or keep any explosive or combustible substance in any city or town, or carry it through the streets thereof in a quantity, or manner prohibited by law, or by ordinance of such municipality; and every person who, by careless, negligent or

unauthorized use or management of any such explosive or combustible substance, shall injure or cause injury to the person or property of another, shall be guilty of a misdemeanor.

County commissioners failing to comply with act relative to storage of explosives, sec. 1947.

6566. Transporting explosives.

SEC. 301. Every person who shall put up for sale, or who shall deliver to any warehouseman, dock, depot, or common carrier any package, cask or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, powder or other explosive or combustible substance, without having printed thereon in a conspicuous place in large letters the word "Explosive," shall be guilty of a misdemeanor.

6567. Setting spring gun.

SEC. 302. Every person who shall set a so-called trap, spring pistol, rifle, or other deadly weapon, shall be punished as follows:

1. If no injury result therefrom to any human being, by imprisonment in the county jail for not more than one year or by a fine of not more than one thousand dollars, or by both.

2. If injuries not fatal result therefrom to any human being, by imprisonment in the state prison for not more than twenty years.

3. If the death of a human being results therefrom, under circumstances not rendering the act murder, by imprisonment in the state prison for not more than twenty years, otherwise the punishment shall be as for murder.

6568. Concealed weapons, carrying of, unlawful.

SEC. 303. It shall be unlawful for any person in this state, except peace officers, or persons while employed upon or traveling upon trains, stages, or other public conveyances, to wear, carry or have concealed upon his person, in any town, city or village, any dirk-knife, pistol, sword in case, slung-shot, sand-club, metal knuckles, or other dangerous weapon, without first obtaining permission from the board of county commissioners, attested by its clerk, of the county in which such concealed weapon shall be carried. The board of county commissioners of any county in this state, may, upon an application made in writing, showing the reason of the person, or the purpose for which any concealed weapon is to be carried, grant permission under its seal, and attested by its clerk, to the person making such application, authorizing such person to carry the concealed weapon described in such permission. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor and on conviction thereof shall be fined not less than twenty dollars, nor more than five hundred dollars, or by imprisonment in the county jail for not less than thirty days, nor more than six months.

See Ex Parte Davis, 33 Nev.—(110 P. 1131).

6569. Discharging firearms unlawful, when.

SEC. 304. Any person, whether under the influence of liquor or otherwise, who shall maliciously, wantonly or negligently discharge or cause to be discharged any pistol, gun or any other kind of firearm, in or upon any public street or thoroughfare, or in any theater, hall, store, hotel, saloon or any other place of public resort, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment in the county jail for a term not less than two nor more than six months, or by a fine not less than one hundred nor more than five hundred dollars, or both.

6570. Idem—Duties of officers.

SEC. 305. It shall be the duty of all civil, military and peace officers to be vigilant in carrying the provisions of the preceding section into full

force and effect; and any peace officer who shall neglect his duty in the due arrest of any such offender, shall be deemed guilty of a gross misdemeanor.

6571. Infernal machines.

SEC. 306. It shall be unlawful for any person to manufacture or procure any dynamite machine or device or other device for the destruction of life or property, or to have either of the same in his possession. Any person violating the provisions of this section shall be guilty of a felony.

6572. Destruction of buildings by explosives.

SEC. 307. Every person who shall destroy, or attempt to destroy, any dwelling-house or other building, a human being being therein at the time, with dynamite, nitroglycerine, gunpowder, or other high explosive, shall be guilty of a felony, and upon conviction thereof shall be punished by death or imprisonment for life in the state prison in the discretion of the jury.

6573. Idem—Conspirators.

SEC. 308. Any person or persons who shall conspire with others to commit the offense described in the last preceding section shall likewise be guilty of a felony and be subject to the same punishment.

6574. Dealers in explosives, duty of.

SEC. 309. It is hereby made unlawful for any dealer in dynamite, nitroglycerine, gunpowder, or other high explosive, to dispose of, transfer, or sell to any person or persons an excessive amount of such commodities, or in any unusual manner, except in the due course of trade, and a record shall be kept by all dealers in such commodities of all such sales of the same made by them, showing the purpose for which the same is to be used and to whom sold, and no such sale of such commodities shall be made to any person except upon a signed order delivered to the merchant dealing in the same, stating the purpose and use to which the same is to be put.

6575. Idem—Penalty.

SEC. 310. Any person violating the provisions of the last preceding section shall be deemed guilty of a gross misdemeanor.

6576. Obstruction of extinguishment of fire.

SEC. 311. Every person who, with intent to prevent or obstruct the extinguishment of any fire, shall cut or remove any bell rope, wire or other apparatus for communicating an alarm of fire, or cut, injure or destroy any engine, hose, or other fire apparatus, or otherwise prevent or obstruct the extinguishment of any fire, shall be punished by imprisonment in the state prison for not more than five years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars.

6577. Obstructing firemen.

SEC. 312. Every person who at the burning of any building shall be guilty of any disobedience to the lawful orders of a public officer or fireman or of resistance to or interference with the lawful efforts of any firemen, or company of firemen, to extinguish the same, or of disorderly conduct likely to interfere with the extinguishment thereof, or who shall forbid, prevent or dissuade others from assisting to extinguish such fire, shall be guilty of a misdemeanor.

6578. Smoking—Where prohibited.

SEC. 313. Every person who shall light a pipe, cigar or cigarette in, or who shall enter with a lighted pipe, cigar or cigarette, any mill or other

building on which is posted in a conspicuous place over and near each principal entrance a notice in plain, legible characters stating that no smoking is allowed in such building, shall be guilty of a misdemeanor.

6579. Negligent fires.

SEC. 314. Every person who shall wilfully or negligently set, or fail to carefully guard or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another shall be endangered, shall be guilty of a misdemeanor.

See sec. 6632.

6580. Operating dangerous engine.

SEC. 315. Every person who shall operate or permit to be operated in dangerous proximity to any brush, grass or other inflammable material, any engine or boiler which is not equipped with a modern spark arrester, in good condition, shall be guilty of a misdemeanor.

6581. Doors of public buildings to swing outward.

SEC. 316. The doors of all theaters, opera houses, school buildings, churches, public halls, or places used for public entertainments, exhibitions or meetings, which are used exclusively or in part for admission to or egress from the same, or any part thereof, shall be so hung and arranged as to open outwardly, and during any exhibition, entertainment or meeting, shall be kept unlocked and unfastened, and in such condition that in case of danger or necessity, immediate escape from such building shall not be prevented or delayed; and every agent or lessee of any such building who shall rent the same or allow it to be used for any of the aforesaid public purposes without having the doors thereof hung and arranged as hereinbefore provided, shall, for each violation of any provision of this section, be guilty of a misdemeanor.

6582. Engineer who cannot read.

SEC. 317. Every person who, as an officer of a corporation or otherwise, shall knowingly employ as an engineer or engine driver, to run a locomotive or train on any railway, any person who cannot read time tables and ordinary handwriting; and every person who, being unable to read time tables and ordinary handwriting, shall act as an engineer or run a locomotive or train on any railway, shall be guilty of a gross misdemeanor.

6583. Intoxication of employees.

SEC. 318. Every person who, being employed upon any railway, as engineer, motorman, gripman, conductor, switch tender, fireman, bridge tender, flagman or signalman, or person having charge of stations, starting, regulating or running trains upon a railway, or person employed as captain, engineer or other officer of a vessel propelled by steam, or being the driver of any animal or vehicle upon any public street, shall be intoxicated while engaged in the discharge of any such duties, shall be guilty of a gross misdemeanor.

Engineer or conductor, intoxication of, sec. 3564.

6584. Failure to ring bell.

SEC. 319. Every engineer driving a locomotive on any railway who shall fail to ring the bell or sound the whistle upon such locomotive, or cause the same to be rung or sounded at least eighty rods from any place where such railway crosses a traveled road or street, where such road or street is customarily used by the public for the purpose of travel (except in cities where other regulations are required), or to continue the ringing of such

bell or sounding of such whistle until such locomotive shall have crossed such road or street, shall be guilty of a misdemeanor.

See sec. 3552.

6585. Other violations of duty.

SEC. 320. Every engineer, motorman, gripman, conductor, brakeman, switch tender, train dispatcher or other officer, agent or servant of any railway company, who shall be guilty of any wilful violation or omission of his duty as such officer, agent or servant, by which human life or safety shall be endangered, for which no punishment is specially prescribed, shall be guilty of a misdemeanor.

6586. Obstructing and delaying train.

SEC. 321. Every person who shall wilfully obstruct, hinder or delay the passage of any car lawfully operated upon any railway, shall be guilty of a misdemeanor.

Injury to railroad property, if personal injury or death, felony, sec. 3565.

6587. Liability of person handling steamboat or steam boiler.

SEC. 322. Every person who shall apply, or cause to be applied to a steam boiler a higher pressure of steam than is allowed by law, or by any inspector, officer or person authorized to limit the same; every captain or other person having charge of the machinery or boiler in a steamboat used for the conveyance of passengers on the waters of this state, who, from ignorance or gross neglect, or for the purpose of increasing the speed of such boat, shall create or cause to be created an undue or unsafe pressure of steam; and every engineer or other person having charge of a steam boiler, steam engine or other apparatus for generating or employing steam, who shall wilfully or from ignorance or gross neglect, create or allow to be created such an undue quantity of steam as to burst the boiler, engine or apparatus, or cause any other accident, whereby human life is endangered, shall be guilty of a gross misdemeanor.

6588. Endangering life by refusal to labor.

SEC. 323. Every person who shall wilfully and maliciously, either alone or in combination with others, break a contract of service or employment, knowing or having reasonable cause to believe that the consequence of his so doing will be to endanger human life or to cause grievous bodily injury, or to expose valuable property to destruction or serious injury, shall be guilty of a misdemeanor.

6589. Disturbance on highway.

SEC. 324. Every person who shall ride or drive any horse upon a public street or other highway, in a manner likely to endanger the safety or life of another on such highway, shall create or participate in any noise, disturbance or other demonstration calculated or intended to frighten, intimidate or disturb any person, shall be guilty of a misdemeanor.

6590. Dangerous exhibitions.

SEC. 325. Every proprietor, lessee or occupant of any place of amusement, or any plat of ground or building, who shall allow it to be used for the exhibition of skill in throwing any sharp instrument or in shooting any bow gun, pistol or firearm of any description, at or toward any human being, shall be guilty of a misdemeanor.

6591. Allowing vicious animal at large.

SEC. 326. Every person having the care or custody of any animal known to possess any vicious or dangerous tendencies, who shall allow the

same to escape or run at large in any place or manner liable to endanger the safety of any person, shall be guilty of a misdemeanor; and any person may lawfully kill such animal when reasonably necessary to protect his own or the public safety.

CHAPTER 17

CRIMES AGAINST PUBLIC PEACE

6592. Disturbing the peace.
6593. Assembling to disturb the peace.
6594. Affray.
6595. Unlawful assemblage.
6596. Rout and riot.
6597. Disturbing religious meetings.
6598. Selling liquor at camp meetings.
6599. Interfering with school children.
6600. Disturbing public schools.
6601. False fire alarms, misdemeanor.
6602. Act construed—Penalty.
6603. Flag, American, penalty for desecration.
6604. Armed association.
6605. Combination to resist process.
6606. Refusing to join posse, or prevent breach of peace.
6607. Disturbing meeting.
6608. Sabbath breaking.
6609. Aiming or discharging firearms.
6610. Use of firearms by minor.
6611. Offenses in public conveyances.
6612. Destruction of property.
6613. Criminal anarchy defined.
6614. Advocacy of criminal anarchy.
6615. Assemblages of anarchists.
6616. Permitting premises to be used for assemblages of anarchists.
6617. Publishing matter inciting breach of peace.
6618. Liability of editors and others.

6592. Disturbing the peace.

SEC. 327. If any person shall, maliciously and wilfully, disturb the peace or quiet of any neighborhood, or family, by loud or unusual noises, or by tumultuous and offensive conduct, threatening, traducing, quarreling, challenging to fight, or fighting, every person convicted thereof shall be fined in a sum not exceeding two hundred dollars, or imprisonment in the county jail not more than two months.

6593. Assembling to disturb the peace.

SEC. 328. If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse, on being desired or commanded so to do by a judge, justice of the peace, sheriff, coroner, constable, or other public officer, the persons so offending shall, on conviction, be severally fined in any sum not exceeding five hundred dollars, and imprisonment in the county jail not more than six months.

See secs. 2836–2838.

6594. Affray.

SEC. 329. If two or more persons shall, by agreement, fight in a public place, to the terror of the citizens of this state, the persons so offending shall be deemed guilty of an affray, and shall be severally fined in a sum not exceeding two hundred dollars, and imprisoned in the county jail not more than one month.

6595. Unlawful assemblage.

SEC. 330. If two or more persons shall assemble together to do an unlawful act, and separate without doing or advancing towards it, such persons shall be deemed guilty of an unlawful assembly, and, upon conviction thereof, shall be severally fined in a sum not exceeding two hundred dollars, or imprisoned in the county jail not exceeding three months.

6596. Rout and riot.

SEC. 331. If two or more persons shall meet to do an unlawful act, upon a common cause of quarrel, and make advances toward it, they shall be deemed guilty of a rout, and, on conviction, shall be severally fined in a sum not exceeding five hundred dollars, or imprisonment in the county jail not

more than six months; and if two or more persons shall actually do an unlawful act of violence, either with or without a common cause of quarrel or even do a lawful act, in a violent, tumultuous, and illegal manner they shall be deemed guilty of a riot, and, upon conviction thereof, shall be fined in any sum not exceeding five hundred dollars each or by imprisonment in the county jail for any term of time not exceeding six months, or by both such fine and imprisonment.

6597. Disturbing religious meetings.

SEC. 332. Every person who shall wilfully disquiet or disturb any congregation, or assembly of people met for religious worship, by making a noise, or by rude or indecent behavior, or profane discourse within their place of worship, or so near to the same as to disturb the order or solemnity of the meeting, or menace, threaten, or assault any person there being, shall be deemed guilty of a misdemeanor, and punished by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding three months.

See secs. 6478, 6607.

6598. Selling liquor at camp meetings.

SEC. 333. Every person who shall erect or keep a booth, tent, stall, or other contrivance for the purpose of selling or otherwise disposing of any wine, or spirituous, or fermented liquors, or any drink of which wine, spirituous, or fermented liquors form a part, within one mile of any camp or field meeting for religious worship, during the time of holding such meeting, shall be deemed guilty of a misdemeanor, and punished by fine not exceeding five hundred dollars.

6599. Interfering with school children.

SEC. 334. It shall be a misdemeanor for any person or persons to detain, beat, whip or otherwise interfere with any pupil or pupils attending any public school on his, her or their way to or from such school against the will of such pupil or pupils.

See sec. 3452.

6600. Disturbing public schools.

SEC. 335. It shall be a misdemeanor for any person or persons to disturb the peace of any public school in the State of Nevada by using vile or indecent language, or by threatening or assaulting any pupil or teacher within the building or grounds of such school, and for the purposes of this act the ground of every public school shall extend to a distance of fifty yards in all directions from the school building.

See sec. 3453.

6601. False fire alarm, misdemeanor.

SEC. 336. It shall be a misdemeanor for any person or persons intentionally to give or cause to be given or turn in or cause to be turned in any false alarm of fire, in any city, town or community in this state.

6602. Act construed—Penalty.

SEC. 337. The last preceding section shall not be construed to apply to alarms given for practice by any chief of a fire department or by any other person properly authorized to give such alarms, nor to alarms given by any person to attract attention of police, firemen, or people to acts of violence, disorder or menace. For each and every offense committed under the provisions of the preceding section, the person or persons so offending shall be punished by a fine of not to exceed one hundred dollars, or imprisonment in the county jail for a period of not to exceed fifty days.

6603. Flag—American, penalty for desecration.

SEC. 338. Any person who, in any manner, for exhibition or display puts or causes to be placed, any inscription, design, device, symbol, portrait, name, advertisement, words, character, marks or notice whatever upon any flag or ensign of the United States, or state flag of this state or ensign, evidently purporting to be either of said flags or ensign, or who in any manner appends, annexes or affixes to any such flag or ensign any inscription, design, device, symbol, portrait, name, advertisement, words, marks, notice or token whatever, or who displays or exhibits or causes to be displayed or exhibited, any flag or ensign, evidently purporting to be either of said flags, upon which shall in any manner be put, attached, annexed, or affixed any inscription, design, device, symbol, portrait, name, advertisement, words, marks, notice or token whatever, or who publicly or wilfully mutilates, tramples upon, or who tears down or wilfully and maliciously removes while owned by others, or otherwise defaces or defiles any of said flags, or ensign, which are public or private property, shall be deemed guilty of a misdemeanor; *provided, however,* that this act shall not apply to flags or ensigns the property of or used in the service of the United States or of this state, upon which inscriptions, names of action, words, marks or symbols are placed pursuant to law or authorized regulations.

6604. Armed association.

SEC. 339. It shall not be lawful for any body of men other than the state or municipal police, university or public school cadets or companies, national guard or troops of the United States, to associate themselves together as a military company with arms, without the consent of the governor; but members of social and benevolent associations are not prohibited from wearing swords. Every person who shall associate with others in violation of this section shall be guilty of a misdemeanor.

6605. Combination to resist process.

SEC. 340. Every person who shall enter into a combination with another to resist the execution of any legal process or other mandate of a court of competent jurisdiction, under circumstances not amounting to a riot, shall be guilty of a gross misdemeanor.

6606. Refusing to join posse, or prevent breach of peace.

SEC. 341. Every male person, above eighteen years of age, who shall neglect or refuse to join the posse comitatus, or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person or persons against whom there may be issued any process, or by neglecting to aid and assist in retaking any person or persons who, after being arrested or confined, may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace, or the commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, judge, or justice of the peace, or other officer concerned in the administration of justice, shall be guilty of a misdemeanor.

See secs. 2833, 6361, 6863, 6956.

6607. Disturbing meeting.

SEC. 342. Every person who, without authority of law, shall wilfully disturb any assembly or meeting not unlawful in its character, shall be guilty of a misdemeanor.

See secs. 6478, 6597.

6608. Sabbath breaking.

SEC. 343. Every person who, on a Sunday, shall promote or engage in

any noisy or boisterous sport or amusement, which disturbs the peace of the day, or shall keep open any race grounds, shall be guilty of a misdemeanor.

See Ex Parte Winston, 9 Nev. 71.

6609. Aiming or discharging firearms.

SEC. 344. Every person who shall aim any gun, pistol, revolver or other firearm, whether loaded or not, at or towards any human being, or who shall wilfully discharge any firearm, air gun or other weapon, or throw any deadly missile in a public place, or in any place where any person might be endangered thereby, although no injury result, shall be guilty of a misdemeanor.

6610. Use of firearms by minor.

SEC. 345. No minor under the age of fourteen years shall handle or have in his possession or under his control, except while accompanied by or under the immediate charge of his parent or guardian, any firearm of any kind for hunting or target practice or for other purposes. Every person violating any of the foregoing provisions, or aiding or knowingly permitting any such minor to violate the same, shall be guilty of a misdemeanor.

6611. Offenses in public conveyances.

SEC. 346. Every person who shall wilfully use profane, offensive, or indecent language or engage in any quarrel in any public conveyance, or interfere with or annoy any passenger therein, or having refused to pay the proper fare, shall fail to leave any such conveyance upon demand, shall be guilty of a misdemeanor.

6612. Destruction of property.

SEC. 347. Whenever any persons unlawfully assembled shall pull down or destroy any dwelling house or other building, or any shop, steamboat, vessel or other property, they severally shall be punished by imprisonment in the state prison for not more than five years, or by a fine of not more than one thousand dollars.

6613. Criminal anarchy defined.

SEC. 348. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocating of such doctrine either by word of mouth or writing is a felony.

6614. Advocacy of criminal anarchy.

SEC. 349. Every person who—

1. By word of mouth or writing shall advocate, advise or teach the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

2. Shall print, publish, edit, issue or knowingly circulate, sell, distribute or publicly display any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

3. Shall openly, wilfully and deliberately justify by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Shall organize or help to organize or become a member of or voluntarily assemble with any society, group or assembly of persons formed to teach or advocate such doctrine;

Shall be punished by imprisonment in the state prison for not more than ten years, or by a fine of not more than five thousand dollars, or both.

6615. Assemblages of anarchists.

SEC. 350. Whenever two or more persons assemble for the purpose of advocating or teaching the doctrines of criminal anarchy, as defined in this act, such an assembly is unlawful, and every person voluntarily participating therein by his presence, aid or instigation, shall be punished by imprisonment in the state prison for not more than ten years, or by a fine of not more than five thousand dollars, or both.

6616. Permitting premises to be used for assemblages of anarchists.

SEC. 351. Every owner, agent, superintendent, janitor, care-taker or occupant of any place, building or room, who shall wilfully and knowingly permit therein any assemblage of persons prohibited by the next preceding section, or who, after notification that the premises are so used, shall permit such use to be continued, shall be guilty of a gross misdemeanor.

6617. Publishing matter inciting breach of peace.

SEC. 352. Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor.

6618. Liability of editors and others.

SEC. 353. Every editor or proprietor of a book, newspaper or serial and every manager of a partnership, corporation or association by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution therefor, the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes by another who had no authority from him to make the publication, and was retracted by him as soon as known, with an equal degree of publicity.

CHAPTER 18

VAGRANCY

6619. What constitutes vagrancy.
6620. Vagrants may be employed on public works.
6621. Credit given for work.
6622. Punishment for refusal to work.
6623. Sheriff to procure employment for vagrants.

6619. What constitutes vagrancy.

SEC. 354. Every—

1. Idle or dissolute person, without visible or known means of living, who has the physical ability to work, and who does not for the space of ten days make proper inquiry for, and use due diligence to seek employment, nor labor when employment is offered him; or,

2. Idle or dissolute person who roams about the country from place to place without any lawful business; or,

3. Healthy beggar who solicits alms as a business; or,

4. Person who makes a practice of going from house to house begging food, money, or other articles, or seeks admission to such houses upon

frivolous pretexts for no other apparent motive than to see who may be therein, or to gain an insight of the premises; or,

5. Idle or dissolute person or associate of known thieves who wanders about the streets at late and unusual hours of the night, or prowls around dark alleys, byways, and other dark or unfrequented places at any hour of the night, without any legitimate business in so doing; or,

6. Idle or dissolute person who lodges in any barn, shed, shop, outhouse, or place other than that kept for lodging purposes, without the permission of the owner or person entitled to the possession thereof; or,

7. Common drunkard who is in the habit of lying around the streets, alleys, sidewalks, saloons, barrooms or other public places in a state of intoxication; or,

8. Pimp, pander, procurer or procuress; or,

9. Lewd or dissolute male person who lives in and about houses of prostitution or solicits for any prostitute or house of prostitution; or,

10. Lewd and dissolute female person known as a "street walker," or common prostitute, who shall upon the public streets, or in or about any public place or assemblage, or in any saloon, barroom, clubroom, or any other public or general place of resort for men, or anywhere within the sight or hearing of ladies or children, conduct and behave herself in an immodest, drunken, indecent, profane, or obscene manner, either by actions, language, or improper exposure of her person; or,

11. Boy or male person under the age of twenty-one years, who habitually remains away from his home or place of residence after the hour of nine o'clock p. m. without some lawful and necessary business, or other imperative duty, or good and sufficient reason or cause for such absence from home after such hour, for his own amusement and pastime, without any legitimate business for so doing, frequents and passes his time in any billiard room or other place where any such games are played, or any saloon or other place where intoxicating liquor is sold or drank; or who at any hour of the night or day, for his own amusement and pastime, without any legitimate business for so doing, frequents or loafs around any low den, house, or other place of vice, infamy, or immorality, where known thieves and other vicious and infamous persons resort or congregate; or who at any hour of the night, either alone or otherwise, prowls about the streets or town, disturbing the peace and quiet of the neighborhood by loud or unnecessary noise, or committing petty depredations, tricks, or pranks, upon the person or property of other people, or by abusive, obscene, or insulting language, or by any manner of rowdyism whatsoever, disturbs or annoys the passersby, any lawful assemblage of persons, or the neighborhood at large; or,

12. Person who keeps a place where lost or stolen property is concealed—

Is a vagrant, and shall be punished by imprisonment in the county jail for not more than three months, or by a fine of not more than three hundred dollars, or both.

See secs. 6506, 6842.

See Tilden v. Esmeralda County, 32 Nev. 319 (107 P. 881).

6620. Vagrants may be employed on public works.

SEC. 355. All male persons having the physical ability to work, convicted of vagrancy and imprisoned on judgment therefor, may be required to perform labor on the public works, buildings, grounds, or ways in the county, and the sheriff or other person or persons having them in charge while performing such labor may, in his discretion, employ any usual, reasonable, humane, and sufficient means to guard against and prevent such prisoner escaping from custody while being so employed.

6621. Credit given for work.

SEC. 356. For each any every day's work willingly and faithfully performed by such vagrant, he shall receive credit for two days' time, which shall be by the sheriff applied upon and deducted from his term of imprisonment.

6622. Punishment for refusal to work.

SEC. 357. If any imprisoned vagrant, having the physical ability to work, refuse to work when required so to do, as herein provided, he may, as a punishment, be forced to work by being compelled to "pack sand," or carry other material and weight from place to place, or to perform other labor not unreasonable, inhumane, or too burdensome, until he declares himself willing to work, and does work as required; or in lieu thereof he may, in the discretion of the sheriff, be confined in a cell of the jail and fed upon no other food except bread and water, until he declares himself ready to work, as required herein; but both methods of punishment herein prescribed shall in no instance be inflicted at the same time. In either case of punishment the prisoner shall have no credit given him upon his term of imprisonment, for such forced labor or solitary confinement.

6623. Sheriff to procure employment for vagrants.

SEC. 358. It shall be the duty of the sheriff, during fair and reasonable weather, when the same can be done without extra expense to the county, to procure employment for and set at work such convicted vagrants, who are serving out their term of imprisonment; and to this end, upon application of any road supervisor, superintendent, foreman, or other overseer or custodian of any public works, buildings, or grounds, he may deliver into the custody and charge of such person making the application, such prisoners, to do labor as herein required, who, after working hours of the day, or after suspension of labor from any cause, shall be returned into the custody of the sheriff of the county for safe keeping until again required for labor.

CHAPTER 19

ARSON—FOREST AND NEGLIGENT FIRES

6624. Arson, first degree—Penalty.
6625. Arson, second degree.
6626. Burning to defraud insurer.
6627. Arson—Fine in addition to imprisonment.
6628. "Set on fire" defined.
6629. Contiguous fires.
6630. Ownership of building.
6631. Preparation is attempt.
6632. Starting and neglecting fires—Penalty.
6633. Damage by fire—Penalty and liability for.

6624. Arson, first degree—Penalty.

SEC. 359. Every person who shall wilfully burn or set on fire in the night-time or between sunset and sunrise the dwelling house of another, or any building in which there shall be at the time a human being, shall be guilty of arson in the first degree and be punished by imprisonment in the state prison for a term not less than two years, and which may extend to life, and in addition thereto, may be fined as provided in section 362.

See sec. 6626.
See State v. McMahan, 17 Nev. 365 (30 P. 1000).

6625. Arson, second degree.

SEC. 360. Every person who, under circumstances not amounting to arson in the first degree, shall wilfully and maliciously burn, or set on fire, any dwelling house or building owned by himself, or the property of another, or any kitchen, office, shop, barn, stable, storehouse, warehouse, or other building, or stacks of grain, or stacks or stocks of hay or straw, or cordwood, or lumber, or charcoal, of the value of fifty dollars or more, or

standing crops, the property of any other person or corporation, or any church, meeting house, school house, state house, court house, or other public building, or any ship, vessel, boat, or other water craft, or any bridge or railroad car or engine, or any threshing machine, wagon, lumber or timber, whether cut or standing, of the value of fifty dollars or more, shall be deemed guilty of arson in the second degree, and, upon conviction thereof, shall be punished by imprisonment in the state prison for a term not less than one year nor more than ten years, and in addition thereto, may be fined, as provided in section 362; and should the life or lives of any person or persons be lost in consequence of such burning, as mentioned in this and the preceding section, such offender shall be deemed guilty of murder, and shall be indicted and punished accordingly.

See sec. 6626.
See Ex Parte Curnow, 21 Nev. 35 (24 P. 430).

6626. Burning to defraud insurer.

SEC. 361. Every person who shall wilfully burn, or cause to be burned, any building, or any goods, wares, merchandise, or other chattel, which shall be at the time insured against loss or damage by fire, with intent to injure or defraud such insurer, whether the same be the property of such person, or of any other, shall, upon conviction, be adjudged guilty of arson in the second degree, and punished as prescribed in the next preceding section.

Evidence of an overlarge insurance upon the goods of the accused destroyed by the fire was competent as tending to show a possible or probable motive—such motive being a material link in the chain of circumstances. When, in a prosecution for arson, the fact of a belief on the part of the accused that he was overinsured became material, as tending to show a motive and thus making an important link in the chain of circumstances: Held, that the place and amount of such insurance might be proved by parol, without producing the policy of insurance. State v. Cohn, 9 Nev. 179.

See Ex Parte Prosole, 32 Nev. 378 (108 P. 630).

6627. Arson—Fine in addition to imprisonment.

SEC. 362. When any person is convicted of arson in either the first or second degree, the court, in addition to any term of imprisonment provided by law, may order and adjudge that the accused pay a fine not exceeding ten thousand dollars and not exceeding twice the value of the property destroyed by fire.

6628. "Set on fire" defined.

SEC. 363. A building, structure or any property mentioned in the last three preceding sections shall be deemed "set on fire," whenever any part thereof or anything therein shall be scorched, charred or burned.

6629. Contiguous fires.

SEC. 364. Whenever any building or structure which may be the subject of arson in either the first or second degree shall be so situated as to be manifestly endangered by any fire and shall subsequently be set on fire thereby, any person participating in setting such fire shall be deemed to have participated in setting such building or structure on fire.

6630. Ownership of building.

SEC. 365. To constitute arson it shall not be necessary that another person than the defendant should have had ownership in the building or structure set on fire.

6631. Preparation is attempt.

SEC. 366. Any wilful preparation made by any person with a view to setting fire to any building or structure shall be deemed to be an attempt to commit the crime of arson, and shall be punished as such.

6632. Starting and neglecting fires—Penalty.

SEC. 367. Every person who, upon departing from camp, or from any fire started by him in the open, wilfully and negligently leaves the fire or fires burning or unexhausted, or fails to thoroughly extinguish the same, is guilty of a misdemeanor.

See sec. 6579.

The act of Congress to prevent forest fires on the public domain, approved February 24, 1897, amended May 5, 1900 (7 Fed. Stats. Anntd., 308, 31 Stats. L. 169), provides that any person who shall wilfully set on fire any timber, underbrush or grass on the public domain, or shall leave or suffer fire to burn unattended near any timber or other inflammable material, shall be punished by a fine of not more than five thousand dollars, or by imprisonment for not more than two years, or by both.

Section 2 of the act provides that any person building a fire in or near any forest, timber or inflammable material upon the public domain, who shall fail to totally extinguish the same before leaving it, shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than one year, or by both.

6633. Damage by fire, penalty and liability for.

SEC. 368. Every person who lights a fire for any purpose along the road through any woodland, or upon the same, or at any other place in the open, and thereby, or by any other means, sets fire to any growing timber or forest, shubbery, crops, grass or vegetation, and thereby causes the destruction of any timber, forest, crops, grass, vegetation or property not his own, of the value of fifty dollars or more, shall be guilty of a felony and imprisoned in the state prison for not less than one year nor more than five years, and in addition thereto may be fined in a sum not exceeding ten thousand dollars and not exceeding twice the value of the property destroyed, in addition to being liable to the owner of such property for the full value thereof in a civil action.

See preceding section and sec. 6579.

CHAPTER 20

BURGLARY

6634. Burglary defined.
6635. Presumption of intent.
6636. Crime in building—Punished separately.
6637. Making or having burglar tools.

6634. Burglary defined.

SEC. 369. Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, or railroad car, with intent to commit grand or petit larceny, or any felony, is guilty of burglary. Every burglary committed in the night-time is burglary of the first degree, and every burglary committed in the daytime is burglary of the second degree. Burglary of the first degree is punishable by imprisonment in the state prison for not less than one nor more than fifteen years. Burglary of the second degree is punishable by imprisonment in the state prison for not more than five years. Whenever burglary is committed upon a railroad train, in motion or in rest, in this state, and it cannot with reasonable certainty be ascertained in what county said crime was committed, the offender may be arrested and tried in any county through which said railroad train may have run on the trip during which such burglary is committed. The phrase "night-time," as used in this section, means the period between sunset and sunrise.

An instruction, that if defendant entered the house and stole therefrom certain goods, it might be inferred that he entered with intent to steal, held correct. State v. Watkins, 11 Nev. 30.

In order to constitute the crime of burglarly, it is just as essential to prove the intent as it is to prove the entry. Evidence to establish intent reviewed and held sufficient. State v. Clark, 12 Nev. 337.

Evidence reviewed and held insufficient to establish that the entry was made with intent to steal. State v. Ryan, 12 Nev. 402.

The language of the statute is broad enough to include buildings of any kind, regardless of the fact of inhabitancy.

Where the premises are described in the indictment as belonging to a certain person, the further allegation that the premises were occupied by a particular tenant is immaterial, and a failure to prove the latter allegation is not a variance, as its only office was to further identify premises already sufficiently described. State v. Dan, 18 Nev. 345 (4 P. 336).

Prior to the above section taking effect, former provisions defined burglary of the second degree as housebreaking, and under an indictment for burglary it was essential to prove that the breaking or entry was done in the night-time. State v. Gray, 23 Nev. 301 (46 P. 801).

See State v. Ah Sam, 7 Nev. 127.

Where an indictment for burglary charged that defendant broke into a certain room occupied by a certain company in a particular building, it was not necessary to allege the ownership of the building, since the allegation that defendant entered the room occupied by the prosecutor sufficiently laid the ownership of the premises entered in the company. It was not incumbent on the state to show ownership otherwise than by possession and occupancy. Where the indictment charged that defendants entered into a certain room occupied by a certain company as a store, it was not necessary to allege that the company was either a corporation, an association, or a copartnership. State v. Simas, 25 Nev. 432 (62 P. 242).

The offense is complete when the house is entered with a specific intent to steal, and the actual stealing or attempt to steal property therein is but evidence of such intent, and the allegation in the indictment of ownership of the property in the house is mere surplusage. Where accused, in explaining his flight from the immediate vicinity of the house, after the breaking and entry thereof had been discovered, testified that he ran away because he had a dirk-knife in his possession, and that he was afraid if arrested that he would be in danger of conviction for carrying a concealed weapon, the error, if any, in admitting the dirk-knife in evidence, was not prejudicial. State v. Simpson, 32 Nev. 138 (104 P. 244).

6635. Presumption of intent.

SEC. 370. Every person who shall unlawfully break and enter or unlawfully enter any building or structure enumerated in the last preceding section shall be deemed to have broken and entered or entered the same with intent to commit grand or petit larceny or a felony therein, unless such unlawful breaking and entering or unlawful entry shall be explained by testimony satisfactory to the jury to have been made without criminal intent.

6636. Crime in building—Punished separately.

SEC. 371. Every person who, in the commission of a burglary shall commit any other crime, shall be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.

6637. Making or having burglar tools.

SEC. 372. Every person who shall make or mend or cause to be made or mended, or have in his possession in the day or night-time, any engine, machine, tool, false key, picklock, bit, nippers or implement adapted, designed or commonly used for the commission of burglary, larceny or other crime, under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a crime, or knowing that the same is intended to be so used, shall be guilty of a gross misdemeanor. The possession thereof except by a mechanic, artificer or tradesman at and in his established shop or place of business, open to public view, shall be prima facie evidence that such possession was had with intent to use or employ or allow the same to be used or employed in the commission of a crime.

CHAPTER 21

LARCENY, ALTERING BRANDS, DRIVING AWAY ANIMALS

6638. Grand larceny defined.
6639. Petit larceny defined.
6640. Taking or misbranding domestic animals, selling or purchasing hide or carcass, grand larceny.
6641. Failure to exhibit hide or keep record of brand, misdemeanor.
6642. Stock not to be driven from range.
6643. Conversion of realty to personalty, grand larceny.
6644. Idem—Petit larceny.
6645. Negotiable and other instruments, subjects of larceny.
6646. Larceny by lodger.
6647. Dog stealing.
6648. Receiving stolen goods.

6649. Detention of person bringing stolen goods into state.
6650. Property restored to owner.
6651. Restoration of stolen property—Duty of officers.
6652. Commission or part ownership no defense for stealing.

6638. Grand larceny defined.

SEC. 373. Every person who shall feloniously steal, take, and carry away, lead or drive away, the personal goods or property of another, of the value of fifty dollars or more, shall be deemed guilty of grand larceny, and upon conviction thereof, shall be punished by imprisonment in the state prison for any term not less than one year nor more than fourteen years.

Where it was objected to an indictment for grand larceny of certain "silver-bearing ore" that the property alleged to have been stolen savored of the realty: Held, that as "ore" in its usual acceptation meant something severed from the realty, there was a sufficient statement of facts in the indictment showing it to be personal property. The taking and carrying away of articles, which formed a part of the freehold, will not constitute a larceny unless an interval of time has elapsed between the acts of severance and asportation; but it seems only such an interval is necessary as that the two acts shall not constitute one transaction. State v. Berryman, 8 Nev. 262.

See State v. Smith, 34 Nev. — (117 P. 19); State v. Brannan, 3 Nev. 238; Ex Parte Maher, 25 Nev. 422 (62 P. 1).

There may be a larceny without any intent on the part of the thief to profit himself, but there cannot be a larceny without an intent to deprive the owner of his property. State v. Ryan, 12 Nev. 401 (28 A. R. 802).

The possession of stolen property is not alone sufficient to justify a conviction for the larceny thereof. State v. Gray, 23 Nev. 301 (46 P. 801).

In prosecutions for larceny, the fact that the stolen property is, recently after the theft, found in the possession of the defendant, can always be given in evidence against him. The strength of the presumption of guilt, raised by the possession of property recently stolen, is for the jury to determine. It is the province of the jury to determine whether the possession is recent enough to raise the presumption. The presumption arising from possession of stolen property is a presumption of fact. Whether the explanation of one found with property, recently stolen, in his possession is reasonable or otherwise, is for the jury. Where there are successive larcenies, each complete and distinct, and not constituting one continuing transaction, the mere retention and possession by the thief of the fruits of his petit larcenies will not make him guilty of grand larceny, though the aggregate value of the stolen property exceeds fifty dollars. Several successive larcenies do not constitute different offenses where there is a continuing transaction, and the defendant may be convicted for the final carrying away. Where accused took cyanides from a mine from time to time, in small quantities, to avoid detection, and then carried them away, it was a continuous transaction, and he was properly convicted for the final asportation, the value of the cyanides being in excess of fifty dollars. The court instructed the jury as follows: "You are instructed that, in order to convict the defendant, you must not only be satisfied beyond a reasonable doubt that the property described in the indictment was stolen from the April Fool Gold Mining and Milling Company, but that the defendant either stole the property, or that he aided or encouraged the theft, and, if circumstances are alone relied on by the prosecution, then each circumstance must be proved beyond a reasonable doubt. And all the circumstances so proved must be such that the defendant could not be innocent in the light of their existence": Held, that that portion of the instruction reading "all the circumstances so proved must be such that the defendant could not be innocent in the light of their existence," suggests that degree of certainty which would exclude the possibility of the innocence of the accused, the law requiring no such certainty. If the circumstances, all taken together, exclude to a moral certainty every hypothesis but the single one of guilt, and establish that one beyond a reasonable doubt, they are sufficient. State v. Mandich, 24 Nev. 336 (54 P. 516).

Where a party commits larceny in one state and carries the stolen goods into another state, and there makes any removal or asportation of them with intent to steal the same, he may be properly indicted and tried for the larceny in the latter state. State v. Bouton, 26 Nev. 34 (62 P. 595).

An indictment, charging defendant with stealing and driving away particularly described cattle of four different owners, charges but one larceny, and is not duplicitous, so as to require the state to elect on which count it stands. Where, in a prosecution for larceny which was planned and executed by defendant, it appeared that he had suggested it to a witness who had been appointed deputy sheriff, and was acting as such, without defendant's knowledge, when invited to join in commission of the theft, and keeping the sheriff fully informed as to what was transpiring between him and defendant, such witness was neither a coconspirator nor an accomplice. State v. Douglas, 26 Nev. 196 (99 A. S. 688, 65 P. 802).

Evidence reviewed and held sufficient to warrant a conviction of the attempting to commit grand larceny in feloniously attempt-

ing to sever gold-bearing ore from the realty of a mining claim. State v. Thompson, 31 Nev. 209.

A person charged with larceny of cattle may be indicted and tried for the offense in any county through which he drove them, as well as in the county where they were stolen or into which they were driven. A person stealing goods in one county and carrying them into other counties is considered guilty of the crime and may be indicted and convicted in any one of such counties; because every act of the thief in the removal of the property and keeping it from the possession of the owner is, in contemplation of law, an offense. If property feloniously taken in one county be removed by the thief into another, the jurisdiction of the offense may be in either; but an indictment in the latter county must allege the offense to have been committed in such county, or that the bringing of the property into such county was felonious; and if it do not, it will not be sufficient. State v. Brown, 8 Nev. 208.

When property is found in the highway, and the finder knows the owner, or there are any marks upon it by which the owner may be ascertained, and the finder, instead of restoring it, converts it to his own use, such conversion will constitute a felonious taking. If there be a felonious intent to appropriate the property, coupled with a reasonable belief that the owner could be found, it would be larceny. If the finder takes possession of the property without intending to steal it at the time of the original taking, he cannot be found guilty of larceny by any subsequent intention to convert it to his own use. Where there is no other evidence tending to establish the guilt of the defendant except the fact of his having the possession of the property stolen, and the jury believed that the defendant gives a reasonable account of such possession, it would be their duty to acquit. State v. Clifford, 14 Nev. 72 (33 A. R. 526).

The court instructed the jury that if they believed that the defendant took the property "with the intent to permanently deprive the owner of the property, and without an intention to return the same, it was a felonious intent and the defendant is guilty": Held, correct. It is not essential that the taking should be with a view to pecuniary profit. The court instructed the jury "that where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye witnesses. State v. Slingerland, 19 Nev. 135 (7 P. 280).

The indictment properly charged defendant with stealing two horses, one saddle, and one blanket. The stealing of different articles at the same time and place constituted but one crime. The facts that one took a horse from the premises of its owner, without the latter's knowledge or consent, rode it for a certain distance, and then abandoned it, after removing and concealing the saddle and blanket, are sufficient to justify a finding of intent to permanently deprive the owner of his property, although the person charged has testified that he expected some one to take the property back, or that he expected the animal to stray back. If the jury were satisfied, beyond a reasonable doubt, that defendant used the property in such a manner that the owner would be likely to be permanently deprived of it, the presumption is that he intended so to use it, and the burden is upon him to rebut such presumption by competent evidence. The declarations of a codefendant made while the conspiracy was pending, and in furtherance of the common design, is admissible in evidence. If such declarations are admitted before proof of the conspiracy, the error is cured by subsequent evidence of the conspiracy. State v. Ward, 19 Nev. 297 (10 P. 133).

A person charged with a criminal offense is not called upon to answer the charge without satisfactory proof, upon the part of the prosecution, of the corpus delicti; but it is not essential, in all cases, that there should be any direct evidence upon this point. The corpus delicti may be established by circumstantial evidence. The identification and ownership of cattle may be proved by the brands and marks on the hides therefrom. Whether the evidence upon this point, in any given case, is sufficient as to the ownership of the cattle, is a question of fact to be determined by the jury. The "act to regulate marks and brands of stock" which provides that "no mark, brand, or counterbrand shall be considered as lawful, if not recorded as specified in this act," has no application to the use of such mark or brand in the identification of cattle as evidence in a criminal prosecution for larceny. Neither the guilt or innocence of the defendant, the ownership of the cattle, or credibility of the witnesses, depended in any manner upon the question whether the owners of the cattle stolen had demanded payment, or possession of the cattle, from the persons who had innocently purchased and paid for them from the defendant. State v. Cardelli, 19 Nev. 319 (10 P. 433).

Where evidence was introduced of defendant's bad character while residing near the place of trial: Held, that, in order to strengthen the case, other evidence was admissible as to his character while residing in a neighboring state fifteen years before. A telegram offering horses for sale, sent by defendant shortly after leaving the place where the larceny was committed, is admissible as tending to prove a desire to speedily dispose of property and flee. An instruction that, in order to convict, the jury must believe beyond a reasonable doubt that the animal was taken by the defendant in the county of trial, and must draw no inference

of his guilt from the fact that they believed he had the animal in another county, was properly refused. An instruction that the accused is bound to explain the possession of stolen property, in order to remove its effect as a circumstance to be considered by the jury in connection with other circumstances indicative of guilt: Held, correct. State v. Espinozei, 20 Nev. 209 (19 P. 677).

6639. Petit larceny defined.

SEC. 374. Every person who shall steal, take, and carry, lead, or drive away, the personal goods or property of another, under the value of fifty dollars, shall be deemed guilty of petit larceny, and upon conviction thereof, shall be punished by imprisonment in the county jail not more than six months, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.

6640. Taking or misbranding domestic animals, selling or purchasing hide or carcass, grand larceny.

SEC. 375. Every person who shall feloniously steal, take and carry, lead, drive or entice away any horse, mare, gelding, colt, cow, bull, steer, calf, mule, jack, jenny, or any one or more head of cattle or horses or any sheep, goat, hog, shoat or pig, not his own property but belonging to some other person; and every person who shall mark or brand, or cause to be marked or branded, or shall alter or deface, or cause to be altered or defaced, a mark or brand upon any horse, mare, gelding, colt, cow, bull, steer, calf, mule, jack, jenny, or any one or more head of cattle or horses, or any sheep, goat, hog, shoat or pig, not his own property but belonging to some other person, with intent thereby to steal the same or to prevent the identification thereof by the true owner, or to defraud; and every person who, with intent to defraud, or to appropriate to his own use, shall wilfully kill any animal running at large, not his own, whether branded, marked or not; and every person who shall sell or purchase, with intent to defraud, the hide or carcass of any animal the brand or mark on which has been cut out or obliterated, shall be deemed guilty of grand larceny, and upon conviction shall be punished by imprisonment in the state prison for any term not less than one year nor more than fourteen years.

See sec. 7172.
Branding in same place as previous brand, sec. 2247.
County recorder recording brand similar to one already of record, sec. 2248.
Failure to give notice of estray animals taken up, deemed larceny, secs. 2274, 2276.
Marking stock by removing more than one-half of ear, sec. 2240.
Mismarking or misbranding stock not one's own, sec. 2242.
Railroads receiving for transportation out of state horses not inspected, secs. 2289–2291.
Removing horses out of state without inspection, sec. 2295.
Sheriff making false certificate of horses transported out of state, sec. 2294.
Shipping horses out of state without inspection, sec. 2290.
Appointment of hide inspector, sec. 2285.

6641. Failure to exhibit hide or keep record of brand, misdemeanor.

SEC. 376. Any person slaughtering any cattle shall keep for the period of ten days, in some place where the same may be seen, the hide intact, with the ears on, and shall on demand of any person or persons be required to produce the hide, with the ears on, for the said period of ten days. It shall be unlawful for any person to sell any slaughtered bovine animal to the keeper of any butcher shop or any market in this state, without having, and upon request exhibiting, to such butcher, the hide containing the brand and other marks upon the hide of such animal, or for any person peddling the meat of any bovine animal, who is not the keeper of any shop or meat market, to sell such meat without having in his possession, then and there, and upon request exhibiting, the hide of such animal containing the brand and other marks thereon. It shall be unlawful for the keeper of any slaughter-house, or person engaged in slaughtering cattle for sale in this state, to purchase any cattle for slaughter, or any slaughtered

bovine animal, without having exhibited to him the hide of such animal, and examining the brand and other marks upon such hide, and making and entering in a book kept for that purpose, and as hereafter provided in this section, a description of such brand and marks, with the name of the person from whom the purchase was made and the date of such purchase. It shall be the duty of every keeper of any slaughter-house, engaged in the business of slaughtering any bovine animals, to keep at his slaughter-house, place of business or office, a book, in which shall be recorded and preserved a description of the brand and other marks upon the hide of each slaughtered bovine animal, with the name of the person from whom the animal was purchased, when such name is known or can be ascertained, and the date of such purchase. Said book shall be open to the hide inspector or the owner of any cattle during business hours. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail not exceeding six months, or both.

6642. Stock not to be driven from range.

SEC. 377. No person shall be permitted to lead, drive, or in any manner remove, any horse, mare, colt, jack, jenny, mule, or any head of neat cattle, or hog, sheep, goat, or any number of these animals, the same being the property of another person, from the range on which they are permitted to run in common, without the consent of the owner thereof first had and obtained; *provided*, the owner of any such animals, as aforesaid, finding the same running on the herd grounds or commons, with other animals of the same kind, may be permitted to drive his own animal or animals, together with such other animals as he cannot conveniently separate from his own, to the nearest and most convenient corral, or other place for separating his own from other animals, if he, in such case, immediately, with all convenient speed, drive all such animals, not belonging to himself, back to the herd ground from which he brought such animals. Any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction thereof, shall be punishable by a fine of not less than twenty nor exceeding five hundred dollars, or imprisonment not exceeding six months nor less than thirty days, or both.

6643. Conversion of realty to personalty, grand larceny.

SEC. 378. Every person who shall convert any manner of real estate, of the value of fifty dollars or over, into personal property, by severing the same from the realty of another, with felonious intent to and shall so steal, take and carry away the same, shall be deemed guilty of grand larceny, and, upon conviction thereof, shall be punished by imprisonment in the state prison for any term not less than one year nor more than fourteen years.

See State v. Thompson, 31 Nev. 209 (101 P. 557); Ex Parte Smith, 33 Nev.—(111 P. 937), cited in Ex Parte Maher, 25 Nev. 422 (62 P. 1).

6644. Idem—Petit larceny.

SEC. 379. Every person who shall convert any manner of real estate, of the value of under fifty dollars, into personal property, by severing the same from the realty of another, with felonious intent to and shall so steal, take and carry away the same, shall be deemed guilty of petit larceny, and upon conviction thereof, shall be punished by imprisonment in the county jail for a period of not more than six months, or by fine not exceeding five hundred dollars, or both.

6645. Negotiable and other instruments subjects of larceny.

SEC. 380. Bonds, promissory notes, bank notes, bills of exchange, or

other bills, orders, drafts, checks, receipts or certificates, or warrants for or concerning money, goods, or property, due, or to become due, or to be delivered, or any public security issued by the United States, or by this state, and any deed or writing containing a conveyance of land, or valuable contract, in force, or any release or defeasance, or any other instrument whatever, shall be considered personal goods, of which larceny may be committed, and the money due thereon, or secured thereby and remaining unsatisfied, or which, in any event or contingency, might be collected thereon, or the value of the property transferred or affected thereby, as the case may be, shall be deemed the value of the article stolen.

6646. Larceny by lodger.

SEC. 381. If any lodger shall take away, with intent to steal, embezzle, or purloin, any bedding, furniture, goods, or chattels, which he is to use in or with his lodging, he shall be deemed guilty of grand or petit larceny, according to the value of the property so taken, and, on conviction, shall be punished accordingly.

6647. Dog stealing.

SEC. 382. Every person who shall steal, take, and carry, lead or drive away, any dog, either of the male or female kind, belonging to another, shall be deemed guilty of petit larceny, and, upon conviction thereof, shall be punished by imprisonment in the county jail, not more than six months, or by a fine not exceeding one hundred dollars, or both. In any judgment rendered for a fine only, the judgment shall provide that, unless the same be paid, the defendant shall be imprisoned in the county jail, at the rate of one day for every two dollars of the fine.

6648. Receiving stolen goods.

SEC. 383. Every person who, for his own gain, or to prevent the owner from again possessing his property, shall buy or receive stolen goods, or anything the stealing of which is declared to be larceny, or property obtained by robbery, burglary, or embezzlement, knowing the same so to have been obtained, shall upon conviction, be imprisoned in the state prison for a term not exceeding five years, or by a fine not exceeding one thousand dollars, or both; and every such person may be tried, convicted, and punished, as well before as after the trial of the principal. No person convicted of the offense specified in this section shall be condemned to imprisonment in the state prison, unless the value of the thing bought or received shall amount to fifty dollars, but the same shall be punished as provided in cases of petit larceny.

The rule of the common law requiring that an indictment be found in the county where the crime was committed prevails in Nevada, and, while the crime of larceny is an exception to the rule, in the absence of statute the venue of the crime of receiving stolen goods is in the county where they are received, and not in the county where they are stolen, nor the one to which they are subsequently taken. There are three material and essential elements of the offense, to wit: The person charged must receive or buy the property; he must know that the property was stolen, and there must be a purpose or intent to prevent the owner from again possessing the property, or to accomplish the receiver's own gain. The wrongful intent, being a necessary ingredient of the crime, must exist at the time of the buying or receiving of the stolen goods. Criminal practice act provides that when a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction shall be in either county. Stolen goods were purchased, paid for, and received by accused in E. County, and were thereafter shipped by him to C. County. Held, that C. County had no jurisdiction of the offense, since the offense of receiving stolen goods is consummated when the goods are received with the unlawful intent specified in the statute, and the subsequent transportation of the goods into another county to reap the fruits of the crime is not an act essential to the consummation of the crime, and, if the effect of the transportation of the goods to C. County constituted the intent to deprive the owner of the property, the act of receiving was not accompanied by the wrongful intent

necessary to constitute the crime. Where the evidence, in a prosecution in C. County for receiving stolen property, merely shows that the stolen property was purchased by accused in E. County, the indictment is not sustained by the proof, and the judgment should be reversed on appeal. State v. Pray, 30 Nev. 206 (94 P. 218).

Money received by a clerk who is intrusted by his employer with bills to collect, in the ordinary course of his business as a clerk, is money intrusted to him by his employer. Petitioner was an assistant of the agent of the Central Pacific Railroad Company, and had been held out to the public by the agent as having authority to collect bills, and was enabled, by reason of the trust reposed in him by the company, to collect the company's money and discharge its debtors from their obligations to the company. Held, that although he had no general authority to collect all bills due the company he was, under the circumstances, intrusted by the company with the money which he had collected. It does not lie in the mouth of petitioner to deny that he had the authority which he claimed in order to collect the money, and which the confidence reposed in him by his employer enabled him to claim with success. A clerk may commit more than one embezzlement of his employer's money, and if he does he may be separately indicted for each separate offense. If the money from different parties was all collected before any portion of it was converted, then petitioner committed but one offense; but the burden of establishing this fact is upon petitioner. Ex Parte Ricord, 98 A. D. 140.

An indictment need not allege that defendant appropriated the property wilfully, feloniously, or with intent to steal, as the offense is complete when the appropriation is made, though he intended to afterwards replace the property taken. State v. Trolson, 21 Nev. 419 (32 P. 930).

The intent with which an accused person appropriates money or property to his own use is a question of fact to be determined from the evidence in the particular case. On the trial of an indictment charging defendant with the embezzlement of certain money received by him as agent of an express company for transmission, the fact that the money so received was in the safe, constitutes no defense, where defendant was short in his accounts with the company in an amount larger than that alleged to have been embezzled. State v. Trolson, 21 Nev. 419 (32 P. 930).

The president of a corporation is a "person," within the statute declaring that any person, agent, manager, or clerk of a corporation with whom any money shall be deposited or intrusted, who shall appropriate it to his own use, shall be guilty of embezzlement. Where defendant, the president of a corporation, was charged with embezzlement in misappropriating the proceeds of treasury stock sold, it was the duty of the state to prove the legal organization of the corporation, the amount and character of its capital stock, that the money credited to defendant's bank account as the proceeds of the stock sold, was applied in whole or in part to his own use, or to that of another, or that defendant, on demand, had refused to repay the same to the rightful owner. State v. Weber, 31 Nev. 385 (103 P. 411).

6649. Detention of person bringing stolen goods into state.

SEC. 384. Every person bringing any goods or property into this state, taken by himself, or which he knew was taken by another, in another territory or state, by robbery, burglary, embezzlement, or larceny, shall, upon reasonable cause being shown to a magistrate to induce him to believe that the accused has brought such goods or property into this state, taken in either of the ways aforesaid in another territory or state, be committed to the county jail, to await a requisition from the governor of the territory or state whence such goods or property were brought as aforesaid into this state; *provided*, that such person shall not be detained in such custody longer than a period of eight weeks.

See Ex Parte Lorraine, 16 Nev. 63.

6650. Property restored to owner.

SEC. 385. All property obtained by larceny, robbery, burglary, or embezzlement, shall be restored to the owner, and no sale, whether in good faith on the part of the purchaser, or not, shall divest the owner of his right to such property. Such owner may maintain his action, not only against the felon, but against any person in whose possession he may find the property.

See sec. 7448.

A motion by the accused for an order directing the sheriff to pay over to him money unlawfully detained, as shown by an affidavit in support of such motion, was properly denied, as such money could be recovered by civil action, and, if the money was taken from him at the time of his arrest, the statute provides for its disposition. State v. Burns, 27 Nev. 289 (74 P. 983).

6651. Restoration of stolen property—Duty of officers.

SEC. 386. The officer arresting any person charged as principal or accessory in any robbery or larceny shall use reasonable diligence to secure the property alleged to have been stolen, and after seizure shall be answerable therefor while it remains in his hands, and shall annex a schedule thereof to his return of the warrant. Whenever the district attorney shall require such property for use as evidence upon the examination or trial, such officer, upon his demand, shall deliver it to him and take his receipt therefor, after which such district attorney shall be answerable for the same.

6652. Commission or part ownership no defense for stealing.

SEC. 387. It shall be no defense to a prosecution for larceny that the accused was entitled to a commission out of the money or property appropriated, as compensation for collecting or receiving the same for or on behalf of the owner thereof, or that the money or property appropriated was partly the property of another and partly the property of the accused; but it shall not be larceny for any bailee, factor, pledgee, servant, attorney, agent, employee, or trustee, executor, administrator, guardian, officer or other person to retain his reasonable collection fee or charges.

CHAPTER 22

EMBEZZLEMENT UNLAWFUL—RETENTION OR PAYMENT OF PUBLIC MONEY

6653. Embezzlement by bailee or others—Bailee defined.
6654. Embezzlement prima facie evidence.
6655. Contractor failing to pay for labor or material.
6656. Using public money, $50 or less, misdemeanor.
6657. Using public money, over $50, a felony.
6658. Misappropriation and falsification of accounts by public officer.
6659. Penalty for neglect or refusal to pay over.
6660. Misappropriation by treasurer.
6661. Compensation prohibited.
6662. Employment of clerks prohibited.

6653. Embezzlement by bailee or other person—Bailee defined.

SEC. 388. Any bailee of any money, goods or property, who shall convert the same to his own use, with the intent to steal the same or to defraud the owner or owners thereof and any agent, manager or clerk of any person, corporation, association or partnership, or any person with whom any money, property or effects shall have been deposited or entrusted, who shall use or appropriate such money, property or effects or any part thereof in any manner or for any other purpose than that for which the same was deposited or entrusted, shall be guilty of embezzlement, and shall be punished in the manner prescribed by law for the stealing or larceny of property of the kind and name of the money, goods, property or effects so taken, converted, stolen, used or appropriated. The term bailee, as used in this section, shall be construed to include and mean all persons with whom any money, goods, or property has been deposited, and all persons to whom any goods or property has been loaned or hired, and all persons to whom any goods or property shall be delivered, for any purpose whatsoever, and all persons who shall, either as agent, collector, or servant, be empowered, authorized, or entrusted to carry, collect, or receive any money, goods or property of another; and any use of said money, goods, or property by any bailee thereof, other than that for which the same was borrowed, hired, deposited, carried, received, or collected, shall be prima facie evidence of conversion and of intent to steal the same and defraud the owner or owners thereof.

Embezzlement or misapplication of bank funds or defrauding bank, sec. 648.

If a clerk by authority of his master collects one bill and fraudulently converts the money, the offense of embezzlement is complete, and if he collects another bill after the first conversion, and then fraudulently converts the proceeds, he is guilty of a second offense. Ricord v. C. P. R. R. Co., 15 Nev. 167.

See Ex Parte Ricord, 11 Nev. 287; State v. Malim, 14 Nev. 293; State v. Carrick, 16 Nev. 120; State v. Nevin, 19 Nev. 167 (7 P. 650, 3 A. S. 873); State v. Weber, 31 Nev. 385 (103 P. 411); Ex Parte Rickey, 31 Nev. 82 (135 A. S. 651, 100 P. 134); State v. Trolson, 21 Nev. 428 (32 P. 930).

6654. Embezzlement, prima facie evidence.

SEC. 389. If any clerk, apprentice, servant, or any other person whatsoever, whether bound or hired, to whom any money or goods, or chattels, or other property, shall be intrusted for any purpose whatsoever, by his or her master, employer, or any other person or persons, corporation or corporations, by whom he or she may be intrusted, shall withdraw himself or herself and shall go away with the said money, goods, chattels, or property, or any part thereof, with the intent to steal the same, and defraud his or her master, employer, or any other person or persons, corporation or corporations, of the same, or being in the service of his or her said master, or employer, corporation or corporations, or any other person or firm, shall embezzle the said money, goods, chattels, or property, or any part thereof, or shall otherwise convert the same to his or her own use, it shall be prima facie evidence of the intent to steal the same, and every such person or persons so offending shall be punished in the manner prescribed by law for feloniously stealing property of the value of the articles so taken, embezzled, stolen, or converted.

See notes to sec. 6653.

6655. Contractor failing to pay for labor or material.

SEC. 390. Every person having entered into a contract to supply any labor or materials for the value or price of which any lien might lawfully be filed upon the property of another, who shall receive the full price or consideration thereof, or the amount of any account stated thereon, or part payment thereon, shall be deemed to receive the same as the agent of the party with whom such contract was made, his successor or assign, for the purpose of paying all claims for labor and materials supplied, in so far as the money so received will pay such claims.

6656. Using public money, $50 or less, misdemeanor.

SEC. 391. Every public officer or other person who shall have in his possession, control or custody any public money belonging to this state, or to any county, town, city, district, or municipal corporation within this state, or to whom any such public money shall be intrusted for safe keeping, or for transmission to any treasurer, other officer or person entitled to receive the same, who shall use any of such public money for his own private purposes, or for any purpose other than one duly authorized by law, shall, if the amount so unlawfully used be fifty dollars or less, be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not less than one hundred dollars, and not more than five hundred dollars, or by imprisonment in the county jail not less than one month nor more than six months, or by both such fine and imprisonment.

See State v. Nevin, 19 Nev. 167 (7 P. 650, 3 A. S. 873).

6657. Using public money, over $50, a felony.

SEC. 392. Every public officer or other person who shall have in his possession, control, or custody any public money belonging to this state, or to any county, town, city, district, or municipal corporation within this state, or to whom any such public money shall be intrusted for safe keeping or for transmission to any treasurer or other officer, or other person entitled to receive the same, who shall use any of such public money for

his own private purposes, or for any purpose other than one duly authorized by law, shall, if the amount unlawfully used be more than fifty dollars, be deemed guilty of a felony, and, on conviction thereof, shall be punished by imprisonment in the state prison for a term not less than one year or more than fifteen years.

6658. Misappropriation and falsification of accounts by public officer.

SEC. 393. Every public officer, and every other person receiving money on behalf or for or on account of this state or of any department of the state government or of any bureau or fund created by law in which the state is directly or indirectly interested, or for or on account of any county, city, town, municipal corporation, or any school or district, who—

1. Shall knowingly keep any false account, or make any false entry or erasure in any account, of or relating to any money so received by him; or,

2. Shall fraudulently alter, falsify, conceal, destroy or obliterate any such account; or,

3. Shall wilfully omit or refuse to pay over to the state, its officer or agent authorized by law to receive the same, or to such county, city, town or such school, municipal corporation, or district or to the proper officer or authority empowered to demand and receive the same, any money received by him as such officer when it is a duty imposed upon him by law to pay over and account for the same, shall be punished by imprisonment in the state prison for not more than fifteen years.

6659. Penalty for neglect or refusal to pay over.

SEC. 394. If any clerk, justice of the peace, sheriff, constable, or other officer, who may receive any fine or forfeiture, shall refuse or neglect to pay over the same according to law, and within thirty days after the receipt thereof, he shall, in addition to being imprisoned and punished as provided by law, be liable upon his official bond for the amount thereof, with fifty per cent damages and interest, to be recovered in like manner as for failing to pay over money received on execution.

6660. Misappropriation by treasurer.

SEC. 395. Every state, county, city or town treasurer who shall wilfully misappropriate any moneys, funds or securities received by or deposited with him as such treasurer, or who shall be guilty of any other malfeasance or wilful neglect of duty in his office, shall be punished by imprisonment in the state prison for not more than fifteen years or by a fine of not more than ten thousand dollars, and not more than twice the amount misappropriated.

6661. Compensation prohibited.

SEC. 396. No money shall be paid out of the state treasury in payment of the salary or compensation of the clerk or secretary of any commission connected with the state government, or for any clerical work done, performed, or rendered to such commission except in pursuance of a direct and explicit appropriation by law to pay for such service; and the state controller is hereby prohibited from drawing his warrant in payment of such salary or compensation unless authorized by a law making an explicit appropriation for that purpose.

6662. Employment of clerks prohibited.

SEC. 397. Any state officer employing or paying any person or persons out of any state money for any such service or labor, as set forth in the preceding section shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in the sum of five hundred dollars, or imprisonment in the

county jail for a period not exceeding six months, or by both such fine and imprisonment, in the discretion of the court.

CHAPTER 23

FORGERY AND COUNTERFEITING

6663. What acts considered forgery.
6664. Other acts constitute forgery.
6665. Fictitious papers.
6666. Falsely indicating person as corporate officer.
6667. Uttering forged instruments, coins, forgery.
6668. True writing signed by wrongdoer's name or name of person not in existence.
6669. False certificate to certain instruments punished as forgery.
6670. Misconduct in signing or filing a petition.
6671. Destroying deeds or other writings.
6672. Drawing check when no deposit or credit—Penalty.
6673. Definitions.
6674. Defacing proclamations and notices.
6675. Location notice, antedating, felony.
6676. Removing landmarks.
6677. Counterfeiting coin.
6678. Intent to pass the same.
6679. Possession of counterfeit coin.
6680. Advertising counterfeit money.
6681. Counterfeit die or plate.
6682. Possessing or receiving forged instruments or bills.
6683. Not necessary to prove incorporation.
6684. Experts.
6685. Counterfeiting seal.
6686. Counterfeiting gold dust, bars or other articles — Making or possessing instruments.
6687. Possessing or receiving same.
6688. Issuing paper money.
6689. Counterfeiting stamps and labels.
6690. Goods containing forged stamps.
6691. Counterfeiting trademark or design.
6692. Displaying goods with false trademark.
6693. Fraudulent registration of trademark.
6694. Form and similitude defined.

6663. What acts considered forgery.

SEC. 398. Every person who shall falsely make, alter, forge, or counterfeit any record, or other authentic matter of a public nature, or any charter, letters patent, deed, lease, indenture, writing obligatory, will, testament, codicil, annuity, bond, covenant, bank bill or note, post note, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, power of attorney, any auditor's warrant for the payment of the money at the treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquittance, release, or receipt for money or goods, or any acquittance, release, or discharge for any debt, account, suit, action, demand, or other thing, real or personal, or any transfer or assurance of money, stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer stock or annuities, or to let, lease, dispose of, alien, or convey any goods or chattels, lands or tenements, or other estate, real or personal, or any acceptance or indorsement of any bill of exchange, promissory note, draft, order, or assignment of any bond, writing obligatory, or promissory note, for money or other property, or any order, writ or process lawfully issued by any court or public officer, or any document or paper recorded or filed in any court or with any public officer, or in the senate or assembly, or shall counterfeit or forge the seal or handwriting of another, with intent to damage or defraud any person or persons, body politic or corporate, whether the said person or persons, body politic or corporate reside in or belong to this state or not, or shall utter, publish, pass, or attempt to pass, as true and genuine, any of the above-named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited with intent to prejudice, damage or defraud any person or persons, body politic or corporate, whether the said person or persons, body politic or corporate, reside in this state or not; shall be deemed guilty of forgery, and upon

conviction thereof, shall be punished by imprisonment in the state prison for a term not less than one year nor more than fourteen years.

Forging or counterfeiting returns, or substituting false for original returns, sec. 1828.

In a prosecution for forging a check drawn in favor of "Sapphire Mill or bearer": Held, that an objection that the check presented no sensible payee was invalid, for the reason that the check being payable to bearer was sufficient. In a prosecution for forging a check drawn on the "Agency of the Bank of California," where it was both alleged and proved that the bank was a corporation under the laws of California, and that it had an agency in Virginia City, whose business it was to receive deposits and pay out money on the checks of depositors: Held, than an objection that the check presented no sensible drawee was invalid. In a prosecution for forging a check upon an "Agency of the Bank of California": Held, that the facts of the existence of the corporation and of the agency might be made by oral testimony, and that the production of the certificate of incorporation was unnecessary. An instruction in a forgery case, that "when an offense involves the commission, or an attempt to commit 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, shall not be deemed material": Held, to be simply a recital of the statutory provisions upon the subject, and proper under circumstances calling for an instruction upon the point. Where an indictment for forgery of a check on a bank alleged an intent to defraud the drawer: Held, that, though in one sense such drawer could not be defrauded, as he could not be held to pay forged paper, yet, as he might have paid, had the forgery not been discovered, and as the forger could not have intended a discovery, there was an existent possibility of fraud upon him, and that was sufficient. In cases of forgery there are generally two persons who legally may be defrauded—the one whose name is forged and the one to whom the forged instrument is to be passed, and the indictment may lay the intent to defraud either of them; and proof of an intent to defraud either and to pass the instrument as good, though there be shown no actual intent to defraud the particular person, will sustain the allegation. State v. Cleavland, 6 Nev. 181.

An indictment for forgery is sufficient, if the offense is substantially set forth, though not in the precise words of a statute. The word "falsely" is not essential to the validity of the indictment. The word "forged," as used in the indictment, necessarily implies that the writing was falsely made. These words, "wilfully, unlawfully, and feloniously," though not words of the same import, have a broader and more extensive significance than the word "falsely," and are more than its equivalent. When the indictment charges the forgery to have been committed by forging the signature of a person on the back of a draft, with intent to defraud such person: Held, unnecessary to allege that the bank upon which the draft was drawn was incorporated. State v. McKiernan, 17 Nev. 224 (30 P. 831).

In view of the statute providing that the offense charged shall be distinctly set forth in ordinary and concise language, so as to enable a person of common understanding to know what is intended, and the general rule that an indictment charging an offense in the words of the statute is sufficient, an indictment for forgery providing that every person who shall attempt to pass, utter, or publish, with intent to defraud, any fictitious note, bill, or check, shall be deemed guilty of forgery, sufficiently charged the offense by the averment that defendant did "attempt to pass a fictitious check," particularly when the sufficiency of the indictment was not raised until after verdict. State v. Raymond, 34 Nev. — (117 P. 17).

6664. Other acts constitute forgery.

SEC. 399. Every person who, with intent to injure or defraud shall—

1. Make any false entry in any public record or account; or,

2. Fail to make a true entry of any material matter in any public record or account; or,

3. Forge any letter or written communication or copy or purported copy thereof, or send or deliver, or connive at the sending or delivery of any false or fictitious telegraph message or copy or purported copy thereof, whereby or wherein the sentiments, opinions, conduct, character, purpose, property, interests or rights of any person shall be misrepresented or may be injuriously affected, or knowing any such letter, communication or message or any copy or purported copy thereof to be false, shall utter or publish the same or any copy or purported copy thereof as true;

Shall be guilty of forgery and be punished as provided in the preceding section.

See note to sec. 6663.

6665. Fictitious papers.

SEC. 400. Every person who shall make, pass, utter, or publish, with an intention to defraud any other person or persons, body politic or corporate, either in this state or elsewhere, or with the like intention shall attempt to pass, utter, or publish, or shall have in his possession, with like intent to utter, pass, or publish, any fictitious bill, note, or check purporting to be the bill, note, or check, or other instrument in writing, for the payment of money or property of some bank, corporation, copartnership, or individual, when in fact, there shall be no such bank, corporation, copartnership, or individual in existence, the said person knowing the said bill, note, check, or instrument in writing for the payment of money or property to be fictitious, shall be deemed guilty of forgery, and on conviction thereof, shall be punished by imprisonment in the state prison for a term not less than one nor more than fourteen years.

See note to sec. 6663.

6666. Falsely indicating person as corporate officer.

SEC. 401. The false making or forging of an instrument or writing purporting to have been issued by or in behalf of a corporation or association, state or government and bearing the pretended signature of any person therein falsely indicated as an agent or officer of such corporation, association, state or government, is forgery the same as if that person were in truth such officer or agent of such corporation, association, state or government.

False statements relative to corporations, sec. 1174.
False entry by officer or refusal to furnish inspection or copy, secs. 1176, 1235.
Corporate officer receiving or possessing property unlawfully, keeping false records, destroying records, secs. 1177, 1178.

6667. Uttering forged instruments, coins, forgery.

SEC. 402. Every person who, knowing the same to be forged or altered, and with intent to defraud, shall utter, offer, dispose of or put off as true, or have in his possession with intent so to utter, offer, dispose of or put off any forged writing, instrument or other thing, the false making, forging or altering of which is punishable as forgery, shall be guilty of forgery the same as if he had forged the same.

6668. True writing signed by wrong-doer's name or name of person not in existence.

SEC. 403. Whenever the false making or uttering of any instrument or writing is forgery, every person who, with intent to defraud shall offer, dispose of or put off such an instrument or writing subscribed or endorsed in his own name or that of any other person, whether such signature be genuine or fictitious, under the pretense that such subscription or endorsement is the act of another person of the same name, or that of a person not in existence, shall be deemed guilty of forgery and be punished accordingly.

6669. False certificate to certain instruments punishable as forgery.

SEC. 404. Every officer authorized to take a proof or acknowledgment of an instrument which by law may be recorded, who shall wilfully certify falsely that the execution of such instrument was acknowledged by any party thereto, or that the execution thereof was proved, shall be guilty of a felony, and be punished the same as persons who are guilty of forgery.

6670. Misconduct in signing or filing a petition.

SEC. 405. Every person who shall wilfully sign the name of another person or of a fictitious person to, or for any consideration, gratuity or reward shall sign his own name to or withdraw his name from any referendum or

other petition circulated in pursuance of any law of this state or any municipal ordinance; or in signing his name to such petition shall wilfully subscribe to any false statement concerning his age, citizenship, residence or other qualifications to sign the same; or knowing that any such petition contains any such false or wrongful signature or statement, shall file the same, or put the same off with intent that it should be filed, as a true and genuine petition, shall be guilty of a misdemeanor.

6671. Destroying deeds or other writings.

SEC. 406. Every person who shall fraudulently or maliciously tear, burn, efface, cut, or in any other way destroy any deed, lease, bond, will, or any other writing sealed, or any bank bill or note, check, warrant, or certificate, for the payment of money or other thing, or other security for the payment of money or the delivery of goods, or any certificate or other public security of this state, or of the United States, or of any state or territory, for the payment of money, or any receipt, acquittance, release, defeasance, discharge of any debt, suit, or other demand, or any transfer or assurance of money, stock, goods, chattels, or other property, or any letter of attorney or other power, or any day-book or other book of account, or any agreement or contract whatsoever, with intent to defraud, prejudice, or injure any person or body corporate, shall, upon conviction thereof, be punished by imprisonment in the state prison for a term not less than one year nor more than ten years.

6672. Drawing checks when no deposit or credit—Penalty.

SEC. 407. Every person who shall make, pass, utter or publish, with the intention to defraud any other person or persons, firm, corporation or body politic, any bill, note, check or other instrument in writing for the payment of money or the delivery of other valuable property, directed to, or drawn upon, any real or fictitious person, bank, firm, partnership, or corporation, when, in fact, such person shall have no money, property or credit, or shall have insufficient money, property, or credit with the drawee of such instrument to meet and make payment of the same, shall be deemed guilty of a felony, and, upon conviction thereof, shall be imprisoned in the state prison for not less than one nor more than ten years.

6673. Definitions.

SEC. 408. Within the provisions of this chapter relating to forgery or other offenses, a "written instrument," or a "writing," or a "paper," shall include an instrument partly written and partly printed or wholly printed with a written signature thereto, or any signature or writing purporting to be a signature of or intended to bind an individual, partnership, corporation or association or an officer thereof.

The words "forge," "forgery," "forged," and "forging," shall include false making, "counterfeiting" and the alteration, erasure or obliteration of a genuine instrument in whole or in part, the false making or counterfeiting of the signature of a party or witness, real or fictitious, and the placing or connecting together with intent to defraud, of different parts or the whole of several genuine instruments.

A plate is in the "form and similitude," of the genuine instrument forged, if the finished parts of the engraving thereupon shall resemble or conform to the similar parts of the genuine instrument.

6674. Defacing proclamations and notices.

SEC. 409. If any person shall intentionally deface, obliterate, tear down, or destroy, in whole or in part, any copy or transcript, or extract from or of any law of the United States, or of this state, or any proclamation, advertisement, or notification, set up at any place in this state, by author-

ity of any law of the United States, or of this state, or by order of any court, such person, on conviction, shall be fined not more than one hundred dollars, nor less than twenty dollars, or be imprisoned in the county jail not more than one month; *provided,* that this section shall not extend to defacing, tearing down, obliterating, or destroying any law, proclamation, publication, notification, advertisement, or order, after the time for which the same was by law to remain set up shall have expired.

6675. Location notice, antedating, felony.

SEC. 410. Every person who shall wilfully antedate or put any false date, or date other than the one on which the location is made upon any notice of location of any mining claim in this state shall be deemed guilty of a felony, and, upon conviction therefor, shall be imprisoned in the state prison for not less than three nor more than ten years.

Form of location notice, sec. 2422.

6676. Removing landmarks.

SEC. 411. Every person who shall wilfully or maliciously remove any monument of stone, wood, or other durable material, erected for the purpose of designating the corner, or any other point, in the boundary of any lot or tract of land, or any post or stake fixed or driven in the ground, for the purpose of designating a point in the boundary of any lot or tract of land, or alter the marks upon any tree, post or other monument, made for the purpose of designating any point, course or line, in the boundary of any lot or tract of land, or shall cut down or remove any tree upon which any such marks shall be made for such purpose, with the intent to destroy such marks, shall, upon conviction, be adjudged guilty of a misdemeanor, and punished by fine not less than one hundred nor more than two thousand dollars, or by imprisonment in the county jail not less than one month nor more than one year.

6677. Counterfeiting coin.

SEC. 412. Every person who shall counterfeit any of the species of gold or silver coin or paper money now current or that shall hereafter be current in this state, or shall pass or give in payment such counterfeit coin or paper money, or permit, cause, or procure the same to be uttered or passed, with intention to defraud any person, body politic, or corporation, knowing the same to be counterfeited, shall be deemed guilty of counterfeiting, and, upon conviction thereof, shall be punished by imprisonment in the state prison for a term not less than one year nor more than fourteen years, or by a fine of not more than five thousand dollars, or both.

6678. Intent to pass the same.

SEC. 413. Every person who shall have in his possession, or receive for any other person, any counterfeit gold or silver coin or coins or paper money, of the species now current, or hereafter to be current in this state, with intention to utter or pass the same, or permit, cause, or procure the same to be uttered or passed, with intention to defraud any person or persons, body politic or corporate, knowing the same to be counterfeit, and being thereof duly convicted, shall be punished by imprisonment in the state prison for a term not less than one nor more than fourteen years, or by a fine of not more than five thousand dollars, or both.

6679. Possession of counterfeit coin.

SEC. 414. Every person who shall have in his possession a counterfeit of any gold or silver coin, whether of the United States or any foreign country or government, knowing the same to be counterfeit, with intent to sell, utter, use, circulate or export the same as true or as false, or to cause the same to be so uttered or used, shall be punished by imprisonment

in the state prison for not more than fourteen years, or by a fine of not more than five thousand dollars, or both.

6680. Advertising counterfeit money.

SEC. 415. Every person who, with intent to defraud, shall print, circulate or distribute a letter, circular, card, pamphlet, hand bill, or any other written or printed matter offering or purporting to offer for sale, exchange or as a gift, counterfeit coin or paper money, or giving or purporting to give information where counterfeit coin or paper money can be procured, shall be punished by imprisonment in the state prison for not more than five years, or by a fine of not more than five thousand dollars, or by both.

6681. Counterfeit die or plate.

SEC. 416. Every person who shall make, or knowingly have in his possession, any die or dies, plate or plates, or any apparatus, paper, metal, machine, or other thing whatever made use of in counterfeiting the coin now made current or hereafter to be made current in this state, or in counterfeiting bank notes or bills, upon conviction thereof shall be punished by imprisonment in the state prison for a term not less than one nor more than fourteen years, and all such dies, plates, apparatus, paper, metal, or machine intended for the purpose aforesaid shall be destroyed.

6682. Possessing or receiving forged instruments or bills.

SEC. 417. Every person who shall have in his possession, or shall receive from any other person, any forged promissory note or notes, or bank bills, or bills for the payment of money or property, with intention to pass the same, or to permit, cause, or procure the same to be uttered or passed, with intention to defraud any person or persons, body politic or corporate, whether such person or persons, body politic or corporate, reside in or belong to this state or not, knowing the same to be forged or counterfeited, or shall have or keep in his possession any blank or unfinished note or bank bill, made in the form or similitude of any promissory note or bill for payment of money or property, made to be issued by any incorporated bank or banking company, with intention to fill up and complete such blank and unfinished note or bill, or to permit, or cause, or procure the same to be filled up and completed in order to utter or pass the same, or to permit, or cause, or procure the same to be uttered and passed to defraud any person or persons, body politic or corporate, whether in this state or elsewhere, shall, on conviction thereof, be punished by imprisonment in the state prison for a term not less than one nor more than fourteen years.

6683. Not necessary to prove incorporation.

SEC. 418. On the trial of any person for forging any bill or note purporting to be the bill or note of some 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 shall not be necessary to prove the incorporation of such bank or company by the charter or act of incorporation, but the same may be proved by general reputation.

See secs. 7175, 7176.

6684. Experts.

SEC. 419. Persons of skill shall be competent witnesses to prove that such bill or note is forged or counterfeited.

6685. Counterfeiting seal.

SEC. 420. Every person who shall fraudulently forge or counterfeit the seal of this state, or the seal of any court or public officer by law entitled to have and use a seal, or seal of any corporation, and shall make use of the

same, or shall forge or counterfeit the signature of any public officer, or seal of any corporation, or shall unlawfully and corruptly, and with evil intent, affix any of the said true seals to any commission, deed, warrant, pardon, certificate, or other writing or who shall have in his possession or custody any such counterfeit seal, and shall wilfully conceal the same, knowing it to be falsely made and counterfeited, and shall thereof be convicted, shall be punished by imprisonment in the state prison for a term not less than one nor more than fourteen years.

6686. Counterfeiting gold dust, bars or other articles—Making or possessing instruments.

SEC. 421. If any person shall counterfeit any kind or species of gold dust, silver, gold bullion or bars, lumps, pieces, or nuggets of gold or silver, or any description whatsoever of uncoined gold or silver currently passing in this state, or shall alter, or put off any kind of uncoined gold or silver mentioned in this section, for the purpose of defrauding any person or persons, body politic or corporate, or shall make any instrument for counterfeiting any kind of uncoined gold or silver as aforesaid, knowing the purpose for which such instrument was made, or shall knowingly have in his possession and secretly keep any instrument for the purpose of counterfeiting any kind of uncoined gold or silver as aforesaid, every such person so offending shall be deemed guilty of counterfeiting, and, upon conviction thereof, shall be punished by imprisonment in the state prison for a term not less than one year nor more than fourteen years.

6687. Possessing or receiving same.

SEC. 422. Every person who shall have in his possession, or receive for any other person, any counterfeit gold dust, silver, gold, bullion, or bars, lumps, pieces, or nuggets of gold or silver, or any description whatsoever of uncoined gold or silver currently passing in this state, or entering in any wise into the circulating medium of the state, with intention to utter, put off, or pass the same, or permit, cause, or procure the same to be uttered or passed, with intention to defraud any person or persons, body politic or corporate, knowing the same to be counterfeit, and being thereof duly convicted, shall be punished by imprisonment in the state prison for a term not less than one year nor more than fourteen years.

6688. Issuing paper money.

SEC. 423. If any person or persons, association, company, or corporation, shall make, issue, or put in circulation, any bill, check, ticket, certificate, promissory note, or the paper of any bank, to circulate as money, the said person or persons, association, company, or corporation, or the persons forming the same, shall, for the first offense, be deemed guilty of a misdemeanor, and for each and every subsequent offense, be deemed guilty of felony.

6689. Counterfeiting stamps and labels.

SEC. 424. Every person who shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, upon any goods, wares, or merchandise, the private stamps or labels of any mechanic or manufacturer, with intent to defraud the purchasers or manufacturers of any goods, wares, or merchandise whatsoever, shall, on conviction thereof, be deemed guilty of a misdemeanor, and shall be punished by imprisonment in the county jail for a term not exceeding six months, or by a fine of not less than three hundred or more than six hundred dollars.

Telegraph company's private mark or design, unlawful use of, sec. 4619.
Counterfeiting trademark or union label, sec. 6437.

6690. Goods containing forged stamps.

SEC. 425. Any person who shall sell any goods, wares, or merchandise having thereon any forged or counterfeit stamps or labels, purporting to be the stamps or labels of any mechanic or manufacturer, knowing the same to be forged or counterfeited, without disclosing the fact to the purchaser, shall, on conviction thereof, be deemed guilty of a misdemeanor, and shall be punished by imprisonment in the county jail for a term not exceeding six months, or by a fine of not less than three hundred nor more than six hundred dollars.

6691. Counterfeiting trademark or design.

SEC. 426. Every person who shall use or display or have in his possession with intent to use or display, the genuine label, trademark, term, design, device, or form of advertisement of any person, corporation, association or union, lawfully filed for record according to law of the state, or the exclusive right to use which is guaranteed to any person, corporation, association or union, by the laws of the United States, or of this state; without the written authority of such person, corporation, association or union, or who shall wilfully forge or counterfeit or use or display or have in his possession with intent to use or display any representation, likeness, similitude, copy or imitation of any genuine label, trademark, term, design, device, or form of advertisement, so filed or protected, or any die, plate, stamp or other device for manufacturing the same, shall be guilty of a gross misdemeanor.

Telegraph company's private mark or design, unlawful use of, sec. 4619.
See Trademarks, secs. 4635-4637.

6692. Displaying goods with false trademark.

SEC. 427. Every person who shall knowingly sell, display or advertise, or have in his possession with intent to sell, any goods, wares, merchandise, mixture, preparation or compound having affixed thereto any label, trademark, term, design, device, or form of advertisement lawfully filed for record in the office of the secretary of state by any person, corporation, association or union, or the exclusive right to the use of which is guaranteed to such person, corporation, association or union under the laws of the United States, which label, trademark, term, design, device or form of advertisement shall have been used or affixed thereto without the written authority of such person, corporation, association or union, or having affixed thereto any forged or counterfeit representation, likeness, similitude, copy or imitation thereof, shall be guilty of a misdemeanor.

6693. Fraudulent registration of trademark.

SEC. 428. Every person who shall for himself, or on behalf of any other person, corporation, association or union, procure the filing of any label, trademark, term, design, device or form of advertisement, by any fraudulent means, shall be guilty of a misdemeanor.

6694. Form and similitude defined.

SEC. 429. A plate, label, trademark, term, design, device or form of advertisement is in the form and similitude of the genuine instrument imitated if the finished parts of the engraving thereupon shall resemble or conform to the similar parts of the genuine instrument.

CHAPTER 24

FRAUDULENT AND KINDRED CRIMES

6995. Fraudulent conveyances.
6996. Credit by false representations.
6997. Mortgageor shall not sell nor remove without consent.
6998. Punishment.
6999. Sale of incumbered property, when fraudulent.
6700. Destruction or removal of mortgaged property.
6701. Removal or sale of property to defraud

6702. Idem—Fraudulent sale or concealment.
6703. Knowingly receiving fraudulent conveyance.
6704. Obtaining property by false pretenses.
6705. Obtaining signature by false pretense.
6706. False representation concerning title.
6707. Fraud by bailee of animal.
6708. Buying or selling by false weight.
6709. Misrepresentation of merchandise.
6710. Changing value of ores.
6711. Falsifying accounts.
6712. Tampering with papers.
6713. Divulging telegram.
6714. Opening sealed letters.
6715. Fraudulently presenting claim to public officer.
6716. Badge of G. A. R.—Unlawful wearing.
6717. Improper use of insignia.
6718. Collecting without authority for benefit.
6719. Use of false permit, license or diploma.
6720. Publication of false financial statements.
6721. Fraud in stock subscription.
6722. Fraudulent issue of stock.
6723. Publishing false statement to affect market price.
6724. Bank deposits received by officer or employee of insolvent institution.
6725. Idem—Failure to prevent receipt of deposits.
6726. Defrauding inn keeper—Penalty.
6727. Fraudulently selling real estate twice.
6728. Business name, assumed, prohibited.
6729. Idem—County clerks to keep list of certificates.
6730. Idem—Does not apply to corporations.
6731. Idem—Penalty.
6732. What is prima facie evidence.
6733. Public service companies, certain acts against unlawful—Penalty.
6734. Personating an officer.
6735. Personating another.
6736. Personating another same as stealing.
6737. Railroads making illegal charge.
6738. Extortion by public officer.
6739. Blackmail.
6740. Coercion.

6695. Fraudulent conveyances.

SEC. 430. Every person who shall be a party to any fraudulent conveyance of any lands, tenements, or hereditaments, goods, or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment, or execution, contract or conveyance had, made, or contrived, with intent to deceive and defraud others, or to defeat, hinder, or delay, creditors or others of their just debts, damages, or demands; or who, being parties as aforesaid, at any time shall wittingly and willingly put in use, avow, maintain, justify, or defend the same, or any of them, as true and done, had, or made, in good faith, or upon good consideration, or shall alien, assign, or sell any of the lands, tenements, hereditaments, goods, chattels, or other things before mentioned, to him, her, or them conveyed as aforesaid, or any part thereof, he, she, or they so offending, shall, on conviction, be fined in any sum not exceeding one thousand dollars, or imprisonment in the county jail not less than six months.

Cited in McCausland v. Ralston, 12 Nev. 216.

6696. Credit by false representations.

SEC. 431. If any person, by false representations of his own wealth, or mercantile correspondence and connections, shall obtain a credit thereby, and defraud any person or persons of money, goods, chattels, or any valuable thing, or if any person shall cause, or procure others to report falsely of his wealth or mercantile character, and by thus imposing upon any person or persons, obtain credit, and thereby fraudulently get into the possession of goods, wares, or merchandise, or other valuable thing, every such offender shall be deemed a swindler, and, on conviction, shall be sentenced to return the property so fraudulently obtained, if it can be done, and shall be fined not exceeding one thousand dollars, and imprisonment in the county jail not more than six months.

6697. Mortgageor shall not sell nor remove without consent.

SEC. 432. The mortgageor of personal property shall not sell or dispose of any such property, or remove the same from the county wherein the mortgage on said property is recorded, during the time said mortgage is in force, with intent to hinder, delay, or defraud the said mortgagee, without the written consent of the mortgagee first had and obtained.

6698. Punishment.

SEC. 433. Any person violating any of the provisions of the next preceding section, shall be deemed guilty of a gross misdemeanor.

6699. Sale of incumbered property, when fraudulent.

SEC. 434. Every person who shall sell or mortgage any personal property which is at the time mortgaged or upon which any lien has been or may lawfully be filed, without informing the purchaser or mortgagee thereof before the payment of the purchase price or money loaned, of the several amounts of all such mortgages and liens known to the seller or mortgageor, shall be deemed to have made a false representation and shall, where no other punishment is prescribed, be punished as for a gross misdemeanor.

6700. Destruction or removal of mortgaged property.

SEC. 435. Every person being in possession thereof, who shall remove, conceal or destroy or connive at or consent to the removal, concealment or destruction of any personal property or any part thereof, upon which a mortgage, lien, conditional sales contract or lease exists, in such a manner as to hinder, delay or defraud the holder of such mortgage, lien or conditional sales contracts or such lessor, or who, with intent to hinder, delay or defraud the holder of such mortgage, lien or conditional sales contract, or such lessor, shall sell, remove, conceal or destroy or connive at or consent to the removal, concealment or destruction of such property, shall be guilty of a gross misdemeanor. In any prosecution under this section any allegation containing a description of the mortgage, lien, conditional sales contract or lease by reference to the date thereof and names of the parties thereto, shall be sufficiently definite and certain.

6701. Removal or sale of property to defraud.

SEC. 436. If any debtor shall fraudulently remove his property or effects out of this state, or shall fraudulently sell, convey, or assign, or conceal his property or effects, with intent to defraud, hinder, or delay his creditors of their just rights, claims, or demands, he shall, on conviction, be punished by imprisonment in the county jail not exceeding six months, or by fine not exceeding five thousand dollars, or both.

6702. Idem—Fraudulent sale or concealment.

SEC. 437. Any person against whom an action is pending, or against whom a judgment has been rendered for the recovery of any personal property or effects, who shall fraudulently conceal, sell, or dispose of such property or effects, with intent to hinder, delay, or defraud the person bringing such action or recovering such judgment, or shall, with such intent, remove such property or effects beyond the limits of the county in which it may be at the time of the commencement of such action, or the rendering of such judgment, shall, on conviction, be punished as provided in the next preceding section.

6703. Knowingly receiving fraudulent conveyance.

SEC. 438. Every person who shall receive any property or conveyance thereof from another, knowing that the same is transferred or delivered to him in violation of, or with the intent to violate any provision of the next three preceding sections, shall be guilty of a misdemeanor.

6704. Obtaining property by false pretenses.

SEC. 439. Every person who shall knowingly and designedly, by any false pretense or pretenses, obtain from any other person or persons any chose in action, money, goods, wares, chattels, effects, or other valuable thing, with intent to cheat or defraud any person or persons of the same

shall be deemed a cheat, and on conviction shall be imprisoned in the state prison not more than ten years nor less than one year, and be sentenced to restore the property so fraudulently obtained, if it can be done; *provided,* that should the value of any chose in action, money, goods, wares, chattels, effects, or other valuable thing so, as aforesaid, fraudulently obtained, not exceed in value the sum of fifty dollars, every person so offending shall be deemed a cheat, and on conviction shall be imprisoned in the county jail not more than six months, or be fined in any sum not exceeding five hundred dollars, or by both such fine and imprisonment, and be sentenced to restore the property so fraudulently obtained, if it can be done.

See sec. 7179.

An indictment charging the offense of obtaining property by means of false pretenses must allege the character of the property charged to have been obtained with the same certainty as is required in an indictment for larceny. In re Waterman, 29 Nev. 288, 11 L. R. A. (N. S.) 424, 89 P. 291.

6705. Obtaining signature by false pretense.

SEC. 440. Every person who, with intent to cheat or defraud another, shall designedly by color or aid of any false token or writing or other false pretense, representation or presentation, obtain the signature of any person to a written instrument, shall be punished by imprisonment in the state prison for not more than five years or in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment.

See sec. 7179.

6706. False representation concerning title.

SEC. 441. Every person who shall maliciously or fraudulently execute or file for record any instrument, or put forward any claim by which the right or title of another to any real property is, or purports to be transferred, encumbered or clouded, shall be guilty of a gross misdemeanor.

6707. Fraud by bailee of animal.

SEC. 442. Every person who shall obtain from another the possession or use of any horse or other draft animal or any vehicle or automobile, without paying therefor, with intent to defraud the owner thereof, or who shall obtain the possession or use thereof, by color or aid of any false or fraudulent representation, pretense, token or writing, or shall obtain credit for such use by color or aid of any false or fraudulent representation, pretense, token or writing; or who having hired property, shall recklessly, wilfully, wantonly or by gross negligence injure or destroy or cause, suffer, allow or permit the same, or any part thereof, to be injured or destroyed; or who, having hired any horse or other draft animal upon an understanding or agreement that the same shall be ridden or driven a specified distance or to a specified place, shall wilfully and fraudulently ride or drive or cause, permit or allow the same to be ridden or driven a longer distance, or to a different place, shall be guilty of a misdemeanor.

6708. Buying or selling by false weight.

SEC. 443. If any person or persons shall knowingly buy or sell any goods, wares, or merchandise, or any valuable thing by false weight or measure, or shall knowingly use any false measure or false weight at any mill in taking toll for grinding corn, wheat, rye, or other grain, or shall knowingly use any false weight or weights, or false scales, or false steelyards, or false balances, or false measures for any purpose in buying or selling or trading any article whatever, he or she shall be deemed a common cheat, and on conviction shall be punished by fine in any sum not

exceeding two hundred dollars, or be imprisoned in the county jail not more than six months, or both.

Weights and measures act, violations of, sec. 4812.

6709. Misrepresentation of merchandise.

SEC. 444. Every person who makes any misrepresentation regarding the weight, amount, measure, quantity, quality, or ingredients of any goods, wares or merchandise, or personal property, for the purpose of selling the same, or while selling or offering the same for sale, is guilty of a misdemeanor; and if the value of any goods, wares, merchandise, or personal property sold under such misrepresentation shall exceed fifty dollars, the party so making the misrepresentation is guilty of a gross misdemeanor.

6710. Changing value of ores.

SEC. 445. Any person, corporation, or association, or the agent of any person, corporation, or association, engaged in the milling, smelting, sampling, concentrating, reducing, shipping, or purchasing of ores in this state, who shall in any manner knowingly alter or change the true value of any ores delivered to him or them, so as to deprive the seller of the correct value of the same, or who shall substitute other ores for those delivered to him or them, or who shall issue any bill of sale, or certificate of purchase, that does not exactly and truthfully state the actual weight, assay value, and total amount paid for any lot or lots of ore purchased, or who, by any secret understanding, or agreement with another, shall issue a bill of sale or certificate of purchase that does not correctly and truthfully set forth the weight, assay value, and total amount paid for any lot or lots of ore purchased by him or them, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined in a sum not exceeding one thousand dollars, nor less than one hundred dollars, or imprisonment in the county jail not more than one year, or both.

6711. Falsifying accounts.

SEC. 446. Every person who shall wilfully or maliciously and with intend to defraud, make any false entry, or fail to make an entry of any material matter, which it is his duty to make, with intent to injure another, in any private book or private account, shall be guilty of a gross misdemeanor.

6712. Tampering with papers.

SEC. 447. Every person who shall wilfully or maliciously and with intent to injure another, destroy, alter, erase, obliterate or conceal any letter, telegraph message, book or record of account, or any writing or instrument by which any claim, privilege, right, obligation or authority, or any right or title to property, real or personal, is, or purports to be, or upon the happening of some future event may be evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected, shall be guilty of a gross misdemeanor.

6713. Divulging telegram.

SEC. 448. Every person who shall wrongfully obtain or attempt to obtain, any knowledge of a telegraphic message, by connivance with the clerk, operator, messenger or other employee of a telegraph company, and every clerk, operator, messenger or other employee of such company who shall wilfully divulge to any but the person for whom it was intended, any telegraphic message or dispatch entrusted to him for transmission or delivery, or the nature or contents thereof, or shall wilfully refuse, neglect or delay duly to transmit or deliver the same, shall be guilty of a misdemeanor.

See schedule of statutory offenses under other titles "Telegraph," preceding this act.

6714. Opening sealed letters.

SEC. 449. Every person who shall wilfully open or read, or cause to be read, any sealed letter, message or telegram, not addressed to himself, without being authorized so to do, either by the writer of the same, or by the person to whom it shall be addressed; and any person who shall maliciously publish the whole, or any part of such letter, message, or telegram, without the authority of the writer thereof, or of the person to whom the same shall be addressed, knowing the same to have been so opened, shall, upon conviction, be punished by a fine not exceeding one thousand dollars.

6715. Fraudulently presenting claim to public officer.

SEC. 450. Every person who, with the intent to defraud, shall knowingly present for audit, allowance or payment to any officer or board of the state or of any county, city, town or school district authorized to audit, allow or pay bills, claims or charges, any false or fraudulent claim, account, writing or voucher or any bill, account or demand containing false or fraudulent charges, items or claims, shall be guilty of a gross misdemeanor.

6716. Badge of G. A. R.—Unlawful wearing.

SEC. 451. Any person who shall wilfully wear the badge of the Grand Army of the Republic, or who shall use or wear the same to obtain aid or assistance thereby, within this state, unless he shall be a member of the Grand Army of the Republic, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for a term not to exceed thirty days in the county jail or a fine not to exceed twenty dollars, or by both such fine and imprisonment.

6717. Improper use of insignia.

SEC. 452. Every person who shall wilfully wear the badge, button, insignia or rosette of any military order or of any secret order or society, or any similitude thereof; or who shall use any such badge, button, insignia or rosette to obtain aid or assistance, or any other benefit or advantage, unless he shall be entitled to so wear or use the same under the constitution, by-laws, rules and regulations of such order or society, shall be guilty of a misdemeanor.

Illegal use or wearing of emblems, sec. 2505.

6718. Collecting for benefit without authority.

SEC. 453. Every person who shall sell a ticket to any ball, benefit or entertainment, or ask or receive any subscription or promise thereof, for the benefit or pretended benefit of any person, association or order, without being duly authorized thereto by the person, association or order for whose benefit or pretended benefit the same is done, shall be guilty of a misdemeanor.

6719. Use of false permit, license or diploma.

SEC. 454. Every person who shall conduct any business or perform any act under color of, or file for record with any public officer, any false or fraudulent permit, license, diploma or writing, or any permit, license, diploma or writing not lawfully belonging to such person, or who shall obtain any permit, license, diploma or writing by color or aid of any false representation, pretense, personation, token or writing, shall be guilty of a gross misdemeanor.

6720. Publication of false financial statements.

SEC. 455. Any person or corporation or joint-stock company or copartnership, who knowingly makes or causes to be published in any way what-

ever, or permits to be made or published, any book, prospectus, notice, report, statement, exhibit or other publication of or concerning the affairs, financial condition or property or receipts or expenditures of any corporation, joint-stock association, copartnership or individual, which said book, prospectus, notice, report, statement, exhibit or other publication shall contain any statement which he knows to be false, shall be deemed guilty of a felony, and upon conviction thereof shall be imprisoned in the state prison for not more than ten years, or fined not more than ten thousand dollars, or shall suffer both said fine and imprisonment.

6721. Fraud in stock subscription.

SEC. 456. Every person who shall sign the name of a fictitious person to any subscription for or any agreement to take stock in any corporation existing or proposed, and every person who shall sign to any such subscription or agreement the name of any person, knowing that such person does not intend in good faith to comply with the terms thereof, or upon any understanding or agreement that the terms of such subscription or agreement are not to be complied with or enforced, shall be guilty of a gross misdemeanor.

6722. Fraudulent issue of stock.

SEC. 457. Every officer, agent or other person in the service of a joint-stock company or corporation, domestic or foreign, who, wilfully and knowingly with intent to defraud, shall—

1. Sell, pledge or issue or cause to be sold, pledged or issued, or sign or execute or cause to be signed or executed, with intent to sell, pledge or issue, or cause to be sold, pledged or issued, any certificate or instrument purporting to be a certificate or evidence of ownership of any share or shares of such company or corporation, or any conveyance or encumbrance of real or personal property, contract, bond, or evidence of debt, or writing purporting to be a conveyance or encumbrance of real or personal property, contract, bond or evidence of debt of such company or corporation, without being first duly authorized by such company or corporation, or contrary to the charter or laws under which such company or corporation exists, or in excess of the power of such company or corporation, or of the limit imposed by law or otherwise upon its power to create or issue stock or evidence of debt; or,

2. Reissue, sell, pledge or dispose of, or cause to be reissued, sold, pledged or disposed of, any surrendered or canceled certificate or other evidence of the transfer of ownership of any such share or shares:

Shall be punished by imprisonment in the state prison for not more than ten years, or by a fine of not more than five thousand dollars, or by both.

6723. Publishing false statement to affect market price.

SEC. 458. Every person who, with intent to affect the market price of any security or property shall put off, circulate or publish any false or misleading writing, statement or intelligence, shall be guilty of a gross misdemeanor.

6724. Bank deposits received by officer or employee of insolvent institution.

SEC. 459. Every officer, director, cashier, managing member, manager, clerk, person, party or agent of any bank, banking corporation, association or firm, banking house, banking exchange, brokerage deposit company, private bank, and every person, company or corporation, engaged in whole or in part in banking, brokerage, exchange or deposit business, in any way, who shall accept or receive on deposit in such bank or banking institution, as aforesaid, with or without interest, from any person, any money,

bank bills or notes, or certificates, or currency, or other notes, checks, bills, bonds, stocks, drafts, or paper circulating as money, when he knows, or has good reason to know, that such person, bank, banking corporation, association or firm, banking house, banking exchange, brokerage deposit company, or private bank as aforesaid, is insolvent, and every person knowing of such insolvency who shall be accessory to, or permit, or connive at, or assent to, the accepting or receiving on deposit therein or thereby any such deposit as aforesaid, shall be guilty of a felony, and punished by imprisonment in the state prison for not less than one, nor more than ten years.

See sec. 20 of banking act (sec. 635, infra).

See schedule of statutory offenses under other titles "Banks," preceding this act.

The banking business can be regulated, and it is not only the legislature's power, but its duty, to regulate the business so as to reduce failures to a minimum. The purpose of statutes making it a crime to receive deposits when a bank is known to be insolvent is not only to protect innocent depositors, but to deter bank officers from so conducting a bank as to endanger its solvency. The legislature as an exercise of police power can impose a penalty for the conduct of business by an insolvent bank. The act of March 29, 1907, making it a crime to receive bank deposits knowing the bank to be insolvent, is not unconstitutional, as being a special law for the punishment of offenses. Neither is the law objectionable as class legislation. Ex Parte Pittman, 31 Nev. 43, 22 L. R. A. (N. S.) 266, 99 P. 700.

A receipt of a deposit by the receiving teller of a private bank is the receipt by the private banker, because he is the principal and the teller the agent, and the deposit is the banker's private property. A deposit received by an incorporated bank is the property of the corporation. The president and receiving teller of an incorporated bank acting within the scope of their authority are agents of the corporation, and not of each other, and though the president has larger powers than the teller, and may direct his acts, the president is in no sense the principal, but his acts, within the scope of his powers, are the acts of the corporation. An indictment alleging that accused was the president of an incorporated state bank engaged in the general banking business, and that he feloniously, by and through the receiving teller, received a deposit knowing that the bank was insolvent, does not charge accused directly with receiving the deposit within the act of March 29, 1907 (Stats. 1907, p. 414, c. 189), penalizing every officer of any bank who receives any deposits knowing that the bank is insolvent; and the indictment does not charge accused with the offense under the doctrine of agency, since the actual receipt of the deposit was by the receiving teller, and the receipt in law was by the bank. The act of March 29, 1907 (Stats. 1907, p. 414, c. 189), penalizing every officer of any bank who "receives any deposits" knowing that the bank is insolvent, does not penalize the act of assent to the reception of a deposit, and, where a receiving teller of an insolvent incorporated bank received a deposit, the president, though knowing of the insolvency cannot be punished on the theory that he assented to the reception of the deposit; the word "receives" involving an affirmative act, and does not include an assent to the reception involving only a mere passive acquiescence. Ex Parte Rickey, 31 Nev. 82 (135 A. S. 651, 100 P. 134).

Under an indictment for assenting to the receipt of deposits by an officer of an incorporated bank, contrary to act of March 13, 1909 (Stats. 1909, c. 92), which by section 1 makes it a crime for any bank officer to receive or to assent to the receipt of deposits knowing the bank to be insolvent, and by section 2 provides that any bank officer having authority to close the bank or to prevent the receipt of deposits, who does not exercise such authority when the bank is known to be insolvent, shall be deemed to have assented to the receipt of deposits, and making the failure of such bank within thirty days after the receipt of any deposits prima facie evidence of such officer's knowledge of its insolvency, the presumption of knowledge of insolvency, by its terms applies only to such officers as have power to close the bank or to prevent deposits.

Unless specially authorized by the board of directors, the president or a director of a bank is not legally authorized to close the bank or to prevent the receipt of deposits by the bank. The title of the act of March 13, 1909 (Stats. 1909, c. 92), in addition to referring to the offenses declared, states that its purpose is to establish a rule of evidence in connection therewith. Section 2 makes the failure of a bank within thirty days after the receipt of deposits prima facie evidence of the officers' knowledge of its insolvency, and in a previous part it is provided that any officer having authority to close the bank or to prevent the receipt of deposits, who does not exercise such authority, shall be "deemed" to have assented to the receipt of deposits. Held, that only the part of the section relating to the knowledge imputed from the bank's failure is evidential in character, while the word "deemed," as used in the section, means "adjudged," in the sense of constituting a crime, instead of a rule of evidence. There is nothing in the act of March 13, 1909 (Stats. 1909, c. 92), which by section 1 penalizes the receipt or the assent to the receipt of deposits by a

bank officer, who knows the bank to be insolvent, and by section 2 provides that a bank officer having authority to close the bank or to prevent the receipt of deposits, and failing to exercise such authority, is deemed guilty of assenting to the receipt of deposits, which makes an officer of an incorporated bank criminally liable simply because he is such officer with knowledge of the bank's insolvency, or because deposits are being received for the bank by some other officer. Ex Parte Smith, 33 Nev. — (111 P. 930).

6725. Idem—Failure to prevent receipt of deposits.

SEC. 460. If any officer, director, cashier or manager of any incorporated bank, having authority to close any banking institution or to prevent the reception of deposits therein, shall not exercise such authority and prevent the receipt of deposits therein when he knows such bank is insolvent or in failing circumstances, he shall be deemed to have assented to the reception of any deposits received therein, and the failure, suspension or involuntary liquidation of any such bank or banking corporation within thirty days from and after the time of receiving any deposit therein shall be prima facie evidence of knowledge on the part of such officer, director, cashier or manager that such bank was insolvent or in failing circumstances at the time such deposit was received therein; *provided,* that if any director at any meeting of the directors of any such corporation held during the thirty days next preceding the failure, suspension or involuntary liquidation of any such bank or banking corporation, shall record his vote to receive no more deposits therein or to close such bank, he shall not be deemed to have assented to the reception of any deposit in such bank, within the meaning of this section.

6726. Defrauding inn keeper—Penalty.

SEC. 461. Any person who obtains any food or accommodation at any hotel, inn, restaurant, boarding-house or lodging-house without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at any hotel, inn, restaurant, boarding-house, or lodging-house by the use of any false pretense, or who, after obtaining credit or accommodation at an hotel, inn, restaurant, boarding-house, or lodging-house, absconds or surreptitiously removes his baggage therefrom without paying for his food or accommodations is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one hundred dollars or by imprisonment in the county jail not to exceed six months.

6727. Fraudulently selling real estate twice.

SEC. 462. Any person or persons, after once selling, bartering or disposing of any tract or tracts of land, town lot or lots, or executing any bond or agreement for the sale of any lands or town lot or lots, who shall again, knowingly and fraudulently, sell, barter, or dispose of the same tract or tracts of land, or town lot or lots, or any part thereof, or shall knowingly and fraudulently execute any bond or agreement to sell or barter, or dispose of the same land, or lot or lots, or any part thereof, to any other person or persons, for a valuable consideration, upon conviction thereof, shall be punished by imprisonment in the state prison not less than one year or more than five years.

6728. Business name, assumed, prohibited.

SEC. 463. No person or persons shall carry on or conduct or transact business in this state under any assumed names, or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file in the office of the clerk of the county or counties in which such person or persons conduct, or transact, or intend to conduct or transact such business, a certificate setting forth the name under which such business is, or is to be, conducted or trans-

acted, and the true or real full name or names of the person or persons conducting or transacting the same, with the postoffice address or addresses of said person or persons. Said certificate shall be executed and duly acknowledged by the person or persons, if there be more than one, so conducting, or intending to conduct said business.

6729. Idem—County clerks to keep list of certificates.

SEC. 464. The several county clerks of this state shall keep an alphabetical index of all persons filing certificates, provided for in the next preceding section, and for the indexing and filing of such certificates, they shall receive a fee of fifty cents. A copy of such certificate duly certified to by the county clerk in whose office the same shall be filed, shall be presumptive evidence in all courts of law in this state of the facts therein contained.

6730. Idem—Does not apply to corporations.

SEC. 465. The two next preceding sections shall in no way affect or apply to any corporation duly organized under the laws of this state, or to any corporation organized under the laws of any other state and lawfully doing business in this state, nor be deemed or construed to prevent the lawful use of a partnership name or designation; *provided*, that such partnership name or designation shall include the true or real name of at least one of such persons transacting such business.

6731. Idem—Penalty.

SEC. 466. Any person or persons carrying on, conducting or transacting business contrary to the provisions of the three preceding sections and without complying with the requirements thereof, shall be guilty of a misdemeanor.

6732. What is prima facie evidence.

SEC. 467. In any prosecution under the next succeeding section, proof that any of the acts therein forbidden were done on or about the premises occupied by the defendant charged with the commission of such an offense, or that he received the use or benefit of such water, gas, electricity or power by reason of the commission of any such acts, shall be prima facie evidence of the guilt of such defendant.

6733. Public service companies, certain acts against unlawful—Penalty.

SEC. 468. Every person who wilfully, and with intent to injure or defraud:

1. Opens, breaks into, taps, or connects with any pipe, flume, ditch, conduit, reservoir, wire, meter, or other apparatus belonging to or used by any water, gas, irrigation, electric, or power company or corporation, or belonging to or used by any other person, persons or association, or by the state, or by any county, city, district or municipality, and takes and removes therefrom or allows to be taken, removed or flow therefrom, any water, gas, electricity or power belonging to another; or,

2. Connects a pipe, tube, flume, conduit, wire, or other instrument or appliance with any pipe, conduit, tube, flume, wire, line, pole, lamp, meter or other apparatus belonging to or used by any water, irrigation, gas, electric, or power company or corporation, or belonging to or used by any other person, persons or association, in such manner as to take therefrom water, gas, electricity or power for any purpose or use, without passing through the meter, or instrument, or other means provided for registering the quantity consumed or used; or,

3. Destroys, detaches, disconnects, alters, injures, or prevents the action of a head-gate, meter, or other instrument or means used to measure or register the quantity of water, gas, electricity, or power consumed or supplied; or,

4. Injures or destroys, or interferes with the efficiency or use, or suf-

fers to be injured or destroyed, any pipe, conduit, flume, wire, pole, line, lamp, fixture, hydrant, or other attachment or apparatus belonging to or used by any water, irrigation, gas, electric, or power company or corporation, or belonging to or used by any other person, persons or association;

Is guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not to exceed six months, or by both such fine and imprisonment, in the discretion of the court; and shall moreover be liable to the person, persons, association or corporations, or the owner or user whose property is injured, in a sum equal to treble the amount of actual damages sustained thereby.

6734. Personating an officer.

SEC. 469. Every person who shall falsely personate a public officer, civil or military, or a policeman, or a private individual having special authority by law to perform an act affecting the rights or interests of another, or who, without authority shall assume any uniform or badge by which such an officer or person is lawfully distinguished, and in such assumed character shall do any act purporting to be official, whereby another is injured or defrauded, shall be guilty of a gross misdemeanor.

Falsely impersonating state police or using badge of, sec. 4291.

6735. Personating another.

SEC. 470. Every person who shall falsely represent or personate another, and, in such assumed character, shall marry another, become bail or surety for any party, in any proceeding, civil or criminal, before any court or officer authorized to take such bail or surety, or confess any judgment, or acknowledge the execution of any conveyance of real estate, or of any other instrument which, by law, may be recorded, or do any other act in the course of any suit, proceeding, or prosecution, whereby the person so represented or personated may be made liable, in any event, to the payment of any debt, damages, cost, or sum of money, or his right or interest may, in any manner, be affected, shall be guilty of a gross misdemeanor.

False impersonation of physician, sec. 2372.

6736. Personating another same as stealing.

SEC. 471. Every person who shall falsely represent or personate another, and, in such assumed character, shall receive any money or valuable property of any description, intended to be delivered to the person so personated, shall, upon conviction, be punished in the same manner and to the same extent as for feloniously stealing the money or property so received.

6737. Railroads making illegal charge.

SEC. 472. Any individual, company or corporation operating any railroad in this state, and every agent of such company or corporation who shall violate or attempt to violate, or suffer or permit to be done any act, matter or thing in violation of any of the provisions of any statute of this state, which prescribes or regulates the charges which may be made and collected by any individual, company or corporation operating any railroad in this state, for the transportation of either persons or property, and for which no other penalty is provided, shall be deemed guilty of a misdemeanor, and on conviction thereof shall pay a fine of two thousand dollars.

Rebates, discrimination, false devices by railroads, secs. 4570–4572, 4576.
See sec. 3581.

6738. Extortion by public officer.

SEC. 473. Every public officer who shall ask or receive, or agree to receive a fee or other compensation for his official service, either—

1. In excess of the fee or compensation allowed to him by statute therefor; or,
2. Where no fee or compensation is allowed to him by statute therefor,

Commits extortion, and is guilty of a misdemeanor.

6739. Blackmail.

SEC. 474. Every person who, with intent thereby to extort or gain any money or other property or to compel or induce another to make, subscribe, execute, alter or destroy any valuable security or instrument or writing affecting or intended to affect any cause of action or defense, or any property, or to influence the action of any public officer, or to do or abet or procure any illegal or wrongful act, shall threaten directly or indirectly—

1. To accuse any person of a crime; or,
2. To do an injury to any person or to any property; or,
3. To publish or connive at publishing any libel; or,
4. To expose or impute to any person any deformity or disgrace; or,
5. To expose any secret,

Shall be punished by imprisonment in the state prison for not more than five years or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment.

See secs. 6335, 6437, 6438, 6821.

In a prosecution for maliciously threatening injury to the person with intent to extort money, evidence of similar offenses committed about the same time are admissible to show intent. Where a man and wife were jointly tried for threatening to commit personal injury with intent to extort money, and the evidence tends to show that the wife was an accessory before the fact, acts and declarations made by her in the consummation of the unlawful act are admissible against the husband. State v. Vertrees, 33 Nev. — (112 P. 42).

6740. Coercion.

SEC. 475. Every person who, with intent to compel another to do or abstain from doing an act which such other person has a right to do, or abstain from doing, shall wrongfully and unlawfully—

1. Use violence or inflict injury upon such other person or any of his family, or upon his property, or threaten such violence or injury; or,
2. Deprive such person of any tool, implement or clothing, or hinder him in the use thereof; or,
3. Attempt to intimidate such person by threats or force,

Shall be guilty of a misdemeanor.

CHAPTER 25

MISCELLANEOUS CRIMES AGAINST PROPERTY

6741. Search warrant maliciously procured.
6742. Idem—Officer exceeding authority.
6743. Forcible entry and detainer.
6744. Working domestic animals without consent.
6745. Imitating lawful brand.
6746. False certificate of registration of animals—False representation as to breed.
6747. Wounding or poisoning cattle.
6748. Obstruction of railroad track, felony.
6749. Malicious injury to railroad property.
6750. False signals for railways—Endangering cars, vessels, motors.
6751. Endangering life and property by explosives.
6752. Injuring public utilities.
6753. Injury to property.
6754. Destruction of property—Trees—Posting bills.
6755. Injury to baggage.
6756. Injuring rafts and other water craft.
6757. Injury to dam, bridge, flume, or other structure.
6758. Injury to jail.
6759. Cemetery property, destruction of, misdemeanor—Penalty.
6760. Injury to church property.
6761. Penalty.
6762. Injury to other property.
6763. Assayers to identify bullion or amalgam.
6764. Idem—Neglect or refusal, penalty.
6765. Trespass upon land of another, warning.

6766. Hunting on inclosed ground unlawful, when.
6767. Idem—Misdemeanor—Penalty.
6768. Destruction of signs or notices unlawful.
6769. Penalty for not closing gates.
6770. Running water on highway.
6771. Idem—Road supervisor to notify—Presumption.
6772. Fast riding or driving on bridges—Penalty—Notice.
6773. Riding or driving on sidewalks.
6774. Defacement or obstruction of capitol grounds.
6775. Poisoning dogs, misdemeanor.
6776. Nursery stock must bear certificate of inspection.
6777. Transportation companies liable—Misdemeanor—Penalty.

6741. Search warrant maliciously procured.

SEC. 476. Whoever shall maliciously, and without probable cause, procure a search warrant to be issued and executed, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not exceeding five thousand dollars, or imprisonment not exceeding six months.

6742. Idem—Officer exceeding authority.

SEC. 477. A peace officer who, in executing a search warrant, shall wilfully exceed his authority, or exercise it with unnecessary severity, shall be deemed guilty of a misdemeanor, and punished as in the next preceding section is provided.

6743. Forcible entry and detainer.

SEC. 478. Every person who shall unlawfully use, or encourage or assist another in unlawfully using, any force or violence in entering upon or detaining any lands or other possessions of another; and every person who, having removed or been removed therefrom pursuant to the order or direction of any court, tribunal or officer, shall afterwards unlawfully return to settle or reside upon, or take possession of, such lands or possessions, shall be guilty of a misdemeanor.

See Ex Parte Webb, 24 Nev. 238 (51 P. 1027); Strozzi v. Wines, 24 Nev. 389 (55 P. 828).

6744. Working domestic animals without consent.

SEC. 479. If any person shall use or work any horse or horses, mule or mules, or work cattle without first obtaining the consent of the owner thereof, he shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars or more than three hundred dollars, or by imprisonment in the county jail for not less than fifty days or more than three hundred days.

6745. Imitating lawful brand.

SEC. 480. Every person who, in any county, shall place upon any property, any brand or mark in the likeness or similitude of another brand or mark filed with the county recorder of such county by the owner thereof as a brand or mark for the designation or identification of a like kind of property, shall—

1. If done with intent to confuse or commingle such property with, or to appropriate to his own use, the property of such other owner, be guilty of a felony, and be punished by imprisonment in the state prison for not more than five years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or both fine and imprisonment; or,

2. If done without such intent, shall be guilty of a misdemeanor.

This section shall not apply to any act for which a penalty is elsewhere provided in this act.

See schedule of statutory offenses under other titles "Stock," preceding this act.

6746. False certificate of registration of animals—False representation as to breed.

SEC. 481. Every person who, by color or aid of any false pretense, rep-

resentation, token or writing shall obtain from any club, association, society or company for the improvement of the breed of cattle, horses, sheep, swine, fowls or other domestic animals or birds, a certificate of registration of any animal or bird in a herd-book, or other register of any such association, society or company, or a transfer of any such registration, and every person who shall knowingly represent an animal or bird for breeding purposes to be of a greater degree of any particular strain of blood than such animal actually possesses, shall be guilty of a gross misdemeanor.

Failure to keep posted pedigree of horses misdemeanor, sec. 2288.

6747. Wounding or poisoning cattle.

SEC. 482. Every person who shall wilfully or maliciously wound, with firearms, knives, or other deadly weapon, any cattle or domestic animal belonging to another person, or administer any poison to, or expose any poisonous substance with the intent that the same shall be taken or swallowed by any cattle or domestic animal belonging to another person, shall on conviction be punished by imprisonment in the state prison not less than one year nor exceeding three years, or by fine not exceeding five hundred dollars, or both.

Cited, Fenstermaker v. Page, 20 Nev. 290 (21 P. 322).

6748. Obstruction of railroad track, felony.

SEC. 483. Every person who shall wilfully and maliciously place any obstruction on the track of any railroad in the state, now in operation or which may hereafter be put in operation therein, or shall tear up or remove any part or portion of such railroad, or shall destroy, derange, misplace, or injure any rail, switch, block or other signaling device, culvert, viaduct, bridge, car, tender or engine, or wilfully and maliciously do or attempt to do any or either of said things, or any other act or thing, whereby the life and limb of any person may be endangered, shall be deemed guilty of a felony, and shall, upon conviction thereof, be punished with imprisonment in the state prison for a period not exceeding twenty-one years.

Excavating under railroad, sec. 3565.
See schedule of statutory offenses under other titles "Railroads," preceding this act.

6749. Malicious injury to railroad property.

SEC. 484. If any person or persons shall without authority wilfully uncouple or detach any locomotive or tender or any car of any railroad train, either when standing or in motion on any track of any railroad, or shall, without authority, take off the brake of any railroad car, tender or train, or shall put in motion any locomotive, tender, car or train without authority, or shall throw any stone, rock, missile or any substance at any railroad train, car, locomotive or tender, or any part of any train, or shall discharge any gun, pistol or any other firearm at any train, car, locomotive or tender, or shall wrongfully injure, deface or damage the same, or any part thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding fifty days, or both.

See sec. 3565.
See note to sec. 6748.

6750. False signals endangering cars, vessels, motors.

SEC. 485. Every person who, in such manner as might, if not discovered, endanger a vessel, railway engine, motor, train or car, shall show, mask, extinguish, alter or remove any light or signal, or exhibit any false light or signal, shall be punished by imprisonment in the state prison for not more than ten years.

6751. Endangering life and property by explosives.

SEC. 486. Every person who shall maliciously place any explosive substance or material in, upon, under, against or near any building, car, vessel, railroad track or structure, in such manner or under such circumstances as to destroy or injure the same if exploded, shall be guilty of a felony, and shall be punished by imprisonment in the state prison for not more than twenty years.

6752. Injuring public utilities.

SEC. 487. Every person who shall wilfully and maliciously remove, damage or destroy—

1. A highway or a private way laid out by authority of law, or a bridge upon such public or private road, or wilfully or maliciously cause to be placed thereon any substance or thing dangerous to any person or animal traveling thereon or which might injure or puncture the tire of any vehicle; or,

2. A pile or other material fixed in the ground and used for securing any bank or dam of any river or other water, or any dike, dock, quay, jetty or lock; or,

3. A buoy or beacon lawfully placed in any waters within this state; or,

4. A tree, rock, post or other monument erected or marked for the purpose of designating a point on the boundary of the state, of a county, city, town or of a farm, tract or lot of land, or any mark or inscription thereon; or,

5. A mile board, mile stone or guide post erected upon a highway, or any inscription thereon; or,

6. A telegraph, telephone or electric transmission line or any part thereof, or any appurtenance thereto, or apparatus connected with the operation thereof; or,

7. A fence, gate, cattle guard, bridge, water tank, mile post, car, engine, motor or other useful structure on the line of any railway; or,

8. A pipe or main for conducting gas, water or oil, or any works erected for the purpose of supplying buildings therewith, or any appurtenance or appendage thereto; or,

9. A sewer or drain, or a pipe or main connected therewith or forming a part thereof; or,

10. A ditch or flume lawfully erected for carrying water or draining land; or,

11. Any engine, hose, hose-cart, truck, ladder, extinguisher or other apparatus used by any fire company or fire department, or any rope, wire, bell, signal, instrument or apparatus for the communication of alarms of fire or police calls; or,

12. Any public building, or building used for educational, scientific, charitable or religious purpose, or any useful or ornamental thing therein; or,

13. Any work of literature or art or copy thereof, object of curiosity or scientific interest, statue, picture or engraving, displayed, kept or erected in any public building, street, park or other public place or in any collection, exhibition, museum, fair, gallery or library, or in any building devoted to educational, scientific, charitable or religious purposes; or,

14. A monument erected in any cemetery, street, park or other public place; or,

15. A sign or notice erected or posted by any officer under lawful authority, or by the owner or occupant of the premises where posted; or,

16. A legal notice or other legal paper posted in compliance with the

requirement of any statute of this state, or under the direction or order of a court; and,

Every person—

17. Who shall moor any vessel, scow, barge, raft or boom to any bridge or to any buoy or beacon lawfully in any waters within this state; or,

18. Who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line; or,

19. Who shall erect or maintain any unlawful structure in any stream or river;

Shall be guilty of a misdemeanor.

Injury to or obstructing telegraph line, sec. 4610.
Defacing or destroying guideboards on public highways, sec. 3028.
Obstructing highways, sec. 3009.

6753. Injury to property.

SEC. 488. Every person who shall wilfully and maliciously—

1. Cut down, destroy or injure any wood, timber, grain, grass or crop, standing or growing, or which has been cut down and is lying upon the lands of another, or of the state; or,

2. Cut down, girdle or otherwise injure a fruit, shade or ornamental tree standing on the land of another or of the state, or in any road or street; or,

3. Dig, take or carry away without lawful authority or consent, from any lot or land in any city, or town, or from any lands included within the limits of a street or avenue in such city or town, any earth, soil or stone; or,

4. Enter without the consent of the owner or occupant, any orchard, garden, vineyard or yard, with intent to take, injure or destroy any thing there grown or growing; or,

5. Cut down, destroy or in any way injure any shrub, tree, vine or garden produce grown or growing within any orchard, garden, vineyard or yard, or any framework or erection therein; or,

6. Damage or deface any fence or building or part thereof, or throw any stone or other missile at any building or part thereof, thereby damaging the same in any way; or,

7. Destroy or damage, with intent to prevent or delay the use thereof, any engine, machine, tool or implement intended for use in trade or husbandry; or,

8. Untie, unfasten or liberate, without authority, the horse or team of another; or lead, ride or drive away, without authority, the horse, team, automobile or other vehicle of another from the place where left by the owner or person in charge thereof; or,

9. Kill, maim or disfigure any animal belonging to another, or expose any poisons or noxious substance with intent that it should be taken by such animal; or,

10. Intrude or place any hovel, shanty or building upon or within the limits of any lot or piece of land within any city or town, without the consent of the owner, or within the boundaries of any street, in such city or town; or,

11. Kill, wound or trap any animal or bird within the limits of any cemetery, park or pleasure ground, or remove therefrom or destroy the young of any such animal or the egg of any such bird; or,

12. Place upon or affix to any real property or any rock, tree, wall, fence or other structure thereupon, without the consent of the owner thereof, any word, character or device designed to advertise any article, business, profession, exhibition, matter or event; or,

13. Suffer any animal to go upon the enclosed right-of-way of any rail-

way company, or leave open any gate or bars so that an animal might stray upon such right-of-way;

Shall be guilty of a misdemeanor.

See State v. Rising, 10 Nev. 97.
Public utility refusing to make connections with consumers, secs. 6844–6846.

6754. Destruction of property—Trees—Posting bills.

SEC. 489. Any person who shall wilfully, unlawfully, or maliciously break, destroy, or injure the door or window of any dwelling house, shop, store, or other house or building, or the door, window, grating, platform, wheels, or other part of any railroad car, or sever therefrom, or from any gate, fence or inclosure, any part thereof, or any material of which it is formed, or sever from the freehold any produce thereof, or anything attached thereto, or pull down, injure, or destroy any gate, post, railing, or fence, or any part thereof, or break, destroy, or injure, any steamer, or other sailing craft, or cut down, lap, girdle, otherwise injure or destroy any fruit or ornamental, or shade tree, being the property of another, or who shall, without the consent of the owner, agent, or occupant of the premises or property herein mentioned, deface, disfigure, or cover up any fruit tree, or ornamental tree, fence, wall, house, shop, or building, the property of another, by pasting upon, or in any way fastening thereto, any printed bill, sign-board, show-poster, or other device whatsoever, or who shall, without a written permit from the board of county commissioners, in the county wherein such written permit may be issued, deface, disfigure, or cover up by pasting upon, or in any way fastening thereto, any printed bills, sign-board, show-poster, or other device whatsoever upon any public building, monument, gravestone, ornamental tree, or other object or property under the supervision and control of the board of commissioners of the respective counties in this state, or under the supervision and control of any municipal government, or of any association or society whatsoever, shall for each and every such offense be guilty of a misdemeanor.

Cutting timber unlawfully, secs. 2114–2116.
Selling or offering for sale young forest trees, sec. 2118.
See State v. Rising, 10 Nev. 100.

6755. Injury to baggage.

SEC. 490. Every person employed by any person or corporation engaged wholly or in part in the business of carrying passengers or baggage for hire, and every express agent, stage driver, drayman, expressman or hackman who shall wilfully or carelessly break, injure or destroy any trunk, valise, box, package or other baggage, shall be guilty of a misdemeanor.

6756. Injuring rafts and other water craft.

SEC. 491. Every person who shall wilfully and maliciously injure, or destroy any pile or raft of wood, plank, boards, or other lumber, or any part thereof, or cut loose or set adrift any such raft or part thereof, or shall cut, break, injure, sink, or set adrift any boat, canoe, skiff, or other vessel or water craft, being the property of another, shall be punished by fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months.

6757. Injury to dam, bridge, flume, or other structure.

SEC. 492. Every person who shall wilfully and maliciously cut, break, injure, or destroy any bridge, mill dam, canal, flume, aqueduct, reservoir, or other structure erected to create hydraulic power, or to conduct water for mining, manufacturing, or agricultural purposes, or any embankment necessary to the same, or either of them, or shall wilfully or maliciously make, or cause to be made, any aperture in such dam, canal, flume, aqueduct, reservoir, embankment, or structure, with intent to injure or destroy the

same, shall be punished by fine in any sum not more than one thousand dollars, or imprisoned in the state prison not less than one year nor more than two years, or both.

Misdemeanor to flood highways or to fail to construct bridges over ditches, secs. 3045, 3046.
See secs. 4704, 4707, 4709, 6770.
Polluting or obstructing streams, secs. 4718, 6547.

6758. Injury to jail.

SEC. 493. If any person shall, wilfully and intentionally, break down, pull down, or otherwise destroy or injure, in whole or in part, any public jail, or other place of confinement, every person so offending shall, on conviction, be fined in any sum not exceeding ten thousand dollars, nor less than the value of the said jail or other place of confinement so destroyed, or of such injury as may have been done thereto by such unlawful act, and be imprisoned in the state prison for any term not exceeding five years nor less than one year.

6759. Cemetery property, destruction of, misdemeanor—Penalty.

SEC. 494. Any person or persons who shall wilfully, unlawfully, and maliciously break, destroy or injure in any manner, any monument, gravestone, curbing or vault in any enclosed private or public cemetery, or who shall pasture or caused to be pastured, any live stock of any description within the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined in any sum not exceeding three hundred dollars, or imprisoned in the county jail for a term not exceeding six months, or both.

6760. Injury to church property.

SEC. 495. It shall be a misdemeanor for any person or persons to wilfully and maliciously injure, mark or deface any church edifice, school house or other building, public or private, its fixtures, books or appurtenances, or to commit any nuisance therein, or to purposely and maliciously commit any trespass upon the grounds attached thereto, or any fixtures placed thereon, or any enclosure or sidewalk about the same, or in any manner to maliciously and purposely interfere with or disturb those peaceably assembled within such building or buildings.

Injuring or defacing school property, sec. 3455.

6761. Penalty.

SEC. 496. Any person or persons convicted of a misdemeanor under the next preceding section shall be subject to a fine, not exceeding two hundred dollars, or imprisonment in the county jail, not to exceed six months, or both.

See sec. 3456.

6762. Injury to other property.

SEC. 497. Every person who shall wilfully or maliciously destroy or injure any real or personal property of another, for the destruction or injury of which no special punishment is otherwise specially prescribed, shall—

1. If the value of the property destroyed, or the diminution in value by the injury, shall be less than twenty dollars, be guilty of a misdemeanor.

2. If the value of the property destroyed, or the diminution in value by the injury, shall be twenty dollars or more, be guilty of a gross misdemeanor.

Abstracting or defacing newspapers in recorder's office, sec. 1642.
Injury to property in state library, sec. 3950.

6763. Assayers to identify bullion or amalgam.

SEC. 498. Every person or firm now engaged in, or who may hereafter

engage in, the business of assaying within this state, shall be required to place a written description, pasted on or stamped upon, every bar of bullion or amalgam melted, retorted, assayed, or refined by such person or firm, containing the name of the person or company by whom such bullion or amalgam was deposited with or sold to such person or firm.

Failure of assayer or other person to make inquiries relative to bullion purchased, received or transported or to keep correct record, sec. 2485.
See secs. 2483–2486.

6764. Idem—Neglect or refusal, penalty.

SEC. 499. Every person or firm engaged in or carrying on the business mentioned in the next preceding section, who shall neglect or refuse to comply with its provisions, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one thousand dollars and not more than five thousand dollars, and shall be imprisoned in the county jail not less than one month nor more than six months, for each and every such refusal or neglect.

6765. Trespass upon land of another, warning.

SEC. 500. Every person who shall go upon the land of another with intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act, or shall wilfully go or remain upon any land after having been warned by the owner or occupant thereof not to trespass thereon, shall be guilty of a misdemeanor.

Every owner or other occupant of any land shall be deemed to have given a sufficient warning against trespassing, within the meaning of this section, who shall post in a conspicuous manner on each side thereof, upon or near the boundary, at intervals of not more than seven hundred feet, signs legibly printed or painted in the English language, warning persons not to trespass.

An entryman on land under the laws of the United States shall be an owner within the meaning of this section.

See Strozzi v. Wines, 24 Nev. 389 (53 P. 828).

6766. Hunting on inclosed ground, unlawful, when.

SEC. 501. It shall be unlawful for any person to shoot or discharge firearms or to hunt upon or within any inclosed grounds which are private property and where signs are displayed forbidding such hunting or shooting, without permission obtained from the owner, or person in the possession of such inclosed ground.

6767. Idem—Misdemeanor—Penalty.

SEC. 502. Any person who shall violate any of the provisions of the next preceding section shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine in a sum not less than fifty dollars, nor more than two hundred dollars, for each and every offense, or by imprisonment in the county jail of the county in which said conviction is had, for any term not exceeding six months or both.

6768. Destruction of signs or notices unlawful.

SEC. 503. It shall be a misdemeanor for any person to maliciously tear down, mutilate or destroy any sign, sign-board, or other notice forbidding hunting, shooting or other trespass within an inclosure.

6769. Penalty for not closing gates.

SEC. 504. Any person or persons opening and passing through gates or bars when said gates or bars are placed in fences inclosing fields, or in fences partly inclosing lands, and not shutting and fastening the same, shall be deemed guilty of a misdemeanor; *provided,* that the provisions of

this section shall not apply to gates in towns and cities nor gates necessary in the approach to any building or works where the passing through or into fields or lands is not contemplated.

6770. Running water on highway.

SEC. 505. If any person or persons being the owner or owners, superintendent or managing agent of any water ditch, flume or artificial watercourse, within this state, or other person or corporation, shall wilfully, maliciously, negligently or carelessly allow or let the water from the said ditch, flume or artificial watercourse run or flow into or upon any public road, highway or common street or alley of any city, town or village within this state, so as to make the said public road, highway, street or alley impassable or inconvenient to travel, or so as to injure the same, every person so offending shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty dollars nor more than five hundred dollars and shall be imprisoned until the fine is paid at the rate of one day for every two dollars of the fine.

See secs. 3045, 3046, 6757.

6771. Idem—Road supervisor to notify—Presumption.

SEC. 506. Whenever the water from any ditch, flume or artificial watercourse in this state shall run or flow into or upon any public road, highway, street or alley of any city, town or village of this state, and the road supervisor within whose road district said public road, highway, street or alley is situated, and in case there is no road supervisor, then any member of the board of county commissioners of the county within which said public road, highway, street or alley is situated, shall notify the said owner or owners, superintendent or managing agent of said ditch, flume or artificial course, that the water from the same is or has been flowing into or upon said public road, highway, street or alley, making the same impassable or inconvenient to travel or pass, or is injuring or has injured the same, and if the said owner or owners, or superintendent or managing agent of said ditch, flume or artificial watercourse refuse or neglect for five days to repair the same and prevent the water from flowing into or upon said public road, highway, street or alley, it shall be prima facie evidence of negligence.

6772. Fast riding or driving on bridges—Penalty—Notice.

SEC. 507. Any person or persons riding or driving any animal or animals upon any toll or county bridge in this state faster than a walk shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment; *provided,* that the county commissioners, or owners of toll bridges, shall cause to be placed in a conspicuous place at or near the end of such bridge, a notice warning all persons not to ride or drive animals upon such bridge faster than a walk.

6773. Riding or driving on sidewalks.

SEC. 508. Any owner or occupant of land may construct and maintain a sidewalk in the highway along the line of his land, subject, however, to the authority conferred by law on city authorities, the boards of county commissioners or road supervisors; and sidewalks already constructed and laid out, being of reasonable limits as to width, and so as not to operate as an obstruction to the street or highway, shall be maintained and protected under this section, and any person who shall wilfully and intentionally ride or drive, or cause to be ridden or driven, any animal, vehicle or other thing over or upon such sidewalk, without permission of the

owner or occupant, shall be deemed guilty of a misdemeanor, and upon conviction thereof, fined in any sum not exceeding twenty dollars, in addition to costs of prosecution.

6774. Defacement or obstruction of capitol grounds.

SEC. 509. Any person who shall wilfully deface, break down, or destroy any fence upon or surrounding the state capitol grounds, or who shall erect any bulletin board or other advertising device, or deposit any garbage, cord-wood, empty boxes, or other debris or obstruction, or leave any idle vehicles within forty feet of said fence, or who shall injure, break down, or destroy any tree, shrub, or other thing upon said grounds, belonging to the state, or shall injure the grass upon the capitol grounds by tramping or walking upon the same, shall be deemed guilty of a misdemeanor, and, upon due conviction thereof, shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment, in the discretion of the court.

6775. Poisoning dog, misdemeanor.

SEC. 510. Every person who shall wilfully and maliciously administer any poison to, or expose any poisonous substance with the intent that the same shall be taken or swallowed by any dog, either of the male or female kind, belonging to another, shall be deemed guilty of a misdemeanor and, on conviction, be punished by imprisonment in the county jail for a term of not less than two months nor exceeding six months, or by a fine of not less than two hundred dollars nor exceeding five hundred dollars, or by both such fine and imprisonment.

6776. Nursery stock must bear certificate of inspection.

SEC. 511. All nursery stock shipped from other states to points within this state, whether fruit trees, ornamental trees, shrubs, vines, cuttings, or other nursery stock of any description whatever shall bear on the outside of each car, crate, bale, bundle or package a label giving the names of the consignor and consignee, together with a copy of an inspection certificate of recent date. Such certificate of inspection must certify that said stock has been inspected and found free from insect pests or plant diseases of any kind. It must bear the signature of the state entomologist or plant pathologist or other duly qualified person in authority in the state in which said nursery stock was grown.

6777. Transportation companies liable—Misdemeanor—Penalty.

SEC. 512. No corporation, company, or individual engaged in the transportation of freight or express shall make delivery of any nursery stock lacking such official certificate of inspection to the consignee or his agent within this state; and any agent of such corporation, company, or individual who does make delivery of any uncertified nursery stock shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars or by imprisonment in the county jail for not less than five nor more than thirty days or by both such fine and imprisonment at the discretion of the court, and any such fines collected under the provisions of this act shall be paid over to the state treasurer.

CHAPTER 26

CRIMES BY OR AGAINST EMPLOYER OR EMPLOYEE

6778. Public work—Eight hours to constitute day.
6779. Preventing employment.
6780. Blacklisting prohibited.
6781. Blacklisting, misdemeanor.
6782. Employer may discharge employee—Written reasons for discharge.

6783. Unlawful to demand money for giving employment.
6784. Employment agencies excepted.
6785. Fraud by employment agent.
6786. Grafting by employee.
6787. Obtaining employment by false letter or certificate.
6788. Time checks, discounting, unlawful, when.
6789. Idem—Misdemeanor—Penalty.
6790. Idem—When not applicable.
6791. Corporation store or boarding house—Unlawful to force trading.
6792. Agreement to join or not to join labor organization, unlawful, when.
6793. Misdemeanor—Penalty.
6794. Bribery of labor representative.
6795. Labor representative receiving bribe.
6796. Corrupt influencing of agent.
6797. Regulating use of collars, sleeves and pulleys.
6798. Penalty does not prevent recovery of damages.
6799. Safety cages in mines.
6800. Recovery of damages.
6801. Lawful and peaceable assembly.

6778. Public work—Eight hours to constitute day.

SEC. 513. On public works, all works or undertakings carried on or aided by the state, county or municipal governments, eight hours shall constitute a day's labor. Any violation of the provisions of this section shall be deemed a misdemeanor and shall subject the employee as well as the person or persons acting on behalf of the state, county or municipal government in the employment of such employee, to a fine of not less than ten dollars nor more than fifty dollars, and in case any contract is let for any state, county or municipal government work, the contractor or contractors violating the provisions hereof shall be punished by a fine of not less than five dollars nor more than fifty dollars for each and every man so employed by such contractor or contractors, and in addition thereto such contract shall be forfeited and be null and void; *provided*, that nothing herein shall be so construed as to prevent the preservation or protection of property in cases of emergency.

Eight-hour law; for surface men at mines, secs. 1941, 1942; for underground miners, sec. 6554; for smelters and ore reduction plants, sec. 6555; for plaster and cement mills, sec. 6559. See sec. 3482.

6779. Preventing employment.

SEC. 514. Any person, association, company, or corporation within this state, or agent, or officer, on behalf of such person, association, company or corporation, who shall hereafter wilfully do anything intended to prevent any person who shall have for any cause left or been discharged from his or its employ from obtaining employment elsewhere in this state, shall be deemed guilty of a misdemeanor, punishable by a fine of not less than fifty dollars, nor more than two hundred and fifty dollars for each offense, or imprisonment in the county jail at the rate of one day for each two dollars of such fine in the event such fine be not paid.

6780. Blacklisting prohibited.

SEC. 515. No corporation, company, organization, or individual shall blacklist or publish, or cause to be blacklisted or published, any employee, mechanic, or laborer discharged by such corporation, company, organization, or individual with the intent and for the purpose of preventing such employee, mechanic, or laborer from engaging in or securing similar or other employment from any other corporation, company, organization, or individual.

6781. Blacklisting, misdemeanor.

SEC. 516. If any officer or agent of any corporation, company, organization, or individual, or other person, shall blacklist or publish or cause to be blacklisted or published any employee, mechanic or laborer discharged by such corporation, company, organization, or individual, with the intent and for the purpose of preventing such employee, mechanic or laborer from engaging in or securing similar or other employment from any other corporation, company, organization, or individual, or shall in any manner conspire or contrive by correspondence or otherwise, to prevent such dis-

charged employee from procuring employment, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than fifty, nor more than two hundred and fifty dollars, or be imprisoned in the county jail not less than thirty nor more than ninety days, or both.

6782. Employer may discharge employee—Written reasons for discharge.

SEC. 517. The two preceding sections shall not be construed as prohibiting any corporation, company, organization or individual from giving in writing, on application from such discharged employee, or any corporation, company, organization or individual who may desire to employ such discharged employee, a truthful statement of the reason for such discharge; *provided,* that said written cause of discharge, when so made by such person, agent, company, organization or corporation shall not be used as the cause for an action for libel, either civil or criminal, against the person, agent, company, organization or corporation so furnishing the same.

6783. Unlawful to demand money for giving employment.

SEC. 518. It shall be unlawful for any person or persons, firm, company, association or corporation, either as principal or agent, to charge, or receive, or demand, or attempt to charge, or receive or demand, any money or other thing of value, from any person or persons whomsoever, upon the promise of hiring or retaining such person or persons in any employment whatsoever, or by threatening to discharge such person or persons from any such employment, whether or not such person or persons, firm, company, association or corporation, either as principal or agent, may have the right or authority to employ, or retain, or discharge such person or persons, in, or from any such employment whatsoever. Any person or persons convicted of the violation of any of the provisions of this section shall be punished by imprisonment in the state prison for a term of not less than one year nor more than three years.

6784. Employment agencies excepted.

SEC. 519. The preceding section shall not apply to any duly and regularly licensed intelligence office for the employment of persons.

6785. Fraud by employment agent.

SEC. 520. Every employment agent or broker who, with intent to influence the action of any person thereby, shall misstate or misrepresent verbally, or in any writing or advertisement, any material matter relating to the demand for labor, the conditions under which any labor or service is to be performed, the duration thereof or the wages to be paid therefor, shall be guilty of a misdemeanor.

6786. Grafting by employee.

SEC. 521. Every agent, employee or servant of any person or corporation and every public officer who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon any agreement or understanding that he shall act in any particular manner in connection with his principal's, employer's or master's business, or his official duties or the public service; or who being authorized to purchase or contract for materials, supplies or other articles or to employ servants or labor for his principal, employer or master, or for the state or any county or municipality, or for the public service, shall ask or receive, directly or indirectly, for himself or another, a commission, percentage, discount, bonus or promise thereof from any person with whom he may deal in relation to such matters, shall be guilty of a gross misdemeanor.

6787. Obtaining employment by false letter or certificate.

SEC. 522. Every person who shall obtain employment or appointment to any office or place of trust, by color or aid of any false or forged letter or certificate of recommendation, shall be guilty of a misdemeanor.

False advertising or deception to workmen to change from one place to another, sec. 1936.

6788. Time checks, discounting, unlawful, when.

SEC. 523. Whenever any person or persons, firm, corporation or association whether acting as principal or agent, contractor or subcontractor, shall hire or employ any other person or persons for the performance of any labor, or service, and shall issue to such person or persons time checks for the labor or service performed, it shall be unlawful for the person or persons, firm, corporation or association, issuing such time checks to discount the same or deduct therefrom any portion of the same as such discount.

Issuance of nonnegotiable paper to employees for indebtedness due for labor, sec. 1939.

6789. Idem—Misdemeanor—Penalty.

SEC. 524. Any employer of labor, or his agent or representative, violating the provisions of the next preceding section, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than three hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than six months, or both.

6790. Idem—When not applicable.

SEC. 525. Nothing in the two next preceding sections shall apply to persons, firms, associations or corporations, making discounts, deduction, or pro rata payments in the course of bankruptcy or insolvency proceedings, or in the settlement of the estates of deceased persons.

6791. Corporation store or boarding house—Unlawful to force trading.

SEC. 526. Any person or persons, employer, company, corporation or association, or the managing agent of any person or persons, employer, company, corporation or association, doing or conducting business in this state, who by coercion, intimidation, threats or undue influence, compels or induces his or her employees to trade at any particular store, or board at any particular boarding house, in this state, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than fifty dollars nor more than two hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days, nor more than one hundred days, or by both such fine and imprisonment.

6792. Agreement to join or not to join labor organization unlawful, when.

SEC. 527. It shall be unlawful for any person, firm or corporation to make or enter into any agreement, either oral or in writing, by the terms of which any employee of such person, firm or corporation, or any person about to enter the employ of such person, firm or corporation, as a condition for continuing or obtaining such employment, shall promise or agree not to become or continue a member of a labor organization, or shall promise or agree to become or continue a member of a labor organization.

6793. Misdemeanor—Penalty.

SEC. 528. Any person or persons, firm or firms, corporation or corporations, violating the provisions of the next preceding section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in a sum not less than fifty nor more than three hundred dollars, or be impris-

oned in the county jail for a period of not less than twenty-five days nor more than five months, or by both such fine and imprisonment.

6794. Bribery of labor representative.

SEC. 529. Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any duly constituted representative of a labor organization, with intent to influence him in respect to any of his acts, decisions or other duties as such representative, or to induce him to prevent or cause a strike by the employees of any person or corporation, shall be guilty of a gross misdemeanor.

6795. Labor representative receiving bribe.

SEC. 530. Every person who, being the duly constituted representative of a labor organization, shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon any agreement or understanding that any of his acts, decisions or other duties as such representative, or any act to prevent or cause a strike of the employees of any person or corporation shall be influenced thereby, shall be guilty of a gross misdemeanor.

6796. Corrupt influencing of agent.

SEC. 531. Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any agent, employee or servant of any person or corporation, with intent to influence his action in relation to his principal's, employer's or master's business, shall be guilty of a gross misdemeanor.

6797. Regulating use of collars, sleeves and pulleys.

SEC. 532. It shall be unlawful for any person, company or corporation, to construct or place any shaft or shafting with collars, sleeves or pulleys over two feet in diameter attached or secured to any such shaft by set screws projecting above the hub of such collars, sleeves or pulleys. In all such cases where set screws are used, the heads thereof shall be countersunk below the surface of the hub of the collar, sleeve or pulley in which they are placed. Any person or corporation who shall fail or refuse to comply with the requirements of this section, when constructing or changing any machinery, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred nor more than five hundred dollars.

6798. Penalty does not prevent recovery of damages.

SEC. 533. Nothing contained in the next preceding section shall be so construed as to prevent recovery in a suit for damages, for injuries sustained by the party so injured or by his heirs or administrators.

6799. Safety cages in mines.

SEC. 534. It shall be unlawful for any person or persons, company or companies, corporation or corporations, to sink or work through any vertical shaft, at a greater depth than three hundred and fifty feet, unless the said shaft shall be provided with an iron-bonneted safety cage, to be used in the lowering and hoisting of the employees of such person or persons, company or companies, corporation or corporations. The safety apparatus shall be securely fastened to the cage and shall be of sufficient strength to hold the cage loaded at any depth to which the shaft may be sunk. In any shaft less than three hundred and fifty feet deep where no safety cage is used and where crosshead or crossheads are used, platforms for employees, to ride upon in lowering and hoisting said employees shall be placed above said crosshead or crossheads. Any person or persons, company or companies, corporation or corporations or the managing agent

of any person or persons, company or companies, corporation or corporations, violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in the sum of five hundred dollars, or imprisoned in the county jail for a term of six months, or by both such fine and imprisonment.

6800. Recovery of damages.

SEC. 535. Nothing contained in the next preceding section shall be so construed as to prevent recovery being had in a suit for damages for injuries sustained by the party so injured, or his heir or administrator or administratrix, or any one else now competent to sue in an action of such character.

6801. Lawful and peaceable assembly.

SEC. 536. No part of this act shall be construed to restrict or prohibit the orderly and peaceably assembling or cooperation of persons employed in any profession, trade or handicraft, for the purpose of securing an advance in the rate of wages, or compensation, or for the maintenance of such rate.

See sec. 6377.
See State v. Hennessy, 29 Nev. 320 (90 P. 221); Branson v. I. W. W., 30 Nev. 270 (95 P. 354).

CHAPTER 27

CORRUPTING ELECTORS—WRONGFUL EXERCISE OF POWER—OBSTRUCTING AN OFFICER—OPPRESSION UNDER COLOR OF OFFICE—VENDING WITHOUT A LICENSE—KILLING BIRDS—CRUELTY TO ANIMALS—OFFENSES BY IMPRISONED PERSONS—EXTORTION—EMPLOYMENT OF CHILDREN—COMMON-LAW AND MISCELLANEOUS CRIMES.

6802. Corrupting or intimidating electors.
6803. Corrupt practices at elections.
6804. Wrongful exercise of official power.
6805. Obstructing public officer.
6806. Oppression under color of office.
6807. Extortion of confession—Refusing accused communication.
6808. Acting without lawful authority.
6809. Licenses to be posted.
6810. Vending without license.
6811. American eagle—Unlawful to kill.
6812. Song, plume, and insectivorous birds not to be killed.
6813. Idem—Prosecution—Duty of officers.
6814. Dead body—Removal of or handling prohibited, when.
6815. Cruelty to animals—Diseased not to run at large.
6816. Producing or selling certain adulterated liquors.
6817. Communications with prisoners.
6818. Tried pending term of imprisonment.
6819. Causing death in attempt to escape, first degree murder.
6820. Costs, how paid.
6821. Property obtained by extortion.
6822. Felony to take property from person of another.
6823. Employment of minors in begging, dangerous or immoral pursuit prohibited.
6824. Employment of children without permit of district judge.
6825. Telegrams to show time of transmission—Penalty.
6826. Denial of libelous article must be published.
6827. Common-law crimes.
6828. Other violations by officers.
6829. Wearing dangerous hatpin—Misdemeanor.
6830. Idem—Exception.

6802. Corrupting or intimidating electors.

SEC. 537. Every person who, by force, threats, menaces, bribery or any other corrupt means, either directly or indirectly, attempts to influence an elector in giving his vote, or to deter him from giving the same, or attempts by any means to awe, restrain, hinder, or disturb any elector in the free exercise of the right of suffrage, or defrauds any elector at any general, special or primary election by deceiving and causing such elector to vote for a different person or office other than he intended or desired to vote for, or who, being inspector, judge, or clerk at any election, while acting as such, induces, or attempts to induce, any elector, either by menace or reward, or promise thereof, to vote differently from what such elector

intended or desired to vote, shall be guilty of felony, punishable by fine not exceeding one thousand dollars, or imprisonment in the state prison not exceeding five years, or both.

See schedule of statutory offenses under other titles "Election," preceding this act.

6803. Corrupt practices at elections.

SEC. 538. Every person who, with intent to promote the election of himself or any other person, either:

1. Furnishes entertainment at his expense to any meeting of electors previous to or during an election;

2. Pays for, procures, or engages to pay for any such entertainment;

3. Furnishes or engages to pay or deliver any money or property for the purpose of procuring the attendance of voters at the polls, or for the purpose of compensating any person for procuring attendance of voters at the polls, except for the conveyance of voters who are sick or infirm;

4. Furnishes or engages to pay or deliver any money or property for any purpose intended to promote the election of any candidate, except for the expenses of holding and conducting public meetings for the discussion of public questions, and of printing and circulating ballots, handbills, and other papers, previous to such election, shall be guilty of a misdemeanor, punishable by fine not exceeding five hundred dollars or imprisonment not exceeding six months in the county jail.

See note to sec. 6802.

6804. Wrongful exercise of official power.

SEC. 539. If any person shall wilfully take upon himself to exercise or officiate in any office or place of another, without being lawfully authorized thereto, he shall, upon conviction, be fined in any sum not exceeding one thousand dollars.

6805. Obstructing public officer.

SEC. 540. Every person who, after due notice, shall refuse or neglect to make or furnish any statement, report or information lawfully required of him by any public officer, or who, in such statement, report or information shall make any wilfully untrue, misleading or exaggerated statement, or who shall wilfully hinder, delay or obstruct any public officer in the discharge of his official powers or duties, shall, where no other provision of this act applies, be guilty of a misdemeanor.

6806. Oppression under color of office.

SEC. 541. Every officer, or person pretending to be such, who unlawfully and maliciously, under pretense or color of official authority shall—

1. Arrest another or detain him against his will; or

2. Seize or levy upon another's property; or

3. Dispossess another of any lands or tenements; or

4. Do any act whereby another person shall be injured in his person, property or rights;

Commits oppression and shall be guilty of a gross misdemeanor.

6807. Extortion of confession—Refusing accused communication.

SEC. 542. No officer or person having the custody and control of the body or liberty of any person under arrest, shall refuse permission to such arrested person to communicate with his friends or with an attorney, nor subject any person under arrest to any form of personal violence, intimidation, indignity or threats for the purpose of extorting from such person incriminating statements or a confession. Any person violating the provisions of this section shall be guilty of a misdemeanor.

6808. Acting without lawful authority.

SEC. 543. Every person who shall in any case not otherwise specially provided for, do any act, for the doing of which a license or other authority is required by law, without having such license or other authority as required by law, shall be guilty of a misdemeanor.

6809. Licenses to be posted.

SEC. 544. Every person required by the laws of this state to obtain a license for the transaction of any kind of business in any fixed or certain locality therein, shall post such license conspicuously in his establishment or place of business, and keep the same so conspicuously posted until such license has expired, or he ceases to transact such business. Any person who shall fail to post or keep posted a license as required by this section, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than ten nor more than one hundred dollars.

6810. Vending without license.

SEC. 545. Any person or persons who shall vend, by wholesale or retail, any spirituous, or malt, or vinous liquors, or any goods, wares, or merchandise, within any county in this state, without first obtaining a license so to do, as required by law, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined in a sum of not less than twenty-five nor more than two hundred dollars, for each and every offense. Upon the trial of any criminal action provided for by this section, the defendant shall be deemed not to have procured any such license, unless he prove the contrary to the satisfaction of the court or jury by whom the same is tried.

Foreign corporation and agents doing business without authority, sec. 1350.
Soliciting business for unlicensed foreign building and loan association, sec. 1358.
Doing business after license revoked, sec. 3870.
Insurance company transacting certain business without authority, sec. 1309.
Doing insurance business without license, sec. 1280.
Doing business without license, sec. 3737.
Peddling without license, sec. 3735.
Running automobiles for rent without license, sec. 3878.
See Ex Parte Siebenhauer, 14 Nev. 365; Mandelbaum v. Gregovich, 17 Nev. 87 (45 A. R. 433; 28 P. 121); Ex Parte Rosenblatt, 19 Nev. 439 (3 A. S. 901, 14 P. 298).

6811. American eagle—Unlawful to kill.

SEC. 546. It shall be unlawful for any person or persons, firm, company, corporation or association to kill, destroy, wound, trap, injure, keep in captivity, or in any other manner to catch or capture, or to pursue with such intent the bird known as the American eagle, or to take, injure or destroy the nest or eggs of said before-mentioned bird. Any person or persons, firm, company, corporation or association violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine in any sum not less than twenty-five dollars, nor more than two hundred dollars, or imprisonment in the county jail for any term not exceeding six months, or both.

6812. Song, plume, and insectivorous birds not to be killed.

SEC. 547. Every person who shall kill, or destroy the eggs of any wild canary, wren, linnet, thrush, robin, bluebird, oriole, hummingbird, meadowlark, snowbird or other song, plume or insectivorous bird, is guilty of a misdemeanor.

This section shall not apply to English sparrows, the killing of which is authorized, or to any bird for the killing of which an open season is provided by the game laws of this state.

6813. Idem—Prosecution—Duty of officers.

SEC. 548. It shall be the duty of the sheriff and his deputies, constable and his deputies, district attorney and all other peace officers in this state, upon receiving information from any person, that any provisions of the next preceding section have been violated, to immediately institute proceedings in the proper court against the person or persons thus complained of, and prosecute the same with reasonable diligence to final judgment, and any peace officer refusing to make complaint or institute proceedings as herein provided, shall be guilty of a misdemeanor in office, and fined in any sum not exceeding twenty-five dollars.

6814. Dead body—Removal of or handling prohibited, when.

SEC. 549. In all cases of death where the person was not attended in his or her last sickness by a physician, or where the person was so attended by a physician if the death was surrounded by circumstances such as to afford reasonable grounds to suspect that the death had been occasioned by unnatural causes, the dead body, and the clothing, property, goods, and effects belonging to the deceased shall not be touched, handled, or removed by any person, except, if necessary, to move it to the nearest shelter, but the person acting as coroner of the county shall be immediately notified of such death; and said coroner, when so notified, shall take charge of the body, goods, and effects and proceed to hold an inquest over the same and ascertain all the facts and circumstances attending said death. Nothing in this section shall apply to communities having no official authorized to act as coroner. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months, or both.

See sec. 6549 and note.

6815. Cruelty to animals—Diseased not to run at large.

SEC. 550. Every person who shall overdrive, overload, torture, torment, deprive of sufficient and necessary sustenance, or maliciously or cruelly beat, maim, mutilate, injure or torture any living animal belonging to himself or another, or shall cause any animal, bull, bear, dog, cock, or other creature to fight, worry or injure each other, or who shall permit the same to be done on premises under his charge or control, or who shall aid, abet or be present at such fighting or worrying of such animals as a spectator for an admission fee, and every owner, driver, or possessor, of any maimed or diseased horse, mule, ox, cow or other domestic animal who shall permit the same to run at large on any public highway or in any street, alley, or vacant lot of any town or city for more than three hours after knowledge thereof, shall be guilty of a misdemeanor.

See sec. 6531.
Unlawful to confine stock on railroad for more than thirty-six hours, secs. 3572, 3585.
See secs. 1378–1380.

6816. Producing or selling certain adulterated liquors.

SEC. 551. Every person who, by mixing, compounding or distilling low wines or ardent spirits, or who, by adding thereto any flavoring or other substance, shall produce, or who shall sell or offer for sale or have in his possession with intent to sell any liquor known as whisky, gin or brandy, so produced, shall be guilty of a gross misdemeanor.

See sec. 3486.

6817. Communications with prisoners.

SEC. 552. No person shall visit, or in any manner communicate with any prisoner convicted of or charged with any felony, imprisoned in the county jail, other than the officer having such prisoner in charge, his

attorney, or the district attorney, except such person has a written permission so to do, signed by the district attorney, or has the consent of the constable, sheriff, or warden, having such prisoner in charge. Any person violating, aiding in, conniving at, or participating in the violation of this section, shall, on conviction thereof, be fined in any sum not exceeding five thousand dollars, or imprisoned in the state prison not exceeding one year, or both.

6818. Tried pending term of imprisonment.

SEC. 553. Where any person or persons, under sentence of imprisonment not expired, shall commit any crime or offense against the law, he or they may be tried pending his or their term of imprisonment, and, upon conviction, the judgment of the court shall be rendered for the sentence to commence upon the expiration of the former sentence, if the punishment be one of imprisonment; but if the punishment be of death, the sentence shall be executed without reference to the unexpired term of imprisonment.

6819. Causing death in attempt to escape, murder in first degree.

SEC. 554. If one or more persons, lawfully imprisoned in the state prison, shall, separately or together, escape, or shall, separately or together, attempt to escape from such prison; and being so engaged, he, they, or either of them, shall cause the death of any human being in making, or attempting to make, such escape, the prisoner or prisoners causing such death shall be deemed guilty of murder in the first degree, and, on conviction thereof, shall suffer death.

6820. Costs, how paid.

SEC. 555. The expenses and costs of prosecuting any person or persons for escaping from, or breaking out of, the state prison, or attempting so to do, or for the commission of any crime while a prisoner therein, shall be a state charge, and shall be paid as other expenses of the state prison.

6821. Property obtained by extortion.

SEC. 556. Every person, who, under circumstances not amounting to robbery, shall extort or gain any money, property or advantage, or shall induce or compel another to make, subscribe, execute, alter or destroy any valuable security or instrument or writing affecting or intended to affect any cause of action or defense, or any property, by means of force or any threat, either—

1. To accuse any person of a crime; or
2. To do injury to any person or to any property; or
3. To publish or connive at publishing any libel; or
4. To expose or impute to any person any deformity or disgrace; or
5. To expose any secret,

Shall be guilty of extortion and shall be punished by imprisonment in the state prison for not more than five years.

See secs. 6335, 6437, 6438, 6739.
State v. Vertrees, 33 Nev.— (112 P. 42).

6822. Felony to take property from person of another.

SEC. 557. Every person who, under circumstances not amounting to robbery, shall, with intent to steal or appropriate to his own use, take from the person of another, without his consent, any money, property or thing of value, shall be punished by imprisonment in the state prison for not more than fourteen years.

6823. Certain employment of minors prohibited.

SEC. 558. Every person who shall employ, or cause to be employed, exhibit or have in his custody for exhibition or employment any minor

actually or apparently under the age of eighteen years; and every parent, relative, guardian, employer or other person having the care, custody, or control of any such minor, who shall in any way procure or consent to the employment of such minor—

1. In begging, receiving alms, or in any mendicant occupation; or,
2. In any indecent or immoral exhibition or practice; or,
3. In any practice or exhibition dangerous or injurious to life, limb, health or morals; or,
4. As a messenger for delivering letters, telegrams, packages or bundles, to any house of prostitution or assignation;

Shall be guilty of a misdemeanor.

6824. Employment of children without permit.

SEC. 559. Every person who shall employ, and every parent, guardian or other person having the care, custody or control of such child, who shall permit to be employed, by another, any male child under the age of fourteen years or any female child under the age of sixteen years at any labor whatever, in or in connection with any store, shop, factory, mine or any inside employment not connected with farm or house work, without the written permit thereto of a judge of the district court of the county wherein such child may live, shall be gulity of a misdemeanor.

6825. Telegrams to show time of transmission.

SEC. 560. All telegrams and written messages transmitted by wire, for the transmission of which any charge is made, and copies of such telegrams and messages made for delivery to the person to whom they are sent, shall have inserted upon them at the time they are received and delivered an entry in printing or writing plainly showing the day of the month and the time of the day, within five minutes, at which they are received for transmission. Any telegraph company, operator or person who shall deliver any such telegram or message or copy thereof which does not bear the entry showing the time of its receipt for transmission as above prescribed, shall be guilty of a misdemeanor.

See sec. 4606.
See schedule of statutory offenses under other titles "Telegraph," preceding this act.

6826. Denial of libelous article must be published.

SEC. 561. If in any newspaper or other periodical published or circulated within this state any matter is published regarding a person named or otherwise designated in such a manner as to be identified therein, it shall be the duty of the editor, publisher, or proprietor to publish gratuitously any denial or correction of the matter so published that may be received from the person so named or designated when the denial or correction is signed by the person so making the same; *provided, however,* that the denial or correction shall be made and presented by mail or otherwise to such editor, publisher, or proprietor within one week after the original publication in the case of daily newspapers published in this state, or thirty days in case of other periodicals. Such denial or correction shall be published in the next issue after the receipt thereof, or if presented less than two days prior to the next issue shall be published in either the next or the succeeding one, and shall be given a like position and space and as much display as had the statement which provoked it; but if the denial or correction exceed the length of the original article, the charge for publishing the excess shall be computed and paid for in advance at the regular advertising rates for the periodical in question. Failure to comply with the provisions of this section by any editor, publisher or proprietor of any newspaper or periodical shall be punished by a fine of not less than one

hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not exceeding six months.

6827. Common-law crimes.

SEC. 562. All offenses recognized by the common law as crimes, and not herein enumerated, shall be punished, in cases of felonies, by imprisonment in the state prison for a term not less than one year nor more than five years, and in case of misdemeanors, by imprisonment in the county jail for a term not exceeding six months or less than one month, or by fine not exceeding five hundred dollars, or both; and whenever any fine is imposed for any felony or misdemeanor, whether such by statute or at common law, the party upon whom the fine is imposed shall be committed to the county jail, when not sentenced to the state prison, until the fine is paid; and he shall be imprisoned at the rate of one day for each two dollars until such fine is paid.

See secs. 5474, 6300.
See Ex Parte Webb, 24 Nev. 238 (51 P. 1027); State v. Sales, 2 Nev. 268.

6828. Other violations by officers.

SEC. 563. Every public officer or other person who shall wilfully disobey any provision of law regulating his official conduct in cases for which no other punishment is provided, shall be guilty of a misdemeanor.

6829. Wearing dangerous hatpin—Misdemeanor.

SEC. 564. No person shall, while upon any public street or in any public conveyance, street car, train or elevator, or in any other public place, wear a hatpin or similar article, the exposed point of which shall protrude more than one-half inch beyond the crown or other portion of the hat upon, in or through which such pin or similar article is worn, unless said exposed point of the hatpin or other similar article shall be so guarded by device or otherwise as to render contact with it entirely free from danger. Any person violating any of the provisions of this act is guilty of a misdemeanor.

6830. Idem—Exception.

SEC. 565. The preceding section shall not apply to any hatpin or similar article, the dangerous end of which is not exposed to view on public streets or in public places.

CHAPTER 28

ON REPEAL

6831. Same provisions in this act as in existing acts deemed continuation thereof.
6832. Effect not affected.
6833. Penal clauses of other acts not affected.
6834. Schedule of acts repealed.

6831. Same provisions in this act as in existing acts deemed continuation thereof.

SEC. 566. The provisions of this act, so far as they are substantially the same as those of existing statutes, shall be construed as a continuation thereof and not as new enactments, and a reference in a statute which has not been repealed to provisions of law which are revised and reenacted herein shall be construed as applying to such provisions as so incorporated in this act.

6832. Offenses committed and proceedings instituted before act goes into effect not affected.

SEC. 567. The repeal of a law by this act shall not affect any act done, or offense committed or the prosecution of a criminal action or proceeding commenced, before this act takes effect, but all offenses committed prior

to the taking effect of this act may be prosecuted to judgment and penalty imposed and such judgment and penalty be enforced in accordance with the provisions of the statute at the time of the commission of such offense.

6833. Penal clauses of other acts not affected.

SEC. 568. Nothing in this act shall be deemed a repeal of any penal clause contained in any other statute, which penal clause may not be embodied in this act or is not in conflict therewith, but all such penal provisions shall remain in full force as a part of such other statutes.

6834. Schedule of acts repealed.

SEC. 569. The acts designated in the following schedule are repealed from and after the time this act goes into effect:

SCHEDULE

1. An act to prevent the driving of stock from their ranges, approved November 21, 1861;
2. An act for the better observance of the Lord's day, approved November 21, 1861;
3. An act concerning crimes and punishments, approved November 26, 1861;
4. An act to prohibit marriages and cohabitation of whites with Indians, Chinese, mulattoes, and Negroes, approved November 28, 1861;
5. An act to prevent the escape of prisoners, approved December 10, 1862;
6. An act for the protection of agricultural lands and preservation of water, approved March 9, 1865;
7. An act supplementary to an act entitled "An act concerning crimes and punishments," approved November 26, 1861, approved March 1, 1866;
8. An act to prevent the spread of contagious diseases, approved February 20, 1869;
9. An act to regulate the business of assaying within the State of Nevada, approved March 3, 1869;
10. An act to prohibit the sale of intoxicating drinks to minors, approved March 7, 1873;
11. An act to prohibit lotteries, approved March 7, 1873;
12. An act to prohibit cheating and unlawful games, approved February 2, 1875;
13. An act defining misdemeanors in certain cases and prescribing penalties therefor, approved March 4, 1875;
14. An act to regulate the sale or disposal of opium, and to prohibit the keeping of places of resort for smoking, or otherwise using that drug, approved February 9, 1877;
15. An act requiring persons slaughtering horned cattle to keep the hides and ears ten days, and punishing a failure so to do, approved February 12, 1877;
16. An act to prohibit certain advertisements tending to promote licentiousness and crime, approved February 13, 1877;
17. An act to punish the wilful and fraudulent killing of stock running at large, and the selling or buying any hide, or carcass, or animal, the brand on which has been cut out or obliterated, approved February 15, 1877;
18. An act to prevent cruelty to women in the State of Nevada, approved February 21, 1877;
19. An act to prohibit animals from being ridden or driven over any toll or county bridge in this state, faster than a walk, approved February 23, 1877;

20. An act supplementary to an act entitled "An act concerning crimes and punishments," approved November 26, 1861, approved February 23, 1877;
21. An act concerning vagrancy and vagrants, approved March 5, 1877;
22. An act to prohibit the winning of money from persons who have no right to gamble it away, approved March 5, 1877;
23. An act to prevent the keeping of disorderly houses or inns, approved February 14, 1879;
24. An act to prevent the adulteration of milk; and to prevent traffic in impure and unwholesome milk, approved February 17, 1879;
25. An act to prevent persons from passing through inclosures and leaving them open, by tearing down fences, or otherwise, and domestic animals from being shot by persons while hunting on inclosed premises, and providing for the payment for such injuries so done, approved February 19, 1879;
26. An act to prevent the propagation and spread of contagious diseases, approved February 24, 1879;
27. An act to prohibit the unauthorized use of horses, mules or work cattle, approved March 6, 1879;
28. An act relating to the burial of the dead of incorporated cities in the State of Nevada, approved March 8, 1879;
29. An act amendatory and supplementary of an act entitled "An act to regulate the sale or disposal of opium, and to prohibit the keeping of places of resort for smoking or otherwise using that drug," approved February 9, 1877, approved March 8, 1879;
30. An act to prohibit and punish the killing or branding of stock running at large by persons not owning the same, approved March 8, 1879;
31. An act prescribing the penalties for the violation of any law of this state, regulating the charges for the transportation of persons and property by railroads in this state, approved March 8, 1879;
32. An act to authorize and empower the board of state prison commissioners to purchase for and on behalf of the State of Nevada, the property known as the Warm Springs hotel, adjoining and west of the state prison, and matters properly connected therewith, and prohibiting the sale of intoxicating liquors, approved March 11, 1879;
33. An act to prevent the unauthorized expenditure of state money, became a law February 8, 1881;
34. An act to prohibit the use of firearms in public places, approved January 28, 1881;
35. An act supplementary to an act entitled "An act concerning crimes and punishments," approved November 26, 1861, and acts amendatory thereto and supplemental thereto, approved February 23, 1881;
36. An act to punish and prevent deception in the manufacture and sale of butter, approved February 4, 1881;
37. An act supplemental to an act entitled "An act to prevent the adulteration of milk, and prevent traffic in impure and unwholesome milk," approved February 17, 1879, approved February 26, 1881;
38. An act concerning marriages, approved March 1, 1881;
39. An act to prevent minors from gambling, approved March 2, 1881;
40. An act to prohibit the carrying of concealed weapons by minors, approved March 4, 1881;
41. An act to more fully define the crime of larceny, approved February 9, 1883;
42. An act to require licenses to be posted up, approved February 9, 1883;

43. An act for the prevention of fraud and the better protection of miners in the sale and purchase of ores, approved February 20, 1883;
44. An act supplementary to an act concerning crimes and punishments, approved November 26, 1861, approved March 1, 1883;
45. An act to prevent fraud and enforce official duty in certain cases, approved March 1, 1883;
46. An act to protect and to encourage the construction of sidewalks in towns and villages of this state, approved February 12, 1885;
47. An act to prohibit the sale of ardent spirits to the Indians, approved February 25, 1885;
48. An act to further define and punish embezzlement, approved February 24, 1886;
49. An act to prevent persons from unlawfully using or wearing the badge of the Grand Army of the Republic in this state, approved February 1, 1887;
50. An act to regulate houses of prostitution, dance houses, and houses where beer, wine or spirituous liquors are sold, approved February 26, 1887;
51. An act to punish false pretenses in obtaining certificates of registration of cattle and other animals, approved March 3, 1887;
52. An act to furnish [punish] the manufacture and use of any dynamite machine or other device for the destruction of life or property, approved March 3, 1887;
53. An act supplementary to an act entitled "An act concerning crimes and punishments," approved November 26, 1861, approved March 5, 1887;
54. An act to prevent the pollution of the waters of the lakes, rivers and running streams of this state by sawdust, approved January 29, 1889;
55. An act to prohibit the shearing of sheep within the limits of any city or town in this state, approved March 6, 1889;
56. An act amendatory of and supplementary to an act entitled "An act to restrict the sale of cigarettes, cigars and tobacco," approved February 23, 1887, approved March 7, 1889;
57. An act to prevent the owners, superintendents or managing agents of any water ditches, flumes or artificial watercourses, to allow the water from the same to run into or upon any public road, highway, street or alley in this state, approved March 6, 1889;
58. An act requiring the shutting and fastening of gates opened for the purpose of passing through or into inclosed fields, or partly inclosed lands, and regulating penalties for violating the provisions of this act, approved March 13, 1891;
59. An act to provide for the punishment of persons for altering the marks and brands upon live stock, approved March 14, 1891;
60. An act to prohibit the sale or removal of mortgaged personal property, approved March 17, 1891;
61. An act to prevent the wilful injury to, or interference with, railroad property, and to provide for the punishment thereof, approved March 19, 1891;
62. An act to prevent the wilful injury to, or interference with, railroad property, and to provide for the punishment thereof, approved March 19, 1891;
63. An act to secure protection to school children and to preserve the peace of public schools and matters connected therewith, approved March 6, 1893;

64. An act supplemental to an act entitled "An act concerning crimes and punishments," approved November 26, A. D. 1861; to prohibit males declaring an illicit carnal knowledge of females, approved February 5, 1895;
65. An act to prohibit the sale of ardent spirits within the capitol building of the State of Nevada, approved February 25, 1895;
66. An act to prevent malicious injury to church, school and other buildings and property, and to protect persons from malicious annoyance, and matters properly relating thereto, approved March 13, 1895;
67. An act declaring the wilful prevention of, or attempt to prevent, any person from procuring employment, to be a misdemeanor and providing a punishment therefor, approved March 15, 1895;
68. An act concerning certain crimes and punishments, approved March 16, 1899;
69. An act relating to nickel-in-the-slot machines and providing a penalty for carrying on or playing against such machine or device, approved February 23, 1901;
70. An act to regulate the sale of meat of any equine animal, approved February 26, 1901;
71. An act making trespass upon patented mining ground a misdemeanor and providing punishment for the same, approved March 23, 1901;
72. An act regulating the hours of employment in underground mines and smelters, and ore reduction works, and providing penalties for violation thereof, approved February 23, 1903;
73. An act for the protection of workmen employed where machinery is used with collars and pulleys secured by set screws, approved February 26, 1903;
74. An act making it a misdemeanor to give false alarms of fire, approved March 4, 1903;
75. An act to prevent wilful and malicious poisoning of dogs by persons not owning the same, approved March 5, 1903;
76. An act to prohibit the rebating, refunding, repayment, payment, or division of salaries allowed by law to deputies or attaches of the state, county or municipal government, approved March 5, 1903;
77. An act to prohibit the disposal of intoxicating liquors, drugs, or other intoxicating substances to Indians, approved March 6, 1903;
78. An act regulating the hours of labor on all public and municipal works, and providing a penalty for violation thereof, approved March 9, 1903;
79. An act regulating within this state bookmaking on horse races, prize fights, or any games conducted outside of this state, approved March 13, 1903;
80. An act for the protection of owners of inclosed property, and to prevent hunting or shooting within enclosures, approved March 16, 1903;
81. An act to provide payment of expenses necessary for the extradition of fugitives from justice, approved March 17, 1903;
82. An act making it unlawful for employers to enter into agreements with their employees, or persons about to enter their employment, not to become or continue as members of labor organizations; and prescribing penalties for violations thereof, approved March 17, 1903;
83. An act to prohibit the carrying of concealed weapons, and to provide for the punishment thereof, approved March 17, 1903;

84. An act to prevent the pollution or contamination of the waters of the lakes, rivers, streams and ditches in the State of Nevada, prescribing penalties, and making an appropriation to carry out the provisions of this act, approved March 20, 1903;
85. An act to prevent the compelling of employees of persons, companies, corporations or associations to trade at any particular store or board at any particular boarding house, by means of coercion, intimidation or otherwise, in this state, approved March 20, 1903;
86. An act for the preservation of a bird known as the American eagle, within the State of Nevada, approved February 25, 1905;
87. An act to prevent the destruction of gravestones, monuments, vaults, and other cemetery property, and to prevent the pasturing of live stock within any inclosed private or public cemetery, approved March 2, 1905;
88. An act making it unlawful for employers to discount time labor checks issued by them to their employees, approved March 15, 1905;
89. An act to prevent the removal or handling of a body or the chattels or effects belonging to the deceased in certain cases, and requiring the coroner to be notified of the death, and providing a penalty for any violation of this act, approved March 16, 1905;
90. An act prohibiting blacklisting and prescribing penalties for violation thereof, approved March 24, 1905;
91. An act to prohibit the making or publishing of false or exaggerated statements or publications of or concerning the affairs, pecuniary condition or property of any corporation, joint-stock association, copartnership or individual, which said statements or publications are intended to give, or shall have a tendency to give, a less or greater apparent value to the shares, bonds or property, or any part thereof of said corporation, joint-stock association, copartnership or individual, than the said shares, bonds or property shall really and in fact possess, and providing a penalty therefor, approved March 12, 1907;
92. An act to prevent the desecration of the flag of the United States and of the flag of this state, approved March 20, 1907;
93. An act to further define and punish the crime of extortion, approved March 29, 1907;
94. An act regulating within this state bookmaking on horse races, prize fights, or any games conducted outside this state, approved March 29, 1907;
95. An act forbidding the antedating or false dating of location notices on mining claims and prescribing the penalty therefor, approved March 29, 1907;
96. An act to regulate the conduct of business and to prevent any person or persons from conducting or transacting business under an assumed name, and providing punishment therefor, approved March 29, 1907;
97. An act making it unlawful for any person or persons, firm, company, association, or corporation, either as principal or agent, to charge, or demand, or receive, or attempt to charge, or to demand, or to receive, any money or other thing of value, from any person or persons whomsoever, upon the promise of hiring or retaining such person or persons, in any employment whatsoever, or by threatening to discharge such person or persons from any such employment, and providing for a punishment for the violation thereof, approved February 18, 1909;
98. An act to regulate the hours of labor of persons engaged or employed in mills and other institutions where plaster or cement is manufac-

tured, so as to better protect the health and safety of those engaged in such work or occupation, and providing penalties for a violation thereof, approved March 3, 1909;

99. An act to regulate the hours of employment of working men in open-pit and open-cut mines, so as to better protect the health and safety of those engaged in such work or occupation, and providing penalties for the violation thereof, approved March 5, 1909;

100. An act to prevent the interference with, or injury to, any dam, ditch, headgate, weir or other appliance for the diversion, storage, apportionment, measurement, conveyance or delivery of water, approved March 3, 1909;

101. An act to prevent throwing, placing or depositing slop, empty bottles, dead animals or other refuse or garbage upon any sidewalk or street and other specified places in any incorporated town of this state, approved March 5, 1909;

102. An act to compel support of wives and children, and for the prosecution and punishment of persons violating the provisions of this act, approved March 11, 1909;

103. An act making it a felony for any banker, or any officer, director, cashier, teller, managing member, manager, clerk, person, party or agent of any bank, banking corporation, association, firm or person engaged in a banking, brokerage, exchange or deposit business to receive, or accept or assent or be accessory to or permit the reception of deposits of money, currency or valuable paper, in banking and other institutions, knowing the same to be insolvent; providing a punishment therefor and establishing a rule of evidence in connection therewith, approved March 13, 1909;

104. An act to prohibit the sale or disposal of opium, morphine and kindred drugs or ardent spirits to any person lawfully confined in the state prison, county jails or in other public institutions, and other matters relating thereto, approved March 24, 1909;

105. An act prohibiting gambling, providing for the destruction of gambling property and other matters relating thereto, approved March 24, 1909;

106. An act requiring all nursery stock shipped into the State of Nevada to have an official certificate of inspection attached, and prescribing the penalty for any common carrier receiving or delivering any uncertified nursery stock, approved March 25, 1909;

107. An act to protect the properties and products of the owners of water, gas, electricity, and power against theft, interference and injury, and providing a punishment therefor, approved March 25, 1909;

Also, all acts amendatory of the foregoing acts specified, and all other acts not particularly referred to, in conflict with this act.

6835. Act to take effect January 1, 1912.

SEC. 570. This act shall take effect on the first day of January, one thousand nine hundred and twelve.

An Act to make criminal the selling, giving, or in any manner disposing of, or the causing to be sold, giving or disposed of spirituous, malt, or intoxicating wines or liquors to habitual or common drunkards or dipsomaniacs who are members of families and who are, when drunk, menaces to the life, health or peace of their families or who when lawfully bound to do so, fail to provide for their families the common necessaries of life.

Approved March 22, 1911, 313

6836. Selling of liquor to certain persons prohibited.

SECTION 1. It shall be the duty of every saloonkeeper or retail liquor

dealer, when requested to do so by the sheriff or other peace officer of the county, or by the parent, wife, child, brother, sister or guardian of an habitual or common drunkard or dipsomaniac who is a member of a family, and a menace, when drunk, or intoxicated, to the life, health or peace of his family, or who when lawfully bound to do so fails to provide for his family the common necessaries of life, to place or post the name of such habitual or common drunkard or dipsomaniac in an appropriate place on a bulletin-board upon which shall be conspicuously placed or posted the words "Drunkards or Dipsomaniacs to Whom Intoxicants Are Forbidden," which said bulletin-board shall be conveniently placed back of the bar in the barroom or establishment of such saloonkeeper or retail liquor dealer in such a manner that it can be readily seen by bartenders back of the bar, but not by patrons of the bar.

6837. Liquor dealers when notified prohibited from serving liquor to certain persons.

SEC. 2. It shall be unlawful for any saloonkeeper or retail liquor dealer, or for his bartender, employee or other agent, upon being informed by the sheriff or any peace officer of the county, or by the parent, wife, child, brother, sister or guardian of an habitual or common drunkard or dipsomaniac who is a member of a family, and a menace, when drunk or intoxicated, to the life, health or peace of his family, or who when lawfully bound to do so, fails to provide for his family the common necessaries of life, that such are the facts, or upon the name of such drunkard or dipsomaniac being posted as in section 1 provided, to sell, give or in any way dispose of, or to cause to be sold, disposed of or given to, such drunkard or dipsomaniac, any spirituous, malt or intoxicating wines or liquors.

See sec. 6523.

6838. Penalties.

SEC. 3. Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty ($50) dollars or more than five hundred ($500) dollars, or by imprisonment in the county jail for not longer than six months, or by both such fine and imprisonment.

An Act restricting the sale, barter, exchange or other disposal of liquors and providing penalties for the violation of the same and repealing certain conflicting acts.

Approved March 22, 1911, 318

6839. Liquor selling restricted near construction camps.

SECTION 1. It shall be unlawful to grant a license to any person, firm or corporation to sell, barter, exchange or otherwise to dispose of any malt, spirituous, vinous or other intoxicating liquors within five miles of any camp or assemblage of men engaged in the construction or reconstruction of any railway or government construction or reconstruction works where twenty-five or more men are employed.

6840. Penalties—Proviso as to regularly established business.

SEC. 2. Any person who shall sell, barter or exchange or offer for sale, barter or exchange, or shall otherwise dispose or offer to dispose of any malt, spirituous, vinous or other intoxicating liquors within five miles of any camp or assemblage where twenty-five or more men are engaged in the construction or reconstruction of any railway or government construction or reconstruction works shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars for each offense or by imprisonment in the county jail for not less than thirty days nor more than six months or by

both such fine and imprisonment, and any attempt to avoid the provisions of this act by giving or disposing of any such liquors to any person or persons on the pretense or for the reason that such person or persons has or have purchased or designs or design or is or are expecting to purchase some other article, shall be deemed a sale within the provisions of this act; *provided*, that nothing in this act shall apply to the sale of liquors made under a license issued by any incorporated town or city nor to sales at a saloon, store or hotel at which such liquors are sold or otherwise disposed of outside of the corporate limits of towns and cities where such saloon, store or hotel has been established in a substantial building of permanent character and has been licensed for at least six months immediately prior to the beginning of such construction work within the said five-mile limit.

6841. County commissioners to revoke licenses—Residue of license money returned.

SEC. 3. It shall be the duty of the board of county commissioners of the several counties to forthwith revoke all and any such license for the sale of such liquors within their respective counties within such five-mile limit, excepting those licenses issued by any incorporated town or city and licenses issued at least six months immediately prior to the commencement of such construction or reconstruction work. Upon the revocation of any such license as under the provisions of this act, the said county commissioners shall provide for the payment to the licensee of a sum of money which shall bear the proportion to the whole amount paid for such license that the unexpired portion of the term for which the license was issued bears to the whole term.

Regarding power to revoke license when business becomes a nuisance, see sec. 3867, et seq. See Wallace v. City of Reno, 27 Nev. 71 (63 L. R. A. 337, 103 A. S. 747, 73 P. 528).

An Act prohibiting certain persons from remaining in saloons, and fixing penalties for the violation thereof.

Approved March 22, 1911, 314

6842. Minor barred from places where liquor is sold.

SECTION 1. Any proprietor, keeper or manager of a saloon, or resort where spirituous, malt, or fermented liquors or wines are sold, who shall, knowingly, allow or permit any person under the age of twenty-one years to remain therein, is guilty of a misdemeanor, and shall be punished by a fine of not less than $25 nor more than $100.

See subdivision 11 of sec. 6619, and sec. 6842.

An Act concerning the liabilities of proprietors and keepers of saloons and gambling houses.

Approved March 19, 1897, 111

6843. Liable for damages.

SECTION 1. Any proprietor or keeper of a saloon, gambling house or resort where liquors are sold, who shall sell or give to any minor any spirituous or malt liquors, or who shall permit any minor to engage in any game in his saloon, gambling house or resort where liquors are sold, or who shall permit any minor to lounge or remain therein, shall be liable to the parent or guardian of such minor in damages, which may be collected by a civil action in a sum not less than fifty nor more than one thousand dollars.

An Act relative to the connections of main wires and pipes of electric light and water companies, or corporations, to residences or buildings.

Approved March 9, 1903, 64

6844. Unlawful to refuse to connect buildings with wires or pipes.

SECTION 1. It shall be unlawful for any superintendent or manager, or

person in control of any electric light or water company or corporation to refuse to connect main wires or pipes to residences or buildings of any description. When the owner or person occupying said buildings has had wires or pipes placed in such residence or buildings placed to the end or side of the land on which such residences or buildings are located, by any competent person; *provided*, that the main pipe or wire is at the time of such request within five hundred feet of the land on which such buildings or residences are located, then said electric light or water company or corporation shall place main pipe or wires at their own expense to the end or side of the land on which such building or residences are located, and when such owner or person occupying such building or residence offer to pay said superintendent or manager or person in control of such electric light or water company or corporation a reasonable amount for such connection or connections; *provided*, that all wiring for electric lights shall be done in accordance with the rules and regulations of the National Fire Underwriters' Association.

6845. Not to apply to private companies.

SEC. 2. Nothing in section 1 of this act shall apply to any electric light or water company or corporation which uses the lights or water furnished by them for their own personal use, or which is not in the business of selling water or light.

6846. Liability for refusal.

SEC. 3. Any superintendent or manager or person in control of any electric light or water company or corporation refusing to comply with section 1 of this act by refusing to make such connection or connections or furnish water or light within fifteen days from the time such connections are asked for, can be sued for damages by the owners or person occupying such residence or buildings to which such refusal is made and such owners or person shall be granted damages to the sum of not less than one hundred ($100) or more than three hundred dollars ($300) for each offense.

An Act to prevent slavery or involuntary servitude, unless for the punishment of crime, in the State of Nevada, and to enforce the provisions of section 17 of article 1 of the constitution of the State of Nevada.

Approved March 8, 1879. 105

WHEREAS, All Chinese who come to this coast arrive here under a contract to labor for a term of years, and are bound by such contract, not only by the superstitions of their peculiar religions, but by leaving their blood relations, fathers, mothers, sisters, brothers, or cousins, as hostages in China for the fulfilment of their part of the contract; and, whereas, such slave labor and involuntary servitude is opposed to the genius of our institutions, opposed to the prevailing spirit of the age, as well as to humanity and Christianity, and degrades the dignity of labor, which is the foundation of republican institutions; and, whereas, section 17 of article 1 of the constitution of the State of Nevada reads as follows: "Neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this state"; therefore,

6847. Involuntary servitude.

SECTION 1. The immigration to this state of all slaves and other people bound by contract to involuntary servitude for a term of years is hereby prohibited.

Slavery prohibited except for crime, U. S. Const., sec. 183; State Const., sec. 246.

6848. Collection of wages.

SEC. 2. It shall be unlawful for any company, person or persons, to collect the wages or compensation for the labor of the persons described in the first section of this act.

6849. To pay wages, unlawful.

SEC. 3. It shall be unlawful for any corporation, company, person or persons, to pay to any owner, or agent of the owner of any such persons mentioned in section 1 of this act, any wages or compensation for the labor of such slaves or persons so bound by said contract to involuntary servitude.

6850. Penalty.

SEC. 4. Any violation of any of the provisions of this act shall be deemed a misdemeanor, and shall be punished by a fine of not less than three hundred dollars, nor more than one thousand dollars, or by imprisonment in the county jail for a term of not less than three months or more than six months, or by both such fine and imprisonment.

CRIMINAL PRACTICE

General act regulating criminal practice, sections 6851–7529.

Act to prohibit the sale of ardent spirits to Indians, making Indians competent witnesses, section 7530, 7531.

Act to detect and punish incendiaries, sections 7532–7539.

Act to provide for the payment of attorneys appointed by the court to defend in criminal cases, sections 7540, 7541.

Act creating coroner districts, making justices of the peace ex officio coroners, and defining their duties, sections 7542–7560.

Arrest in civil cases in district court, section 5087, et seq.
Arrest in civil cases in justice's court, section 5744, et seq.
Arrest in criminal cases, sections 6930–6951, et seq.
Civil practice act, sections 4943–5821.
Contempts, sections 5394–5407.
Contempts punishable in justice's courts, sections 5794–5798.
Crimes and punishments, sections 6266–6850.
Crimes under other titles, schedule of, section 6266.
District court has jurisdiction of criminal cases appealed from justice's court, sections 4840, 4848.
Grand juries under jurisdiction of district court, section 4848.
Habeas corpus, sections 6226–6265.
Indictment found and triable in district court, section 4848.
Judge of municipal or recorder's court as committing magistrate, section 4848.
Jurisdiction of public offenses, supreme court, sections 319, 4832, 4834; district courts, sections 321, 4840, 4848; justices' courts, sections 323, 4851; municipal or recorder's court, sections 316, 324, 4854; committing magistrates, section 6927, et seq.
Juvenile court law under jurisdiction of district court, section 729, et seq.
Prosecution and expenses of offenses by persons in or escaping from state prison, section 6820.
Trial and sentence for crimes committed by imprisoned person, sections 6818, 6819.
Witness fees in criminal cases not allowed, section 2000.
Allowed: Clark County, Stats. 1909, p. 128, and Stats. 1907, p. 150.
Elko, Esmeralda, Eureka, Humboldt, and Mineral Counties, Stats. 1911, p. 361.
Lander County, Stats. 1909, p. 78.
Lincoln County, Stats. 1907, p. 150.
Nye County, Stats. 1909, p. 158.
White Pine County, Stats. 1909, p. 168.

CONSTITUTIONAL PROVISIONS

Accused not to be compelled to be witness against himself, section 237; U. S. Const., section 175.
Appeal, legislature may prescribe methods, section 323.
Bail, excessive not to be required, section 235; U. S. Const., section 178.
Bail to be allowed, except when, section 236.
Bill of attainder not to be passed, section 244.
Charge to jury, how to be made, section 327.
Civil process suspended on election day, section 253.
Concurrent jurisdiction of district and justices' courts, section 323.

Counsel, right of accused to have, section 237; U. S. Const., section 178.
Court may state testimony and declare the law, section 327.
Due process and equal protection of law guaranteed, section 237; U. S. Const., sections 175, 185.
Extradition, U. S. Const., section 161.
Fines, pledged to educational purposes, section 355.
Fines, excessive not to be imposed, section 235; U. S. Const., section 178.
Fines, governor may suspend collection of not exceeding sixty days, section 306.
Fines, remission of, section 307.
Freedom of speech and press, section 238.
Habeas corpus not to be suspended except in case of rebellion or invasion, section 234; U. S. Const., section 130.
Impeachment, chief justice and associate justices liable to, sections 335, 336.
Impeachment, district judges subject to, sections 335, 336.
Impeachment, powers of, conferred upon the legislature, section 334.
Impeachment proceedings in senate, chief justice to preside over, section 334.
Impeachments, sections 335, 336.
Impeachments, conviction on not pardonable, section 307.
Imprisonment for debt prohibited, except for fraud, libel or slander, section 243.
Indictment, trial by secured (resolution for amendment of state constitution pending), section 237; U. S. Const., section 175.
Information, resolutions of legislatures 1909, 1911, favoring amendment of constitution to allow prosecutions by, section 237.
Jeopardy, no person to be twice put in, section 237; U. S. Const., section 175.
Judges not to charge juries regarding matters of fact, but may state testimony and declare the law, section 327.
Judicial power of state in supreme court, district courts, justices of the peace and municipal courts, section 316.
Judicial power of the United States, U. S. Const., sections 119, 154.
Juries, how to be charged, section 327.
Juries, persons convicted of crime, or not electors, not to serve on, section 285.
Jurisdiction of public offenses, supreme court, section 319; district courts, section 321; justices' courts, section 323; municipal or recorder's court, sections 316, 324.
Jury trial secured, section 232; U. S. Const., sections 156, 176.
Libel, in civil and criminal actions for, truth may be given in evidence, section 238.
Libel, if true and justifiable jury may acquit, section 238.
Liberty guaranteed, section 230.
Militia fine, imprisonment for in time of peace prohibited, section 243.
Pardons, section 307.
Right of assembly and petition, section 238.
Search and seizure not to take place without oath and probable cause, section 247; U. S. Const., section 174.
Slavery prohibited except for crime, section 246; U. S. Const., section 183.
Style of process, "The State of Nevada," section 328.
Testimony, court may state, section 327.
Treason defined, two witnesses necessary, section 248; U. S. Const., section 157.
Treason, governor may suspend sentence until convening of legislature, section 306.
Treason not pardonable, section 307.

An Act to regulate proceedings in criminal cases in this state and to repeal all other acts in relation thereto.

Approved March 17, 1911; effective January 1, 1912

Chapter 1—Preliminary provisions, sections 6851–6858.
Chapter 2—Lawful resistance, sections 6859–6861.
Chapter 3—Intervention of the officers of justice, sections 6862, 6863.
Chapter 4—Security to keep the peace, sections 6864–6877.
Chapter 5—Impeachments, sections 6878–6893.
Chapter 6—Removal of civil officers otherwise than by impeachment, sections 6894–6907.
Chapter 7—Local jurisdiction of public offenses, sections 6908–6920.
Chapter 8—Time of commencing criminal actions, sections 6921–6926.
Chapter 9—Magistrates and complaint, sections 6927–6929.
Chapter 10—Warrant of arrest, release on bail, sections 6930–6950.
Chapter 11—Arrest, by whom and how made, sections 6951–6967.
Chapter 12—Retaking prisoner after escape or rescue, sections 6968, 6969.
Chapter 13—Examination, discharge of, or holding defendant to answer, sections 6970–6998.

Chapter 14—Prosecution by indictment or accusation, sections 6999–7001.
Chapter 15—Formation of grand jury, sections 7002–7019.
Chapter 16—Powers and duties of grand jury, sections 7020–7033.
Chapter 17—Presentment and proceedings thereon, bench warrant, sections 7034–7041.
Chapter 18—The indictment—Finding, presentation and filing, sections 7042–7047.
Chapter 19—Rules of pleading and form of the indictment, sections 7048–7073.
Chapter 20—Bench warrant and bail, sections 7074–7089.
Chapter 21—Setting aside the indictment, sections 7090–7094.
Chapter 22—Demurrer, sections 7095–7105.
Chapter 23—The plea, sections 7106–7114.
Chapter 24—Removal of action before trial, sections 7115–7120.
Chapter 25—Mode of trial, sections 7121–7123.
Chapter 26—Formation of trial jury—Calendar, sections 7124–7127.
Chapter 27—Postponement of trial, section 7128.
Chapter 28—Challenging the jury, sections 7129–7158.
Chapter 29—The trial, sections 7159–7203.
Chapter 30—Conduct of jury, sections 7204–7212.
Chapter 31—The verdict, sections 7213–7226.
Chapter 32—Exceptions, sections 7227–7231.
Chapter 33—New trial, sections 7232–7237.
Chapter 34—Arrest of judgment, sections 7238–7241.
Chapter 35—The judgment, sections 7242–7263.
Chapter 36—The execution, sections 7264–7282.
Chapter 37—Bill of exceptions, appeal without, on error in record, sections 7283–7285.
Chapter 38—Appeal, sections 7286–7307.
Chapter 39—Bail, sections 7308–7347.
Chapter 40—Compelling attendance of witnesses, sections 7348–7364.
Chapter 41—Examination of witnesses on commission, sections 7365–7384.
Chapter 42—Inquiry into sanity of defendant, sections 7385–7394.
Chapter 43—Dismissal of action, sections 7395–7401.
Chapter 44—Proceedings against corporations, sections 7402–7410.
Chapter 45—Compromising public offenses, sections 7411–7413.
Chapter 46—Entitling affidavits, section 7414.
Chapter 47—Search warrants, search of persons charged with felony, sections 7415–7434.
Chapter 48—Fugitives from justice, sections 7435–7444.
Chapter 49—Disposal of property stolen or embezzled, sections 7445–7450.
Chapter 50—Witnesses, sections 7451–7456.
Chapter 51—General provisions, sections 7457–7469.
Chapter 52—Justices' courts, sections 7470–7524.
Chapter 53—Repeal and continuance of certain acts relating to criminal practice, sections 7525–7529.

CHAPTER 1

PRELIMINARY PROVISIONS

6851. Criminal action defined.
6852. Criminal action, how prosecuted.
6853. Defendant defined.
6854. Public offenses, how prosecuted.
6855. Criminal action, rights of defendant.
6856. Second prosecution for same offense prohibited.
6857. Witness against self — Unnecessary restraint.
6858. Conviction must be based on verdict or judgment.

6851. Criminal action defined.

SECTION 1. The proceedings by which a party charged with a public offense is accused and brought to trial and punishment, shall be known as a criminal action.

Kerr, Pen. C., 683.

Cited generally, State v. Millain, 4 Nev. 464; State v. Somers, 9 Nev. 399; State v. McClear, 11 Nev. 42, 43; State v. Johnson, 11 Nev. 148.

Cited, State v. Borowsky, 11 Nev. 124; Egan v. Jones, 21 Nev. 436 (32 P. 929); Bell v. District Court, 28 Nev. 299, 163 A. S. 854, 1 L. R. A. (N. S.) 843, 81 P. 875.

6852. Criminal action, how prosecuted.

SEC. 2. A criminal action is prosecuted in the name of The State of Nevada, as plaintiff.

Kerr, Pen. C., 684.

6853. Defendant defined.

SEC. 3. The party prosecuted in a criminal action is designated as the defendant.

Kerr, Pen. C., 685.

6854. Public offenses, how prosecuted.

SEC. 4. Every public offense must be prosecuted by indictment, except:

1. Where proceedings are had for the removal of a civil officer;

2. Offenses arising in the militia when in actual service in time of war, or which this state may keep, with the consent of Congress, in time of peace;

3. Offenses tried in justices' courts.

Kerr, Pen. C., 682.

Legislative resolution for amendment of constitution so as to allow prosecutions by information, pending, sec. 237.

6855. Criminal action, rights of defendant.

SEC. 5. 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 he may appear and defend in person or 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, except that where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down in writing, and subscribed by the witness in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the state, who is unable to give security for his appearance, has been taken conditionally, in the like manner, in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine the witness, the deposition of such witness may be read upon its being satisfactorily shown to the court that he is dead or insane, or cannot, with due diligence, be found within the state.

Kerr, Pen. C., 686.

See Const., sec. 237.

Every person held on a criminal charge has the legal right to demand a speedy and impartial trial by jury. Ex Parte Stanley, 4 Nev. 113, 116–119.

The speedy trial guaranteed every person accused of crime is a trial as soon as possible after indictment found, without depriving the prosecution of a reasonable time for preparation. Idem.

Cited, Ex Parte Maxwell, 11 Nev. 433.

6856. Second prosecution for same offense prohibited.

SEC. 6. No person can be subject to a second prosecution for a public offense for which he has once been prosecuted and duly convicted or acquitted.

Kerr, Pen. C., 687.

Where one charged with murder is convicted of involuntary manslaughter, and on appeal a new trial is granted him because of a mistrial in the first instance, the reversal and remanding sets aside the result of the former trial and leaves accused in the same position as if he had never been tried. In re Somers, 31 Nev. 531, 536 (135 A. S. 700, 103 P. 1073).

Under such circumstances accused is estopped from pleading rights under Const., sec. 237, ante, or under this section, and waives his rights thereunder. Idem.

6857. Witness against self—Unnecessary restraint.

SEC. 7. No person can be compelled, in a criminal action, to be a witness against himself, nor shall a person charged with a public offense be sub-

jected, before conviction, to any more restraint than is necessary for his detention to answer the charge.

Kerr, Pen. C., 688.

See sec. 7161; U. S. Const., sec. 175; State Const., sec. 237.
See State v. Ah Chuey, 14 Nev. 83 (33 A. R. 530); State v. Petty, 32 Nev. 384.

6858. Conviction must be based on verdict or judgment.

SEC. 8. No person can be convicted of a public offense, tried by indictment, unless by a verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or when he refuses to plead after judgment against him upon a demurrer to the indictment.

Kerr, Pen. C., 689.

Right of trial by jury secured, U. S. Const., secs. 156, 176; State Const., sec. 232.

CHAPTER 2

OF LAWFUL RESISTANCE

6859. Lawful resistance, by whom made.

SEC. 9. Lawful resistance to the commission of a public offense may be made:

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

Kerr, Pen. C., 692.

6860. Resistance to prevent offense, by whom made.

SEC. 10. 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.

Kerr, Pen. C., 693.

6861. Others may resist, when.

SEC. 11. Any other person, in aid or defense of a person about to be injured, may make resistance sufficient to prevent the offense.

Kerr, Pen. C., 694.

Where one believes as a reasonable man that another who has been assaulted is in danger of losing his life, or of suffering great bodily harm, he has the same right to defend such other as the latter would have to defend himself. State v. Hennessy, 29 Nev. 320, 340 (90 P. 221).

CHAPTER 3

OF THE INTERVENTION OF OFFICERS OF JUSTICE

6862. Intervention of officers, in what cases.

SEC. 12. Public offenses may be prevented by the intervention of the officers of justice:

1. By requiring surety to keep the peace;
2. By forming a police in cities and towns, and requiring their attendance in exposed places;
3. By suppressing riots.

Kerr, Pen. C., 697.

6863. Intervention by persons aiding officers.

SEC. 13. Whenever 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.

Kerr, Pen. C., 698.
See secs. 6361, 6606.

CHAPTER 4

SECURITY TO KEEP THE PEACE

6864. Complaint for threatening.
6865. Examination, depositions.
6866. Magistrate to issue warrant of arrest.
6867. Hearing of evidence.
6868. Complaint dismissed, when.
6869. Security to keep the peace.
6870. Giving or refusing to give bond, effect.
6871. Person committed may give bail later.
6872. Bond to be filed.
6873. Breach of peace before magistrate, when security required.
6874. Bond to keep the peace, when broken.
6875. Bond to keep the peace, when and how prosecuted.
6876. Breach of bond, evidence.
6877. No other security required, chapter governs.

6864. Complaint for threatening.

SEC. 14. A complaint may be laid before any magistrate that a person has threatened to commit an offense against the person or property of another.

Kerr, Pen. C., 701.

6865. Examinations, depositions.

SEC. 15. When the complaint is laid before the magistrate, he must examine, on oath, the complainant and any witnesses he may produce and must take their depositions in writing, and cause them to be subscribed by the parties making them.

Kerr, Pen. C., 702.

6866. Magistrate to issue warrant of arrest.

SEC. 16. If it appears from the deposition that there is just reason to fear the commission of the offense threatened by the person so complained of, the magistrate must issue a warrant directed generally to the sheriff of the county, or any constable, marshal, or any policeman in the state, reciting the substance of the complaint, and commanding the officer forthwith to arrest the person complained of, and bring him before the magistrate.

Kerr, Pen. C., 703.

6867. Hearing of evidence.

SEC. 17. When the person complained of is brought before the magistrate, if the charge is controverted, the magistrate must take testimony in relation thereto. The evidence must be reduced to writing, and subscribed by the witnesses.

Kerr, Pen. C., 704.

6868. Complaint dismissed, when.

SEC. 18. If it appears that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged.

Kerr, Pen. C., 705.

6869. Security to keep the peace.

SEC. 19. If, however, there is a just reason to fear the commission of the offense, the person complained of may be required to enter into a bond, in such sum, not exceeding five thousand dollars, as the magistrate may direct, with one or more sufficient sureties, to keep the peace towards the people of this state, and particularly towards the complainant. The bond shall be valid and binding for six months, and may, upon the renewal of the complaint, be extended for a longer period or a new bond may be required.

Kerr, Pen. C., 706.

6870. Giving or refusing to give bond, effect.

SEC. 20. If the bond required by the last section is given, the party complained of shall be discharged. If he does not give it, the magistrate must

commit him to prison, specifying in the warrant the requirement to give security, the amount thereof, and the omission to pay the same.

Kerr, Pen. C., 707.

6871. Person committed may give bail later.

SEC. 21. If the person complained of is committed for not giving the bond required, he may be discharged by any magistrate upon giving the same.

Kerr, Pen. C., 708.

6872. Bond to be filed.

SEC. 22. A bond given, as provided in section 19, must be filed by the magistrate in the office of the clerk of the county.

Kerr, Pen. C., 709.

6873. Breach of peace before magistrate, when security required.

SEC. 23. Any person who, in the presence of a court or magistrate, assaults or threatens to assault another or to commit any offense against his person or property, or who shall contend with another with angry words, may be ordered by the court or magistrate to give security, as provided in section 19, or if he refuses to do so, he may be committed as provided in section 20.

Kerr, Pen. C., 710.

6874. Bond to keep the peace, when broken.

SEC. 24. A bond to keep the peace must be deemed broken when the person complained against is convicted of a breach of the peace.

Kerr, Pen. C., 711.

6875. Bond to keep the peace, when and how prosecuted.

SEC. 25. Upon the district attorney's producing evidence of such conviction to the district court of the county, the court must order the bond to be prosecuted, and the district attorney must thereupon commence an action on the same, in the name of the state.

Kerr, Pen. C., 712.

6876. Breach of bond, evidence.

SEC. 26. In the action, the offense stated in the record of conviction, must be alleged as the breach of the bond, and such record is conclusive evidence of the breach.

Kerr, Pen. C., 713.

6877. No other security required, chapter governs.

SEC. 27. No security to keep the peace or to be of good behavior, is required except as herein prescribed.

Kerr, Pen. C., 714.

CHAPTER 5

OF IMPEACHMENTS

6878. Impeachment, officers liable to.
6879. Impeachment, how tried.
6880. Articles of impeachment, to whom delivered.
6881. Date of hearing, notice to defendant.
6882. Service must be personal or by publication.
6883. Impeachment, when defendant does not appear.
6884. Answer or demurrer of defendant after appearance.
6885. If objection overruled, defendant must answer.
6886. Senate to be sworn.
6887. Two-thirds to convict, when must be acquitted.
6888. Judgment, form, how pronounced.
6889. Judgment, extent and nature of.
6890. Judgment of suspension, effect of.
6891. Officer suspended during hearing, office filled by governor.
6892. When lieutenant-governor is impeached.
6893. Indictment not barred.

6878. Impeachment, officers liable to.

SEC. 28. Any state officer, created by state law, shall be liable for impeachment for any misdemeanor in office.

Kerr, Pen. C., 737.

6879. Impeachment, how tried.

SEC. 29. All impeachments must be tried by the senate; when sitting for that purpose, the senators shall be upon oath or affirmation.

Kerr, Pen. C., 738.

6880. Articles of impeachment, to whom delivered.

SEC. 30. When an officer of the state is impeached by the assembly for a misdemeanor in office, the articles of impeachment must be delivered to the president of the senate.

Kerr, Pen. C., 739.
See Const., sec. 334, et seq.

6881. Date of hearing, notice to defendant.

SEC. 31. The senate must assign a day for hearing the impeachment, and must inform the assembly thereof. The president of the senate must cause a copy of the articles of impeachment, with a notice to appear and answer the same at the time and place appointed, to be served on the defendant, not less than ten days before the day fixed for the hearing.

Kerr, Pen. C., 740.

6882. Service must be personal or by publication.

SEC. 32. The service must be made upon the defendant personally, or if he cannot, upon diligent inquiry, be found within the state, the senate, upon due proof of that fact, may order that publication be made in such manner as they deem proper, of a notice requiring him to appear at a specified time and place, and answer the articles of impeachment.

Kerr, Pen. C., 741.

6883. Impeachment, when defendant does not appear.

SEC. 33. If the defendant does not appear, the senate, upon proof of service or publication as provided in the last two sections, may, of its own motion, or for cause shown, assign another day for hearing the impeachment; or may then, or at any other time which it may appoint, proceed, in the absence of the defendant, to trial and judgment.

Kerr, Pen. C., 742.

6884. Answer or demurrer of defendant after appearance.

SEC. 34. When the defendant appears, he may in writing object to the sufficiency of the articles of impeachment, or he may answer the same by an oral plea of not guilty, which plea must be entered upon the journal, and puts in issue every material allegation of the articles of impeachment.

Kerr, Pen. C., 743.

6885. If objection overruled, defendant must answer.

SEC. 35. If the objection to the sufficiency of the articles of impeachment is not sustained by a majority of the members of the senate, who heard the argument, the defendant must be ordered forthwith to answer the articles of impeachment. If he then pleads guilty, or refuses to plead, the senate must render judgment of conviction against him. If he pleads not guilty, the senate must, at such time as it may appoint, proceed to try the impeachment.

Kerr, Pen. C., 744.

6886. Senate to be sworn.

SEC. 36. At the time and place appointed, and before the senate proceeds

to act on the impeachment, the secretary must administer to the president of the senate, and the president of the senate to each of the members of the senate then present, an oath truly and impartially to hear, try, and determine the impeachment; and no member of the senate can act or vote upon the impeachment, or upon any question arising thereon, without having taken such oath. When such oath has been administered, the senate must proceed to try and determine the impeachment, and may adjourn the trial from time to time.

Kerr, Pen. C., 745.

6887. Two-thirds to convict, when must be acquitted.

SEC. 37. The defendant cannot be convicted on impeachment without the concurrence of two-thirds of the members elected, voting by ayes and noes, and if two-thirds of the members elected do not concur in a conviction he must be acquitted.

Kerr, Pen. C., 746.

6888. Judgment, form, how pronounced.

SEC. 38. After conviction the senate must, at such time as it may appoint, pronounce judgment in the form of a resolution which must be entered upon the journal of the senate. On the adoption of the resolution by a majority of the members present, who voted on the question of acquittal or conviction, it becomes the judgment of the senate.

Kerr, Pen. C., 747, 748.

6889. Judgment, extent and nature of.

SEC. 39. The judgment may be that the defendant be suspended, or that he be removed from office and disqualified to hold any office of honor, trust, or profit under the state.

Kerr, Pen. C., 749.

6890. Judgment of suspension, effect of.

SEC. 40. If the judgment of suspension is given, the defendant during the continuance thereof, is disqualified from receiving the salary, fees, or emoluments of the office.

Kerr, Pen. C., 750.

6891. Officer suspended during hearing, office filled by governor.

SEC. 41. Whenever articles of impeachment against any officer subject to impeachment are presented to the senate, such officer is temporarily suspended from his office, and cannot act in his official capacity until he is acquitted. Upon such suspension of any officer, other than the governor, his office must at once be temporarily filled by an appointment made by the governor, with the advice and consent of the senate, until the acquittal of the party impeached; or, in case of his removal, until the vacancy is filled as provided by law.

Kerr, Pen. C., 751.

6892. When lieutenant-governor is impeached.

SEC. 42. If the lieutenant-governor is impeached, notice of the impeachment must be immediately given to the senate by the assembly, that another president may be chosen.

Kerr, Pen. C., 752.

6893. Indictment not barred.

SEC. 43. If the offense for which the defendant is convicted on impeachment is also the subject of an indictment, the indictment is not barred thereby.

Kerr, Pen. C., 753.

Cited, Egan v. Jones, 21 Nev. 436 (32 P. 929).

CHAPTER 6

OF THE REMOVAL OF CIVIL OFFICERS OTHERWISE THAN BY IMPEACHMENT

6894. Written accusation presented to grand jury.
6895. Statement of offense.
6896. Accusation delivered to district attorney, notice to defendant.
6897. Defendant to appear — Proceedings when defendant fails to appear.
6898. Answer of defendant, how made.
6899. Objection to sufficiency, form of.
6900. Denial of accusations, manner of.
6901. Objection not sustained, defendant must answer forthwith.
6902. Plea, failure to make—Trial, when.
6903. Trial by jury, manner of conducting.
6904. Attendance of witnesses, process.
6905. Judgment, form of.
6906. Appeal, defendant suspended, office may be filled.
6907. Proceedings to remove district attorney.

6894. Written accusation presented to grand jury.

SEC. 44. An accusation in writing against any district, county, township, or municipal officer, for wilful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed.

Kerr, Pen. C., 758.

Every wilful violation of his duty by a public administrator is a misdemeanor, punishable by fine and removal from office. State v. Borowsky, 11 Nev. 119.

It is a "misdemeanor in office" for a public administrator to embezzle money received ex officio after his term of office has expired. Idem.

Secs. 68, 281 of the act of 1861, 435, cited, Bell v. District Court, 28 Nev. 299.

6895. Statement of offense.

SEC. 45. The accusation must state the offense charged in ordinary and concise language, and without repetition.

Kerr, Pen. C., 759.

6896. Accusation delivered to district attorney—Notice to defendant.

SEC. 46. The accusation must be delivered by the foreman of the grand jury to the district attorney of the county, except when he is the officer accused, who must cause a copy thereof to be served upon the defendant, and require, by notice in writing of not less than ten days, that he appear before the district court of the county, at the time mentioned in the notice, and answer the accusation. The original accusation must then be filed with the clerk of the district court.

Kerr, Pen. C., 760.

6897. Defendant to appear—Proceedings when defendant fails to appear.

SEC. 47. The defendant must appear at the time appointed in the notice and answer the accusation, unless for some sufficient cause the court assigns another day for that purpose. If he does not appear, the court may proceed to hear and determine the accusation in his absence.

Kerr, Pen. C., 761.

6898. Answer of defendant, how made.

SEC. 48. 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.

Kerr, Pen. C., 762.

6899. Objection to sufficiency, form of.

SEC. 49. If he objects to the legal sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection.

Kerr, Pen. C., 763.

6900. Denial of accusation, manner of.

SEC. 50. If he denies the truth of the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

Kerr, Pen. C., 764.

6901. Objection not sustained, defendant must answer forthwith.

SEC. 51. If the objection to the sufficiency of the accusation is not sustained, the defendant must answer thereto forthwith.

Kerr, Pen. C., 765.

6902. Plea, failure to make—Trial, when.

SEC. 52. If the defendant pleads guilty, or refuses to answer the accusation, the court must render judgment of conviction against him. If he denies the matters charged, the court must immediately, or at such time as it may appoint, proceed to try the accusation.

Kerr, Pen. C., 766.

6903. Trial by jury, manner of conducting.

SEC. 53. The trial must be by a jury, and conducted in all respects in the same manner as a trial upon an indictment.

Kerr, Pen. C., 767.
See sec. 7129, et seq.

6904. Attendance of witnesses, process.

SEC. 54. The district attorney and the defendant are respectively entitled to such process as may be necessary to enforce the attendance of witnesses as upon a trial upon indictment.

Kerr, Pen. C., 768.

6905. Judgment, form of.

SEC. 55. Upon a conviction the court must immediately, or at such time as it may appoint, pronounce judgment that the defendant be removed from office; but, to warrant a removal, the judgment must be entered upon the minutes and the cause of removal must be assigned therein.

Kerr, Pen. C., 769.

6906. Appeal, defendant suspended, office may be filled.

SEC. 56. From a judgment of removal an appeal may be taken to the supreme court in the same manner as from a judgment in other criminal actions, but until such judgment is reversed the defendant must be suspended from his office. Pending the appeal the office may be filled as in case of vacancy.

Kerr, Pen. C., 770.

6907. Proceedings to remove district attorney.

SEC. 57. The same proceedings may be had on like grounds for the removal of a district attorney, except that the accusation must be delivered to the district judge of the district, who must thereupon appoint some one to act as prosecuting officer in the matter, or place the accusation in the hands of the district attorney of an adjoining county, and require him to conduct the proceedings.

Kerr, Pen. C., 771.
See secs. 2851–2854, 2861–2863.

CHAPTER 7

OF THE LOCAL JURISDICTION OF PUBLIC OFFENSES

6908. Offenses committed in state, jurisdiction of.
6909. Offenses commenced without, but concluded within state, jurisdiction of.
6910. Death by dueling, jurisdiction.
6911. Offense partly in one county, partly in another, jurisdiction.
6912. Offense committed on or near boundary, jurisdiction.
6913. Offense committed on vessels and cars within state, jurisdiction.
6914. Offenses concerning animals ranging in two or more counties, jurisdiction.
6915. Kidnaping and abduction, jurisdiction.
6916. Bigamy and incest, jurisdiction.
6917. Property stolen and moved to another county—Jurisdiction.
6918. Accessory, jurisdiction of.
6919. Conviction or acquittal in another state, bar.
6920. Conviction in another county, bar.

6908. Offenses committed in state, jurisdiction of.

SEC. 58. Every person, whether an inhabitant of this state, or any other state, or of a territory or district of the United States, is liable to punishment by the laws of this state for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States.

Kerr, Pen. C., 777.

A court's jurisdiction in criminal cases extends only to acts which the law declares to be criminal. Ex Parte Rickey, 31 Nev. 82 (100 P. 134, 135 Am. St. Rep. 651). See State v. Mack, 23 Nev. 359 (47 P. 763, 62 A. S. 811); State v. Buckaroo Jack, 30 Nev. 325 (96 P. 497).

6909. Offense commenced without, but concluded within state, jurisdiction of.

SEC. 59. When the commission of a public offense, commenced without the state, is consummated within its boundaries, the defendant is liable to punishment therefor in this state, though he was out of the state at the time of the commission of the offense charged. If he consummated it in this state, through the intervention of an innocent or guilty agent, or any other means proceeding directly from himself, in such case the jurisdiction is [in] the county in which the offense is consummated.

Kerr, Pen. C., 778.

6910. Death by dueling, jurisdiction.

SEC. 60. When an inhabitant or resident of this state, by previous appointment or engagement, fights a duel or is concerned as second therein, out of the jurisdiction of this state, and in the duel a wound is inflicted upon a person, whereof he dies in this state, the jurisdiction of the offense is in the county where the death happens.

Kerr, Pen. C., 779.

6911. Offense partly in one county, partly in another, jurisdiction.

SEC. 61. When a public offense is committed in part in one county and in part in another or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county.

Kerr, Pen. C., 781.

Stolen goods were purchased, paid for, and received in E. County, and were thereafter shipped by him to C. County. It was held that C. County had no jurisdiction of the offense, since the offense of receiving stolen goods is consummated when the goods are received with the unlawful intent specified in the statute, and the subsequent transportation of the goods into another county to reap the fruits of the crime is not an act essential to its consummation, and if the effect of the transportation of the goods to C. County constituted the intent to deprive the owner of the property, the act of receiving was not accompanied by the wrongful intent necessary to constitute the crime. State v. Pray, 30 Nev. 207, 222, 224 (94 P. 218).

6912. Offense committed on or near boundary, jurisdiction.

SEC. 62. When an offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county.

Kerr, Pen. C., 782.

6913. Offense committed on vessels and cars within state, jurisdiction.

SEC. 63. When an offense is committed in this state, on board a vessel navigating a river, slough, 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; and when the offense is committed in this state, on a railroad train, car, stage or other public conveyance, prosecuting its trip, the jurisdiction is in any county through which the train, car, stage or other public con-

veyance passes in the course of its trip, or in the county where the trip terminates.

Kerr, Pen. C., 783.

6914. Offenses concerning animals ranging in two or more counties, jurisdiction.

SEC. 64. When a public offense concerns any neat cattle, horse, mule or other animal running at large upon any range which extends into more than one county of this state, such offense may be prosecuted in either of said counties, and upon the trial of any such offense, proof that such animal is the property of the owner, or person occupying the said range, and was at the time the offense was committed running at large upon the range, shall be prima facie evidence that said offense was committed within the jurisdiction of the court.

6915. Kidnaping and abduction, jurisdiction.

SEC. 65. The jurisdiction of an indictment for the crime of forcibly taking, or arresting any man, woman, or child in this state and carrying him or her into another county, state or territory; or for forcibly taking or arresting any person or persons whomsoever, with a design to take him or her out of this state, without having established a claim according to the laws of the United States; or for hiring, persuading, enticing, decoying, or seducing by false promises, misrepresentations, and the like, any Negro, mulatto, Indian, or colored person to go out of this state, or to be taken or removed therefrom for the purpose and with the intent to sell such Negro, mulatto, Indian, or colored person into slavery or involuntary servitude, or otherwise to employ him or her for his or her own use, or the use of another, without the free will and consent of such Negro, mulatto, Indian, or colored person, shall be 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 prosecution of the offense, have been brought, or in which an act shall [be] done by the offender in instigating, procuring, promoting, aiding in, or being accessory to the commission of the offense, or in abetting the parties therein concerned.

Kerr, Pen. C., 784.

6916. Bigamy and incest, jurisdiction.

SEC. 66. When the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county.

Kerr, Pen. C., 785.

6917. Property stolen and moved to another county—Jurisdiction.

SEC. 67. 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 at any time before the conviction of the defendant in the latter, he is indicted in the former county, the sheriff of the latter county must, upon demand, deliver him to the sheriff of the former.

Kerr, Pen. C., 786.

A person charged with larceny of cattle may be indicted and tried for the offense in any county through which he drove them, as well as in the county where they were stolen or into which they were driven. State v. Brown, 8 Nev. 208, 211.

A person stealing goods in one county and carrying them into other counties is considered guilty of the crime and may be indicted and convicted in any of such counties; because every act of the thief in the removal of the property and keeping it from the possession of the owner is, in contemplation of law, an offense. Idem.

If property feloniously taken in one county be removed by the thief into another, the jurisdiction of the offense may be in either; but an indictment in the latter county must allege the offense to have been committed in such county or that the bring-

ing of the property into such county was felonious; and if it do not, it will not be sufficient. Idem.

Venue for crime of receiving stolen goods in county where they are received. State v. Pray, 30 Nev. 206, 221 (94 P. 218).

6918. Accessory, jurisdiction of.

SEC. 68. In the case of an accessory in the commission of a public offense, the jurisdiction is in either the county where the offense of the accessory was committed, or where the principal offense was committed.

Kerr, Pen. C., 791.

Under the act of 1861, 435, it was held: There seems to be an incongruity between section 91 of said act, which requires an accessory before the fact to be tried where his offense is committed, and section 252, which places him on the same plane with the principal, but the former clearly does not apply in a case where the acts of the accessory are done out of the state. State v. Chapman, 6 Nev. 321, 329.

Application of above section discussed. State v. Hamilton, 13 Nev. 390–392.

6919. Conviction or acquittal in another state, bar.

SEC. 69. When an act charged as a public offense is within the jurisdiction of another state, territory or country, as well as of this state, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this state.

Kerr, Pen. C., 793.

6920. Conviction in another county, bar.

SEC. 70. When an offense is within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county is a bar to the prosecution or indictment therefor in another.

Kerr, Pen. C., 794.

CHAPTER 8

OF THE TIME OF COMMENCING CRIMINAL ACTIONS

6921. No limitation to begin prosecution for murder.
6922. Indictment for theft and other felonies, when may be found.
6923. Misdemeanor, limit for finding indictment.
6924. Secret offenses, limit for finding indictment.
6925. Indictment, legally found when presented, received and filed.
6926. Limitation, when to commence.

6921. No limitation to begin prosecution for murder.

SEC. 71. There is no limitation of the time within which a prosecution for murder must be commenced. It may be commenced at any time after the death of the person killed.

Kerr, Pen. C., 799.

6922. Indictment for theft and other felonies, when may be found.

SEC. 72. An indictment for theft, robbery, burglary, forgery, arson or rape must be found within four years after the commission of the offense. An indictment for any other felony than murder, theft, robbery, burglary, forgery, arson or rape must be found within three years after the commission of the offense.

Kerr, Pen. C., 800.

6923. Misdemeanor, limit for finding indictment.

SEC. 73. An indictment for any misdemeanor must be found within one year after its commission.

Kerr, Pen. C., 801.

6924. Secret offenses, limit for finding indictment.

SEC. 74. If a felony or misdemeanor is committed in a secret manner, an indictment for the same must be found within the periods of limitation prescribed in the two last preceding sections after the discovery of the offense; *provided*, that if any indictment found within the time thus prescribed is defective so that no judgment can be given thereon, another prosecution

may be instituted for the same offense within six months after the first is abandoned.

6925. Indictment, legally found when presented, received and filed.

SEC. 75. An indictment is found, within the meaning of this chapter, when it is presented by the grand jury in open court, and there received and filed.

Kerr, Pen. C., 803.

6926. Limitation, when to commence.

SEC. 76. In offenses committed before the passage of this act, indictments may be found at any time within the limitation hereinabove provided, and the time of limitation must commence after the passage of this act.

CHAPTER 9

MAGISTRATES

6927. Complaint defined.

SEC. 77. The complaint is the allegation made to a magistrate that a person has been guilty of some public offense.

Kerr, Pen. C., 806.
Complaint on information and belief. Ex Parte Buncel, 25 Nev. 426 (62 P. 207).
Regarding signature to complaint by mark, see sec. 7458, and State v. Depoister, 21 Nev. 107 (25 P. 1000).

6928. Magistrate defined.

SEC. 78. A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense.

Kerr, Pen. C., 807.
Cited, Ex Parte White, 15 Nev. 147 (37 A. R. 466).

6929. Who are magistrates.

SEC. 79. The following persons are magistrates:

1. The justices of the supreme court.
2. The judges of the district courts.
3. The justices of the peace.
4. Police judges and others, upon whom are conferred by law the powers of a justice of the peace in criminal cases.

Kerr, Pen. C., 808.
Regarding jurisdiction of justices of the peace, see sec. 4857.
See sec. 7461.

CHAPTER 10

WARRANT OF ARREST, RELEASE ON BAIL

6930. Examination of complainant and witnesses, issuance of warrant.
6931. Deposition, what to contain.
6932. Warrant, when to issue.
6933. Warrant of arrest, form of.
6934. Arrest under warrant — Bail—Provision for new warrant.
6935. Warrant to specify, what.
6936. Warrant, how executed.
6937. Peace officers.
6938. Warrant, to whom directed.
6939. Executed in other county, how.
6940. Return and bail when arrest is made in another county — Failure of defendant to answer—Forfeiture of bail—Powers of magistrates.
6941. Form of recognizance.
6942. Qualification of sureties.
6943. Classification of bail; discharge of defendant.
6944. If bail not given, delivery of defendant and warrant.
6945. When other magistrate may act.
6946. Defendant to be taken before magistrate without delay.
6947. Before another magistrate, proceedings.
6948. Offenses triable in another county, proceedings.
6949. Duty of officer and magistrate.
6950. Admission to bail in misdemeanor—Duty of officer.

6930. Examination of complainant and witnesses, issuance of a warrant.

SEC. 80. When a complaint is laid before a magistrate of the commission of a public offense triable within the county, he must examine on oath the

complainant or prosecutor and any witness he may produce, and may require their depositions to be taken, reduced to writing and subscribed by the parties making them if he deems it advisable; *provided*, if a complaint by proper affidavit, setting forth the nature of the charge, and the facts within the knowledge, information, or belief of the party making the same, is filed with the magistrate, and it sufficiently appears therefrom that an offense has been committed by some person known or unknown to the affiant, triable within the county, the magistrate may issue a warrant of arrest.

Kerr, Pen. C., 811.

An affidavit charging a person with the crime of arson on information and belief of the affiant and stating the facts constituting the offense, is sufficient to authorize the issuance of a warrant. Ex Parte Buncel, 25 Nev. 426, 427 (62 P. 207).

6931. Deposition, what to contain.

SEC. 81. The deposition must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant.

Kerr, Pen. C., 812.

6932. Warrant, when to issue.

SEC. 82. If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he shall issue a warrant of arrest.

Kerr, Pen. C., 813.

6933. Warrant of arrest, form of.

SEC. 83. A warrant of arrest is an order in writing in the name of the State of Nevada, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form:

County of_____. The State of Nevada, to any sheriff, constable, marshal, policeman, or peace officer in this state: A complaint, upon oath, has been this day laid before me by A. B., that the crime of (designate it) has been committed, and accusing C. D. thereof; you are therefore commanded forthwith to arrest the above-named C. D. and bring him before me at (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county. Dated at_____, this _____day of_____, 19__.

Kerr, Pen. C., 814.

6934. Arrest under warrant—Bail—Provision for new warrant.

SEC. 84. The defendant, when arrested under a warrant for an offense not bailable, must be held in custody by the sheriff of the county in which the complaint is filed, unless admitted to bail after an examination upon a writ of habeas corpus; but if the offense is bailable, there must be added to the body of the warrant 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, or any adjoining county, that he may give bail to answer to the charge"; and the magistrate upon directing it to issue, shall fix the amount of bail, and an indorsement shall be made thereon and signed by the magistrate, to the following effect: "The defendant is to be admitted to bail in the sum of_____dollars (designating the amount fixed by the court)."

Kerr, Pen. C., 982, 1284–1286.

Regarding cases in which bail must be allowed, see Const., sec. 236.

6935. Warrant to specify, what.

SEC. 85. The warrant must specify the name of the defendant; if it be unknown to the magistrate, the defendant may be designated therein by any

name. It must also state the date of its issuance, and the county, city, or town where it was issued, and be signed by the magistrate with his name of office.

Kerr, Pen. C., 815.

6936. Warrant, how executed.

SEC. 86. The warrant must be directed to, and executed by, a peace officer.

Kerr, Pen. C., 816.

Service of process on land ceded to the United States. State v. Mack, 23 Nev. 359 (62 Am. St. Rep. 811, 47 P. 763).

6937. Peace officers.

SEC. 87. Peace officers are the bailiff of the supreme court, sheriffs of counties, constables, members of the state police, state detective, marshals, and policemen of cities and towns, respectively.

Kerr, Pen. C., 817.

See sec. 7462.

6938. Warrant, to whom directed.

SEC. 88. If a warrant be issued by a justice of the supreme court or district judge, it may be directed generally to any or all peace officers designated in the preceding section, and may be executed in any part of the state by any of those officers to whom it may be delivered.

Kerr, Pen. C., 818.

6939. Executed in other county, how.

SEC. 89. If a warrant is issued by any other magistrate, it may be directed generally to any sheriff, constable, marshal, policeman, or other peace officer in the county in which it is issued, and may be executed by such officer in any part of the state, or if defendant be in another county it may be executed by any peace officer in the state.

Kerr, Pen. C., 819; Mont. P. C., 1604; N. Dak., 7897.

6940. Return and bail when arrest is made in another county—Failure of defendant to answer—Forfeiture of bail—Powers of magistrates.

SEC. 90. If the offense charged in the warrant is bailable and the defendant is arrested in another county, the officer must, upon being required so to do by the defendant, take him before the most convenient magistrate in that or any adjoining county, who must admit the defendant to bail in the amount fixed in or indorsed on the warrant, and take bail from him accordingly, naming therein a time, not less than ten days nor more than twenty days from the date of taking such bail, for the defendant to appear before the magistrate who issued the warrant, and in case of the death, absence or inability to act of such magistrate, for the defendant to appear, not later than five days after the time so named, before the nearest and most accessible magistrate in the county in which the warrant was issued, to answer the charge and obey all orders which may be made by any magistrate or court before which the case may be pending or prosecuted. Any magistrate, other than the one issuing the warrant, before whom the defendant may so appear, when the magistrate issuing the warrrant is absent or unable to act, shall be entitled to receive and to require the delivery to him of the original complaint, warrant, return and all papers in the case, and shall have jurisdiction and power to hear and determine the case the same as if the warrant of arrest had been originally issued by him, or to order the case transferred for determination to some more convenient magistrate, or in the absence of the papers to file a new complaint and issue a new warrant and to proceed as if the case had been originally presented to him. If the defendant has been discharged on bail, or has deposited money instead thereof, and fails to appear and answer before the magistrate who issued the warrant at the time designated for his appear-

ance by the magistrate taking the bail, or if in case of the death, absence, or inability to act of such magistrate the defendant fails to appear and answer within five days after that time before the nearest or most accessible magistrate in the county in which the warrant was issued, or fails to appear and answer the charge in whatever court or before whatever magistrate it may be prosecuted, or before which he may be required to appear by law, or fails to render himself amenable at all times to the orders and process of the court and the requirements of the law, or fails to appear for judgment or to render himself in execution thereof, he shall forfeit the bail so given, and any money deposited instead thereof, and be subject to rearrest and prosecution for the offense charged upon the same or a new warrant issued by any magistrate who had power to issue the warrant in the first instance.

Kerr, Pen. C., 821–829.

A person accused and arrested for crime is entitled to prompt examination by both the spirit and letter of the statutes, and examination should not be delayed to suit the convenience of officers. Ex Parte Ah Kee, 22 Nev. 374, 376 (40 P. 879).

A defendant taken before a magistrate upon arrest is entitled to an immediate examination after appearance of counsel, if counsel be required. If an adjournment be had, even for good cause, it cannot be for more than two days at a time, nor more than six days in all, without consent of defendant, and if adjourned for a longer time, the defendant is entitled to be discharged. Idem.

6941. Form of recognizance.

SEC. 91. The bail provided in the preceding section must be by written recognizance executed by two sufficient sureties, with or without the defendant, in the discretion of the court or magistrate, and in substantially the following form:

"A warrant having been issued on the _____ day of _____, A. D. 19____, by_____, a justice of the peace of _____ county, for the arrest of _____ (stating name of the accused), upon a charge of _____ (stating briefly the nature of the offense), upon which he has been arrested and duly ordered admitted to bail in the sum of _____ dollars and ordered to appear before the magistrate who issued the warrant, we, _____, of _____, and _____ of _____ (stating their names and place of residence), hereby undertake that the above-named _____ shall appear and answer the charge above mentioned, at ____ o'clock __ m., on the _____ day of _____, A. D. 19____, before _____, the magistrate issuing the warrant, at his office in _____, _____ County, State of Nevada, or in case of his death, absence or inability to act, within five days after that time before the nearest or most accessible magistrate in the same county, and that the said above-named (insert name of accused) shall appear and answer the charge above mentioned in whatever court and before whatever magistrate it may be prosecuted, or before which he may be required to appear by law, and shall at all times render himself amenable to the orders and process of the court and the requirements of the law, and if convicted shall appear for judgment and render himself in execution thereof; or if he fail to perform any of these conditions, that we will pay to the State of Nevada the sum of _____ dollars (inserting the sum in which the defendant is admitted to bail)."

Kerr, Pen. C., 1278.

6942. Qualification of sureties.

SEC. 92. Qualification of bail and justification of sureties must be required as provided in chapter on bail.

Kerr, Pen. C., 1279, 1280.

6943. Certification of bail; discharge of defendant.

SEC. 93. On admitting the defendant to bail, the magistrate shall certify

on the warrant the fact of his having done so, and deliver the warrant and recognizance to the officer having charge of the defendant. The officer shall forthwith discharge the defendant from arrest, and shall, without delay, deliver the warrant and recognizance to the justice of the peace, magistrate or clerk of the court at which the defendant is required to appear.

Kerr, Pen. C., 1281.

6944. If bail not given, delivery of defendant and warrant.

SEC. 94. If the defendant is not admitted to bail in some county other than the one in which the warrant is issued, the officer making the arrest must take him before the magistrate who issued the warrant; or if he is absent or unable to act, before the nearest or most accessible magistrate in the same county. The officer shall, at the same time, deliver to the magistrate the warrant, with his return indorsed and subscribed by him.

Kerr, Pen. C., 824.

6945. When other magistrate may act.

SEC. 95. If the magistrate who issued the warrant is absent or unable to act, and the accused is taken before the nearest or most accessible magistrate in the same county, the latter shall have the same power to hold the defendant, admit him to bail, hear, determine and make disposition of the charge as the magistrate who issued the warrant.

Kerr, Pen. C., 824.

6946. Defendant to be taken before magistrate without delay.

SEC. 96. The defendant must, in all cases, be taken before the magistrate without unnecessary delay.

Kerr, Pen. C., 825.

6947. Before another magistrate, proceedings.

SEC. 97. If the defendant is brought before a magistrate in the same county, other than the one who issued the warrant, the affidavits and depositions on which the warrant was granted, if the defendant insist upon an examination, must be sent to that magistrate, or, if they cannot be procured, the prosecutor and his witnesses must be summoned to give their testimony anew.

Kerr, Pen. C., 826.

6948. Offenses triable in another county, proceedings.

SEC. 98. When a complaint is laid before a magistrate of the commission of a public offense triable in another county of the state, but showing that the defendant is in the county where the complaint is laid, the same proceedings must be had as prescribed in this act 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 depositions of the complainant or prosecutor, and of the witnesses who may have been produced, must be delivered by the magistrate to the officer to whom the warrant is delivered.

Kerr, Pen. C., 827.

6949. Duty of officer and magistrate.

SEC. 99. The officer who executed the warrant must take the defendant before the nearest or most accessible magistrate of the county in which the offense is triable, and must deliver to him the depositions and the warrant, with his return indorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by himself.

Kerr, Pen. C., 828.

6950. Admission to bail in misdemeanor—Duty of officer.

SEC. 100. If the offense charged in the warrant issued pursuant to section

98, 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, depositions, and undertaking, to the justice of the peace or clerk of the court in which the defendant is required to appear.

Kerr, Pen. C., 829.

CHAPTER 11

ARREST, BY WHOM AND HOW MADE

6951. Arrest defined—By whom made.
6952. Arrest, how made—What restraint allowed.
6953. Arrest by peace officers.
6954. Arrest by private persons.
6955. Magistrates may order arrest.
6956. Persons must aid officer making arrest.
6957. Arrest, when may be made.
6958. Arrest without warrant—Officer to state authority.
6959. Warrant to be shown, when.
6960. When defendant flees or resists, power of officer.
6961. Doors and windows may be broken, when.
6962. Officer may break door to gain liberty.
6963. Weapons may be taken from person arrested.
6964. Duty of private person who has made an arrest.
6965. Duty of officer arresting with warrant.
6966. Person arrested without warrant, duty of officer.
6967. Arrest by telegraph.

6951. Arrest defined—By whom made.

SEC. 101. An arrest is the taking of a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person.

Kerr, Pen. C., 834.

Concerning service of process on land ceded to the United States. State v. Mack, 23 Nev. 359 (62 Am. St. Rep. 811, 47 P. 763).

6952. Arrest, how made—What restraint allowed.

SEC. 102. An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention.

Kerr, Pen. C., 835.

6953. Arrest by peace officers.

SEC. 103. A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

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

2. When a 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 a reasonable cause, of the commission of a felony by the party arrested.

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

Kerr, Pen. C., 836.

6954. Arrest by private persons.

SEC. 104. 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.

Kerr, Pen. C., 837.

6955. Magistrate may order arrest.

SEC. 105. A magistrate may orally order a peace officer or private person to arrest anyone committing or attempting to commit a public offense in the presence of such magistrate, and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.

Kerr, Pen. C., 838.

6956. Persons must aid officer making arrest.

SEC. 106. Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein.

Kerr, Pen. C., 839.
See secs. 2833, 6361, 6606.

6957. Arrest, when may be made.

SEC. 107. If the offense charged is a felony, the arrest may be made on any day, and at any time of day or night. If it is a misdemeanor, the arrest cannot be made at night, unless upon the direction of a magistrate, indorsed upon the warrant, except when the offense is committed in the presence of the arresting officer.

Kerr, Pen. C., 840.

6958. Arrest without warrant—Officer to state authority.

SEC. 108. The person making the arrest must inform the person to be arrested of his intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission or after an escape.

Kerr, Pen. C., 841.

6959. Warrant to be shown, when.

SEC. 109. If the person making the arrest is acting under the authority of a warrant, he must show the warrant, if required.

Kerr, Pen. C., 842.

6960. When defendant flees or resists, power of officer.

SEC. 110. When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest.

Kerr, Pen. C., 843.

6961. Doors and windows may be broken, when.

SEC. 111. To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open a door or window of the house in which the person to be arrested is, or in which there is reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

Kerr, Pen. C., 844.

6962. Officer may break door to gain liberty.

SEC. 112. Any person who has lawfully entered a house for the purpose of making an arrest, may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same, when necessary for liberating a person who, acting in his aid, lawfully entered for the purpose of making an arrest, and is detained therein.

Kerr, Pen. C., 845.

6963. Weapons may be taken from persons arrested.

SEC. 113. Any person making an arrest may take from the person

arrested all dangerous and offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken.

Kerr, Pen. C., 846.

6964. Duty of private person who has made an arrest.

SEC. 114. A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person before a magistrate, or deliver him to a peace officer.

Kerr, Pen. C., 847.

6965. Duty of officer arresting with warrant.

SEC. 115. An officer making an arrest, in obedience to a warrant, must proceed with the person arrested as commanded by the warrant, or as provided by law.

Kerr, Pen. C., 848.

6966. Person arrested without warrant, duty of officer.

SEC. 116 When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint, stating the charge against the person, must be laid before such magistrate.

Kerr, Pen. C., 849.

6967. Arrest by telegraph.

SEC. 117. A justice of the supreme court, or a judge of a district court, may, by an indorsement under his hand upon a warrant of arrest, authorize the service thereof by telegraph, and thereafter a telegraphic copy of such warrant may be sent to one or more peace officers and such copy is as effectual in the hands of any officer, and he must proceed in the same manner under it, as though he held an original warrant issued by the magistrate making the indorsement. Every officer causing telegraphic copies of warrants to be sent, must certify as correct and file in the telegraph office from which such copies are sent, a copy of the warrant and indorsement thereon and must return the original with a statement of his action thereunder.

Kerr, Pen. C., 850, 851.
See sec. 4618.

CHAPTER 12

RETAKING PRISONER AFTER ESCAPE OR RESCUE

6968. Recapture may be made at any place within state.

SEC. 118. If a person arrested escape or is rescued, the person from whose custody he escaped or was rescued, may immediately pursue and retake him at any time and in any place within the state.

Kerr, Pen. C., 854.

6969. May break doors and windows to recapture.

SEC. 119. To retake the person escaped or rescued, the person pursuing may break open an outer or inner door or window of a dwelling house, structure, or other place of concealment, if, after notice of his intention, he is refused admittance.

Kerr, Pen. C., 855.

CHAPTER 13

EXAMINATION, DISCHARGE OF, OR HOLDING DEFENDANT TO ANSWER

6970. Magistrate to inform defendant of his rights.
6971. Defendant must be allowed time to procure counsel.
6972. Examination, when to proceed.
6973. Completion and adjournment of an examination.
6974. When hearing postponed defendant to be committed or admitted to bail.
6975. Form of commitment.

6976. Depositions to be read and subpenas to be issued.
6977. Witnesses examined—When stenographer may be employed, compensation—Testimony may be used on trial—Testimony to be filed.
6978. Defendant to be informed of right to make statement.
6979. When defendant waives right to make statement, duty of magistrate.
6980. Statement of defendant, how taken—Questions to be asked.
6981. Answers of defendant to be read and corrected.
6982. Form of authentication of defendant's statement.
6983. Defendant's witnesses may testify after statement is made or waived—Defendant may testify, when.
6984. Examination, exclusion and separation of witnesses.
6985. Who may attend hearing—Closed doors.
6986. Defendant to be discharged, when and how.
6987. Defendant, when and how committed.
6988. When offense not bailable, form of commitment.
6989. When offense bailable, form—Minimum bail for felony.
6990. When offense bailable, bail not given, form of commitment.
6991. Commitment, how made and by whom delivered.
6992. Commitment, form of.
6993. Undertaking of witness, when and how taken.
6994. Appearance of witness, security for—When and how required.
6995. Infants and married women may be required to furnish sureties.
6996. Witnesses may be committed who refuse to give bond.
6997. Witness unable to give security may be conditionally examined.
6998. When defendant discharged or held to answer, duty of magistrate.

6970. Magistrate to inform defendant of his rights.

SEC. 120. When the defendant is brought before the 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 at every stage of the proceedings, and before any further proceedings are had.

Kerr, Pen. C., 858, 987.

6971. Defendant must be allowed time to procure counsel.

SEC. 121. He must also allow the defendant reasonable time to send for counsel, and postpone the examination for that purpose, and must, upon the request of the defendant, require a peace officer to take a message to any counsel in the township or city the defendant may name. The officer must, without delay and without fee, perform that duty.

Kerr, Pen. C., 859.
Right of accused to have counsel, secured by State Const., sec. 237; U. S. Const., sec. 178.

6972. Examination, when to proceed.

SEC. 122. If the defendant requires the aid of counsel, the magistrate must immediately after the appearance of counsel, or if, after waiting a reasonable time therefor none appears, proceed to examine the case.

Kerr, Pen. C., 860.
Examination must be prompt. Ex Parte Ah Kee, 22 Nev. 374 (40 P. 879).

6973. Completion and adjournment of an examination.

SEC. 123. The examination must be completed in one session, unless the magistrate for good cause shown, adjourns it. The adjournment cannot be for more than two days at a time, nor for more than six days in all, unless by consent or on motion of the defendant.

Kerr, Pen. C., 861.

6974. When hearing postponed defendant to be committed or admitted to bail.

SEC. 124. If an adjournment is had for any cause, the magistrate must commit the defendant for examination, admit him to bail or discharge him from custody upon the deposit of money as provided in this act, as security for his appearance at the time to which the examination is adjourned.

Kerr, Pen. C., 862.

6975. Form of commitment.

SEC. 125. The commitment for examination is made by an indorsement, signed by the magistrate on the warrant of arrest, to the following effect: "The within named A. B. having been brought before me under this warrant, is committed for examination to the sheriff of the county of....." If the sheriff is not present, the defendant may be committed to the custody of a peace officer.

Kerr, Pen. C., 863.

6976. Depositions to be read and subpenas to be issued.

SEC. 126. At the examination, the magistrate must first read to the defendant the depositions of the witnesses examined on taking the information. He must also issue subpenas, subscribed by him for witnesses within the state, required either by the prosecution or the defense.

Kerr, Pen. C., 864.

6977. Witnesses examined—When stenographer may be employed—Compensation—Testimony may be used on trial—Testimony to be filed.

SEC. 127. The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf. If either party so desires, the examination must be by interrogatories direct and cross; *provided,* by consent of the parties the testimony may be reduced to writing in narrative form. The magistrate, if he deems it necessary for the best interests of justice, and upon the approval of the district attorney, is authorized to employ a stenographer to take down all the testimony and the proceedings on said hearing or examination, and within such time as the court may designate have the same transcribed into long hand or typewritten transcript. The stenographer employed as aforesaid shall be sworn by the magistrate before whom such proceedings are held to take down in shorthand, verbatim, truthfully and correctly such proceedings and testimony and to make a true and correct transcript of the same into long hand or typewritten transcript. When the testimony of each witness is all taken and transcribed, the same must be read over to the witness and corrected as may be desired, and then subscribed by the witness; or if he refuses to sign it, the fact of such refusal, and any reasons assigned therefor must be stated, and the same must be attested by the magistrate. And such testimony so reduced to writing and authenticated according to the provisions of this section must be filed by the examining magistrate with the clerk of the district court of his county and in case such prisoner is subsequently examined upon a writ of habeas corpus, such testimony must be considered as given before such judge or court. The testimony so taken may be used by either party on the trial of the cause, and in all proceedings therein, when the witness is sick, out of the state, dead, or when his personal attendance cannot be had in court. The compensation for the services of a stenographer employed as provided in this section shall be such an amount as shall be approved by the magistrate and district attorney, not exceeding eight dollars per day for reporting and twenty cents per folio for transcribing, to be paid out of the county treasury as other claims against the county are allowed and paid.

Kerr, Pen. C., 865, 869.

State not bound to introduce proceedings on preliminary examination. State v. Guidieri, 26 Nev. 31.

Regarding testimony taken by stenographer on preliminary examination. State v. Gibson, 30 Nev. 353 (96 P. 1057).

This section is not amenable to the objection of being opposed to the United States constitution. The provision of the sixth amendment of the United States constitution (sec. 176, ante) is applicable only to the federal courts, and is in no wise a restriction upon the powers of the states, or applicable to state courts. State v. Jones, 7 Nev. 408.

When a deposition in a criminal case is offered in evidence the offer should be

accompanied with proof that it was taken in conformity with the statute; and if the proper objection be made, it should not be admitted without such preliminary proof. Idem.

Where such a deposition was offered by the prosecution, and defendant objected that it was "incompetent evidence" it was held that such objection was too general to reach the point of failure to show that the deposition was taken in a case authorized by the statute. Idem.

In criminal, as well as in civil cases, objections should be so specific that the attention of the court may be directed to the exact point, so that the objection may be obviated if it be of a character which admits of remedy. Idem.

Defendant objected to proceeding with the trial because the testimony given at his preliminary examination had not been reduced to writing. It was held that he could not avail himself of this irregularity without an affirmative showing that he was deprived of this statutory right without his consent. State v. Davis, 14 Nev. 407, 412.

A deposition of a witness taken under this section cannot be used in evidence without proof that at the time of the trial, the witness was "sick, out of the state, dead, or that his personal attendance could not be had in court." State v. Parker, 16 Nev. 79, 82–85.

Testimony stated and held insufficient to show the above-required facts. Idem.

At the trial on an indictment the parol testimony of the committing magistrate and of the clerk who wrote the testimony at the preliminary examination, is admissible to show that the depositions were taken and the examination had in the mode and according to the requirements of the law. State v. Depoister, 21 Nev. 107, 111 (25 P. 1000).

A former act (Stats. 1907, 59) held unconstitutional as repugnant to Const., sec. 275, ante. State v. Gibson, 30 Nev. 353, 354–358 (96 P. 1057).

Said former act cited, State ex rel. Sparks v. State B. & T. Co., 31 Nev. 473 (103 P. 407).

6978. Defendant to be informed of right to make statement.

SEC. 128. When the examination of the witnesses on the part of the people is closed, the magistrate must distinctly inform the defendant that it is his right to make a statement in relation to the charge against him (stating to him the nature thereof); that the statement is designed to enable him, if he sees fit, to answer the charge, and to explain the facts alleged against him; that he is at liberty to waive making a statement, and that his waiver cannot be used against him on the trial.

Cited, State v. Parker, 16 Nev. 83.

The committing magistrate may select clerks to write out the testimony taken on preliminary examination; and where the provisions of the law for taking such testimony have been complied with, the statement then made by defendant is admissible in evidence against him upon the trial of the case. State v. Rover, 13 Nev. 17, 21.

6979. When defendant waives right to make statement, duty of magistrate.

SEC. 129. If the defendant waives his right to make a statement, the magistrate must make a note thereof immediately following the deposition of the witnesses against the defendant, but the fact of his waiver cannot be used against the defendant on the trial.

Cited, State v. Parker, 16 Nev. 83.

6980. Statement of defendant, how taken—Questions to be asked.

SEC. 130. If the defendant chooses to make a statement, the magistrate must proceed to take the same in writing, without oath, and must put to the defendant the following questions only: "What is your name and age? Where were you born? Where do you reside, and how long have you resided there? What is your business or profession? Give any explanation you may think proper of the circumstances appearing against you, and state any facts which you think will tend to your exculpation."

Cited, State v. Parker, 16 Nev. 83.

6981. Answers of defendants to be read and corrected.

SEC. 131. The answer of the defendant to each of the questions must be distinctly read to him as it is taken down. He may thereupon correct or add to his answer, and it must be corrected until it is made conformable to what he declares to be the truth.

6982. Form of authentication of defendant's statement.

SEC. 132. The statement must be reduced to writing by the magistrate, or under his direction, and authenticated in the following form:

1. It must set forth in detail that the defendant was informed of his rights as provided by section 128, and that after being so informed he made the statement.

2. It must contain the questions put to him, and his answers thereto, as provided in sections 130 and 131.

3. It may be signed by the defendant, or he may refuse to sign it; but if he refuses to sign it, his reason therefor must be stated as he gives it.

4. It must be signed and certified by the magistrate.

6983. Defendant's witnesses may testify after statement is made or waived—Defendant may testify, when.

SEC. 133. After the waiver of the defendant to make a statement, or after he has made it, his witnesses, if he produces any, must be sworn and examined. The defendant, if he waives making a statement, upon his own request and not otherwise, may be sworn and examined as a witness and if so sworn and examined, he may be cross-examined.

6984. Examination, exclusion and separation of witnesses.

SEC. 134. The witnesses produced on the part of either the state or the defendant must not be present at the examination of the defendant, and while a witness is under examination the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined.

Kerr, Pen. C., 867.

In the absence of any evidence tending to show that the witnesses were not excluded pending examination of defendant, as provided in this section, the supreme court cannot presume that the justice did not conform to this provision. State v. Rover, 13 Nev. 21.

When an order is made excluding defendant's witnesses from the courtroom, so that neither witness shall hear the other testify, and some of the witnesses come in during the trial, this may discredit such witnesses, and subject them to punishment for contempt. But the defendant himself, not being in fault is entitled to that testimony. State v. Salge, 2 Nev. 321.

6985. Who may attend hearing—Closed doors.

SEC. 135. The magistrate must, also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney-general, the district attorney of the county, the defendant and his counsel, and the officer having the defendant in his custody.

Kerr, Pen. C., 868.

6986. Defendant to be discharged, when and how.

SEC. 136. If, after hearing the proofs, and the statement of the defendant, if he has made one, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant to be discharged, by an indorsement on the depositions and statement signed by him, to the following effect: "There being no sufficient cause to believe the within named A. B. guilty of the offense within named, I order him to be discharged."

Kerr, Pen. C., 871.

6987. Defendant, when and how committed.

SEC. 137. If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the

depositions and statement, an order signed by him to the following effect: "It appearing to me by the within depositions and statement (if any), that the offense therein named (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."

Kerr, Pen. C., 872.

In order to justify a magistrate in holding accused, the evidence need not show guilt beyond a reasonable doubt. In re Kelly, 28 Nev. 491 (83 P. 223).

6988. When offense not bailable, form of commitment.

SEC. 138. If the offense is not bailable, the following words must be added to the indorsement: "And he is hereby committed to the sheriff of the county of....."

Kerr, Pen. C., 873.

Regarding cases which are not bailable, see Const., sec. 236.

6989. When offense bailable, form—Minimum bail for felony.

SEC. 139. If the offense is bailable, and bail is taken by the magistrate, the following words, or words to the same effect, must be added to the indorsement: "And I have admitted him to bail to answer by the undertaking hereto annexed"; *provided,* that if the offense charged constitutes a felony, no bail can be accepted in a less sum than five hundred dollars.

Kerr, Pen. C., 874.

6990. When offense bailable, bail not given, form of commitment.

SEC. 140. If the offense is bailable, and the defendant is admitted to bail, but bail has not been taken, the following words, or words to the same effect, must be added to the indorsement mentioned in section 137: "And that he be admitted to bail in the sum of.....dollars, and is committed to the sheriff of the county of.....until he give such bail."

Kerr, Pen. C., 875.

6991. Commitment, how made and by whom delivered.

SEC. 141. If the magistrate orders that the defendant be committed, he must make out a commitment, signed by him, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed, or, if that officer is not present, to a peace officer, who must deliver the defendant into the proper custody, together with the commitment.

Kerr, Pen. C., 876.

Testimony held sufficient to authorize commitment. Ex Parte Willoughby, 14 Nev. 451.

6992. Commitment, form of.

SEC. 142. The commitment must be to the following effect:

County of.....(as the case may be).

The State of Nevada to the sheriff of the county of.....:

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, and giving as near as may be the time when and the place where the same was committed), you are commanded to receive him into your custody and detain him until he is legally discharged.

Dated this.....day of.....', 19....

Kerr, Pen. C., 877.

A recognizance which gives the name of the offense for which the principal is held, sufficiently complies with the statutory provision of "briefly stating the nature of the offense." State v. Birchim, 9 Nev. 95, 99, 100; State v. O'Keefe, 32 Nev. 331 (108 P. 2).

The reasons for setting forth the particulars of the offense in a commitment do not exist in the case of a recognizance, and therefore the construction requiring such particularity given to the words quoted above is not applicable to the same words as used in the statutory form of recognizances. Idem.

A commitment which recites that petitioner has been held to answer the charge of murder by being accessory before the fact to the killing of P. L. Traver "at Metallic City, Esmeralda County, State of Nevada, on or about the fifth day of January," satisfies the requirement of the statute. Ex Parte Willoughby, 14 Nev. 451, 453.

6993. Undertaking of witness, when and how taken.

SEC. 143. On holding the defendant to answer, the magistrate may take from each of the material witnesses examined before him on the part of the state a written undertaking, to the effect that he will appear and testify at the court to which the deposition and statements are to be sent, or that he will forfeit the sum which may be ordered by the court.

Kerr, Pen. C., 878.

This section does not make the taking of a recognizance a condition precedent to the admission of a deposition. State v. Parker, 16 Nev. 79, 82.

6994. Appearance of witness, security for, when and how required.

SEC. 144. When the magistrate is satisfied by proof, on oath, that there is reason to believe that any such witness will not appear and testify unless security is required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper, for his appearance as specified in the preceding section.

Kerr, Pen. C., 879.

6995. Infants and married women may be required to furnish sureties.

SEC. 145. Infants and married women, who are material witnesses against the defendant, may be required to procure sureties for their appearance, as provided in the preceding section.

Kerr, Pen. C., 880.

6996. Witnesses may be committed who refuse to give bond.

SEC. 146. If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the magistrate must commit him to prison until he complies or is legally discharged.

Kerr, Pen. C., 881.

6997. Witness unable to give security may be conditionally examined.

SEC. 147. When, however, it satisfactorily appears by the examination on oath of the witness, or any other person, that the witness is unable to procure sureties, or if either the state or defendant demands the deposition of the witness to be taken, he or she may forthwith conditionally be examined on behalf of the party requiring the deposition to be taken; such examination must be by question and answer, and must be reduced to writing by the magistrate, or under his direction in the presence of the defendant and the counsel for the state. When the examination is completed the deposition must be read over to the witness, and corrected in any particular desired, signed by the witness, certified by the magistrate, and transmitted to the clerk of the district court of the proper county, the witness thereupon must be discharged; *provided*, when both parties consent thereto the deposition may be taken in narrative form. This section does not apply to the prosecutor, or to an accomplice in the commission of the offense charged.

Kerr, Pen. C., 882.

Cited, State v. Parker, 16 Nev. 84.

See State v. Jones, under sec. 127 of this act.

6998. When defendant discharged or held to answer, duty of magistrate.

SEC. 148. When a magistrate has discharged a defendant, or has held him to answer, he must return, without delay, to the clerk of the court at which defendant is required to appear, the warrant, if any, the deposi-

tions, the statement of the defendant, if he has made one, and all undertakings of bail, for the appearance of witnesses taken by him.

Kerr, Pen. C., 883.

State not bound to introduce record of preliminary examination. State v. Guilieri, 26 Nev. 31 (26 P. 49).

CHAPTER 14

PROSECUTION BY INDICTMENT OR ACCUSATION

6999. What prosecutions must be by indictment.

SEC. 149. All public offenses triable in the district courts must be prosecuted by indictment, except as provided in the next section.

Kerr, Pen. C., 888.

Const., art. 1, sec. 8, provides that no person shall be tried for infamous crime except upon the presentment or indictment of a grand jury (sec. 237, ante).

An amendment allowing prosecutions upon the information of the attorney-general and district attorneys has been favored by resolutions passed by the legislatures of 1909 and 1911 and is ready to be voted upon by the people at the general election in November, 1912.

7000. What prosecutions to be by accusation.

SEC. 150. When proceedings are had for the removal of district, county, municipal, or township officers, they may be commenced by accusation, in writing, as provided in sections 44 and 57.

Kerr, Pen. C., 889.

7001. Accusations and indictments must be found in district courts.

SEC. 151. All accusations, and indictments against district, county, municipal, and township officers, must be found in the district court.

Kerr, Pen. C., 890.

CHAPTER 15

FORMATION OF GRAND JURY

7002. Formation prescribed by special statutes.
7003. Who may challenge panel or individual grand juror.
7004. Grounds for challenge to panel.
7005. Grounds for challenge to individual grand juror.
7006. Challenge, how made and tried.
7007. Decision upon challenges.
7008. Effect of allowing challenge of panel.
7009. Effect of allowing challenge to individual grand juror.
7010. Objections can only be taken by challenge.
7011. Foreman, how appointed.
7012. Oath of foreman.
7013. Oath of grand jurors.
7014. Charge to be given by court.
7015. Where jury shall deliberate — Discharge of.
7016. Special grand jury.
7017. Order for special grand jury.
7018. Order, how executed.
7019. Special grand jury, how formed.

7002. Formation prescribed by special statutes.

SEC. 152. The formation of grand juries is prescribed by special statutes.

See secs. 4931, 4940; State v. Hartley, 22 Nev. 342 (28 L. R. A. 33, 40 P. 372).

7003. Who may challenge panel or individual grand juror.

SEC. 153. The state, or a person held to answer a charge for a public offense, may challenge the panel of a grand jury, or an individual grand juror.

Kerr, Pen. C., 894.

An indictment found by a grand jury not legally selected is invalid. State v. McNamara, 3 Nev. 71, 75.

7004. Grounds for challenge to panel.

SEC. 154. A challenge to the panel may be interposed 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 as prescribed by law.

2. That the notice of the drawing of the grand jury was not given as prescribed by law.

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

Kerr, Pen. C., 895.

See State v. McNamara, under sec. 211 of this act.

Nothing else than what the statute prescribes can disqualify one from acting as a grand juror. State v. Millain, 3 Nev. 409.

A motion to quash an indictment because the grand jurors were not selected according to law, ought to be made before plea. State v. Collyer, 17 Nev. 275, 280 (30 P. 891).

If the plea has been entered and the motion to quash thereafter made in good faith, before the trial commences, the court should allow the plea to be withdrawn and give defendant an opportunity to be heard upon his motion. Idem.

The right of challenge to the panel of the grand jurors is restricted to the three grounds enumerated in the statute, and the fact that these statutory grounds have no application to the present method of selecting a grand jury, does not authorize the court to consider the motion as a challenge to the panel. Idem.

Where defendant had not been held to answer before the finding of an indictment against him, and he moved to set it aside on the ground that no list of names selected as grand jurors for the session at which the indictment was found was certified by the officer making the selection, the motion was properly overruled. State v. Simas, 25 Nev. 442 (62 P. 242).

The statutory grounds of challenge to the panel of a grand jury specified in this section, do not apply to the changed method of drawing grand jurors. State v. Williams, 31 Nev. 360, 361 (102 P. 974).

7005. Grounds for challenge to individual grand juror.

SEC. 155. A challenge to an individual grand juror may be interposed for one or more of the following causes only:

1. That he is a minor;

2. That he is an alien;

3. That he is insane;

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

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

6. 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 grand juror by reason of having formed or having expressed an opinion upon the matter of cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety; *provided,* it satisfactorily appears to the court upon his declaration, under oath, or otherwise, that he will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him.

Kerr, Pen. C., 896.

A prosecutor is "one who prefers an accusation against a party whom he suspects to be guilty." A party who appears in response to a subpena is not a prosecutor, but only a witness. State v. Millain, 3 Nev. 409, 455–458.

See State v. Simas, under sec. 154 of this act.

7006. Challenge, how made and tried.

SEC. 156. Challenges mentioned in the last three sections may be oral or in writing, and must be entered upon the minutes, and tried by the court in the same manner as challenges in the case of a trial jury which are triable by the court.

Kerr, Pen. C., 897.

Under sec. 181 (Stats. 1861, 435) it was held: The criminal practice act does not require the clerk to make any minutes of peremptory challenges; and if he does make such minutes, they will not be considered as parts of the record or reviewed on appeal, without a bill of exceptions. State v. Baker, 8 Nev. 146, 147.

7007. Decision upon challenges.

SEC. 157. The court must allow or disallow the challenge and the clerk must enter its decision upon the minutes.

Kerr, Pen. C., 898.
Cited, State v. Baker, 8 Nev. 146.

7008. Effect of allowing challenge to panel.

SEC. 158. If a challenge to the panel is allowed, the grand jury are prohibited from inquiring into the charge against the defendant by whom the challenge was interposed. If, notwithstanding, they do so, and find an indictment against him, the court must direct it to be set aside.

Kerr, Pen. C., 899.

7009. Effect of allowing challenge to individual grand juror.

SEC. 159. If a challenge to an individual grand juror is allowed, he cannot be present or take part in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon. The grand jury must inform the court of a violation of this section, and it is punishable by the court as a contempt.

Kerr, Pen. C., 900.

7010. Objections can only be taken by challenge.

SEC. 160. A person held to answer for a public offense can take advantage of any objection to the panel or to an individual grand juror in no other mode than by challenge.

Kerr, Pen. C., 901.

7011. Foreman, how appointed.

SEC. 161. 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 the person already appointed is excused or discharged before the grand jury is dismissed.

Kerr, Pen. C., 902.

7012. Oath of foreman.

SEC. 162. The following oath must be administered to the foreman of the grand jury:

"You, as foreman of the grand jury, will diligently inquire into, and true presentment make, of all offenses against the State of Nevada committed or triable within this county, of which you shall have or can obtain legal evidence. You will keep your own counsel, and that of your fellows and the government, 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 will 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 you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding, so help you God."

Kerr, Pen. C., 903.

7013. Oath of grand jurors.

SEC. 163. 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."

Kerr, Pen. C., 904.

7014. Charge to be given by court.

SEC. 164. The grand jury being impaneled and sworn, must be charged by the court. In doing so, the court must give them such information as it may deem proper, or as is required by law, as to their duties, and as to any charges for public offenses returned to the court or likely to come before the grand jury. The court need not, however, charge them respecting violation of any particular statute.

Kerr, Pen. C., 905.

District judges to charge grand juries regarding statutes relating to duties of officers (sec. 4924), and concerning recording of marriages, births and deaths (sec. 4925).

Cited, Ex Parte Job, 17 Nev. 187 (30 P. 699).

7015. Where jury shall deliberate—Discharge of.

SEC. 165. The grand jury must then retire to a private room and inquire into the offenses cognizable by them. On the completion of the business before them, they must be discharged by the court; but, whether the business is completed or not, they may be discharged by the court after the expiration of one year.

Kerr, Pen. C., 906.

7016. Special grand jury.

SEC. 166. If an offense is committed during the sitting of the court, after the discharge of the grand jury, the court may, in its discretion, direct an order to be entered that the sheriff summon another grand jury.

Kerr, Pen. C., 907.

7017. Order for special grand jury.

SEC. 167. An order must thereupon be made out by the clerk, and directed to the sheriff, requiring him to summon twenty-four persons, qualified to serve as grand jurors, to appear forthwith, or at such time as may be named by the court.

Kerr, Pen. C., 908.

7018. Order, how executed.

SEC. 168. The sheriff must execute the order, and return it with a list of the names of the persons summoned.

Kerr, Pen. C., 909.

7019. Special grand jury, how formed.

SEC. 169. At the time appointed a list must be called over, and the names of those in attendance be written by the clerk on separate ballots and put into a box, from which a grand jury must be drawn.

Kerr, Pen. C., 910.

CHAPTER 16

POWERS AND DUTIES OF GRAND JURY

7020. Powers and duties of grand jury.
7021. Presentment defined.
7022. Indictment defined.
7023. Foreman to administer oaths to witnesses.
7024. What evidence is receivable by the grand jury.
7025. Not bound to hear evidence for defendant.
7026. Degree of evidence to warrant indictment.
7027. Grand juror having knowledge of offense, duties of.
7028. Grand jury, duties of.
7029. Grand jury entitled to enter jails and examine records.
7030. Grand jury to be advised by court and district attorney—Who allowed in jury room.
7031. Grand jury proceedings to be secret.
7032. Grand juror, when required to disclose testimony.
7033. Grand jury shall not be questioned for proceedings in jury room—Exceptions.

7020. Powers and duties of grand jury.

SEC. 170. The grand jury must inquire into all public offenses committed and triable within the jurisdiction of the court, and present them to the court, either by presentment or indictment.

Kerr, Pen. C., 915.

The grand jury is authorized to indict a person accused of crime, notwithstanding the case may be pending on preliminary examination before a justice of the peace. Knight v. District Court, 32 Nev. 346 (108 P. 358).

7021. Presentment defined.

SEC. 171. 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 within the district, and that there is reasonable ground for believing that a particular individual, named or described, has committed it.

Kerr, Pen. C., 916.

7022. Indictment defined.

SEC. 172. An indictment is an accusation in writing, presented by a grand jury to a competent court, charging a person with a public offense.

Kerr, Pen. C., 917.

A presentment at common law was a mere informal statement of a grand jury (not prepared by the law officer of the court) calling attention to the existence of some violation of law which the jury might think needed correction. State v. Millain, 3 Nev. 439.

An indictment is a "written accusation of one or more persons, of a crime or misdemeanor, presented to, and preferred upon oath or affirmation by a grand jury legally convoked." Idem.

An indictment should not be quashed merely because the grand jury received some illegal or incompetent testimony. If there is any legal testimony to sustain it, it should not be set aside. State v. Logan, 1 Nev. 510, 515, 516.

Though the law declares that the grand jury shall receive none but legal evidence in support of an indictment, yet it does not follow that the admission of incompetent testimony will authorize the district court to set it aside. Idem.

If there be nothing to support the bill but evidence clearly incompetent and which would not be admissible at the trial, as the testimony of a person rendered incompetent by conviction of an infamous crime, the indictment may be set aside on motion before plea. Idem.

But to authorize the setting aside of an indictment, even where there is no competent evidence to support it, that fact must appear by proof, independent of the testimony of the grand jurors who found the bill, for it is inadmissible for them to show that the indictment was found without testimony or upon insufficient testimony. Idem.

7023. Foreman to administer oaths to witnesses.

SEC. 173. The foreman may administer an oath to any witness appearing before the grand jury.

Kerr, Pen. C., 918.

7024. What evidence is receivable by the grand jury.

SEC. 174. In the investigation of a charge, for the purpose of either presentment or indictment, 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, or the deposition of witnesses taken as provided in this act. The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

Kerr, Pen. C., 919.

7025. Not bound to hear evidence for defendant.

SEC. 175. The grand jury is not bound to hear evidence for the defendant; it is their duty, however, to weigh all evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they must order such evidence to be

produced, and for that purpose may require the district attorney to issue process for the witnesses.

Kerr, Pen. C., 920.

7026. Degree of evidence to warrant indictment.

SEC. 176. 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 and uncontradicted, warrant a conviction by the trial jury.

Kerr, Pen. C., 921.

7027. Grand juror having knowledge of offense, duties of.

SEC. 177. If a member of the grand jury knows or has reason to believe that a public offense has been committed, which is triable within the jurisdiction of this court, he must declare the same to his fellow jurors, who shall thereupon investigate the same.

Kerr, Pen. C., 922.

7028. Grand jury, duties of.

SEC. 178. The grand jury must inquire into the case of every person imprisoned in the jail of the county, on a criminal charge, and not indicted; into the condition and management of the public prisons within the county; and into the wilful and corrupt misconduct in office of public officers of every description within the county.

Kerr, Pen. C., 923.

7029. Grand jury entitled to enter jails and examine records.

SEC. 179. The grand jury shall be entitled to free access, at all reasonable times, to all public prisons and to the examination without charge, of all public records within its district.

Kerr, Pen. C., 924.

Cited, State ex rel. N. T. G. & T. Co. v. Grimes, 29 Nev. 60.

7030. Grand jury to be advised by court and district attorney—Who allowed in jury room.

SEC. 180. The grand jury may, at all reasonable times, ask the advice of the court, or any member thereof, and of the district attorney. Unless his advice be asked, no member of the court shall be permitted to be present during the session of the grand jury. The district attorney shall be allowed, at all times, to appear before the grand jury, on his request, for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them when they shall deem it necessary. Except the district attorney, no person shall be permitted to be present before the grand jury besides the witness actually under examination, and no person shall be permitted to be present during the expression of their opinions or the giving of their votes upon any matter before them.

Kerr, Pen. C., 925.

7031. Grand jury proceedings to be secret.

SEC. 181. Every member of the grand jury shall 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 in a matter before them.

Kerr, Pen. C., 926.

Regarding penalty for divulging secrets of grand jury by grand juror or others, see sec. 6374.

Grand jurors may be called to testify against a witness who is indicted for perjury, to prove what was sworn to before them, or to show that the indictment is not found by the requisite number; but the testimony of no grand juror can be received to impeach or affect the findings of his fellows. State v. Logan, 1 Nev. 510.

The testimony of grand jurors is not admissible to impeach their acts in finding an indictment. State v. Hamilton, 13 Nev. 389.

7032. Grand juror, when required to disclose testimony.

SEC. 182. A member of the grand jury may, however, be required by any court to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person upon a charge against him for perjury in giving his testimony, or upon his trial therefor.

Kerr, Pen. C., 926.

See citations under sec. 181 of this act.

7033. Grand juror shall not be questioned for proceedings in jury room—Exceptions.

SEC. 183. No grand juror shall be questioned for anything he may say or vote he may give during any session of 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.

Kerr, Pen. C., 927.

CHAPTER 17

PRESENTMENT, AND PROCEEDINGS THEREON

7034. Presentment, how found.
7035. Presentment, how presented and filed.
7036. Presentment, finding thereof not to be disclosed.
7037. Bench warrant on presentment.
7038. Presentment, clerk to issue bench warrant, when.
7039. Presentment, form of bench warrant.
7040. Presentment, bench warrant, how executed.
7041. Presentment, proceedings on arrest.

7034. Presentment, how found.

SEC. 184. A presentment cannot be found without the concurrence of at least twelve grand jurors. When so found it must be signed by the foreman.

See secs. 6854, 6894, 6999.

7035. Presentment, how presented and filed.

SEC. 185. The presentment, when found, must be presented by the foreman in the presence of the grand jury to the court and must be filed by the clerk thereof.

7036. Presentment, finding thereof not to be disclosed.

SEC. 186. No grand juror, district attorney, clerk, judge or other officer or person shall disclose the fact of a presentment having been made for a felony until the defendant shall have been arrested. But this prohibition shall not extend to disclosure by the issuing or in the execution of a warrant to arrest the defendant.

See secs. 6374, 7031.

7037. Bench warrant on presentment.

SEC. 187. If the court deems that the facts stated in the presentment constitute a public offense, triable within the county, it shall direct the clerk to issue a bench warrant for the arrest of the defendant.

7038. Presentment, clerk to issue bench warrant, when.

SEC. 188. The clerk, on the application of the district attorney, may accordingly, at any time after the order, whether the court is sitting or not, issue a bench warrant, under the signature and the seal of the court, into one or more districts.

7039. Presentment, form of bench warrant.

SEC. 189. The bench warrant upon presentment shall be substantially in the following form:

County of..... The State of Nevada to any sheriff, constable,

marshal or policeman in the state: A presentment having been made on the.....day of....., 19...., to the district court of the district of ....., 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 this district; or in case of his absence or inability to act, before the nearest or most accessible magistrate of this district. Given under my hand, with the seal of said court affixed, this.....day of....., A. D. 19.... By order of court.

7040. Presentment, bench warrant, how executed.

SEC. 190. The bench warrant may be served in any district, and the officer serving it must proceed thereon in all respects as upon a warrant of arrest on a complaint, except when served in another district it need not be indorsed by a magistrate of that district.

7041. Presentment, proceedings on arrest.

SEC. 191. The magistrate, when the defendant is brought before him, shall proceed to examine the charge contained in the presentment and hold the defendant to answer the same, or discharge him thereupon in the same manner in all respects as upon a warrant of arrest on complaint.

See secs. 6940, et seq.

CHAPTER 18

THE INDICTMENT—FINDING AND PRESENTMENT OF

7042. Indictment must be found by twelve jurors—Indorsement.
7043. Indictment, failure to find, duty of grand jury.
7044. Indictment, dismissal does not bar further indictment.
7045. Indictment, names of witnesses to be inserted.
7046. Indictment, how presented and filed.
7047. Indictment against defendant not in custody, procedure.

7042. Indictment must be found by twelve jurors—Indorsement.

SEC. 192. An indictment cannot be found without the concurrence of at least twelve grand jurors. When so found it shall be indorsed: "A true bill," and the indorsement shall be signed by the foreman of the grand jury.

Kerr, Pen. C., 940.

Cited, State v. Hartley, 22 Nev. 253, 254 (28 L. R. A. 33, 40 P. 372).

An objection that indictment has not been found, indorsed or presented as prescribed by law, is not a ground of demurrer, but must be taken by a motion to set aside an indictment before pleading to it. State v. Harris, 12 Nev. 414, 419.

When the people adopted the provisions of the bill of rights (Const., sec. 237, ante), they had in view a grand jury as it existed under the common law and the statutes at the time the constitution was adopted. State v. Hartley, 22 Nev. 342, 353, 354 (28 L. R. A. 33, 40 P. 372).

Twelve qualified grand jurors are a legal body and may return an indictment. State v. Casey, 33 Nev. — (117 P. 5).

7043. Indictment, failure to find, duty of grand jury.

SEC. 193. If twelve grand jurors do not concur in finding an indictment against a defendant who has been held to answer, the deposition and statement, if any, transmitted to them shall be returned to the court with the indorsement signed by the foreman to the effect that the charge is dismissed.

Kerr, Pen. C., 941.

See State v. Hartley, and State v. Harris, under sec. 257 of this act.

7044. Indictment, dismissal does not bar further indictment.

SEC. 194. The dismissal of the charge shall not, however, prevent the same charge from being again submitted to a grand jury or as often as the court shall so direct. But, without such direction, it shall not be again submitted.

Kerr, Pen. C., 942.

Upon a review of the statutory provisions, it was held that the failure of the respective grand juries to find an indictment was not a bar to further prosecution. Ex Parte Job, 17 Nev. 184, 186 (30 P. 699).

An order resubmitting the case "to the same or another grand jury," is not void for uncertainty. Idem.

See State v. Harris, under sec. 257 of this act.

7045. Indictment, names of witnesses to be inserted.

SEC. 195. When an indictment is found the names of the witnesses examined before the grand jury shall be inserted at the foot of the indictment, or indorsed thereon before it is presented to the court.

Kerr, Pen. C., 943.

See State v. Harris, under sec. 192 of this act.

The names of witnesses whose depositions are read before the grand jury must be inserted at the foot of, or indorsed upon, the indictment. State v. Hamilton, 13 Nev. 388.

7046. Indictment, how presented and filed.

SEC. 196. An indictment, when found by the grand jury, shall be presented by their foreman, in their presence, to the court and shall be filed with the clerk and remain in his office as a public record.

Kerr, Pen. C., 944.

7047. Indictment against defendant not in custody, procedure.

SEC. 197. When an indictment has been found against a defendant, not in custody, the same proceedings shall be had as are prescribed in sections 227 and 234, both inclusive, against a defendant who fails to appear for arraignment.

Kerr, Pen. C., 945.

CHAPTER 19

RULES OF PLEADING AND FORM OF THE INDICTMENT

7048. Pleadings, forms and rules of.
7049. Indictment, first pleading.
7050. Indictment, to contain what.
7051. Indictment, form of, signed by district attorney.
7052. Indictment, must be direct, to contain what.
7053. Indictment, when defendant's name is fictitious or erroneous.
7054. Indictment, to charge only one offense.
7055. Indictment, time, how stated in.
7056. Indictment, error in describing person injured, effect.
7057. Indictment, construction of words used.
7058. Indictment—Words of statute need not be strictly followed.
7059. Indictment, when sufficient.
7060. Indictment, defect in form not material when not prejudicial—Amendment.
7061. Indictment, what need not be stated therein.
7062. Judgment, how pleaded.
7063. Private statute, how pleaded.
7064. Indictment for libel, requisites of.
7065. Indictment for forgery, description of lost instrument—Effect.
7066. Perjury, what sufficient.
7067. Pleading in indictment for obtaining by false representation.
7068. Pleading in indictment for larceny or embezzlement.
7069. Pleading in indictment for selling or possessing lewd and obscene books.
7070. Indictment against several.
7071. Distinction between principal and accessory abrogated.
7072. Accessory after the fact, indictment and punishment.
7073. Indictment for compounding and concealing offenses.

7048. Pleadings, forms and rules of.

SEC. 198. All the forms of pleadings in criminal actions and the rules by which the sufficiency of the pleadings is to be determined shall be those which are prescribed by this act.

Kerr, Pen. C., 948.

The legislature has absolute power over the subject of criminal proceedings, and may prescribe such forms of proceedings and indictment as it sees fit, except in those particulars where its power is restrained by some clause in the state or national constitution. State v. Millain, 3 Nev. 410, 462.

7049. Indictment, first pleading.

SEC. 199. The first pleading on the part of the state is the indictment.

Kerr, Pen. C., 949.

7050. Indictment, to contain what.

SEC. 200. The indictment must contain the title of the action, specifying the name of the court to which the indictment is presented and the names of the parties, and 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.

Kerr, Pen. C., 950.

It cannot be said that an indictment which charges "an assault with a deadly weapon with intent to kill," does not charge the statutory offense of "an assault with intent to kill," merely because it describes the means or instrument of the assault. State v. Rigg, 10 Nev. 284, 288.

It is not necessary to include in an indictment a formal statement of the crime of which the defendant is accused according to the statutory designation; a statement of the acts constituting the offense is sufficient. Idem.

It is not necessary in charging an assault to allege a present ability to kill or inflict injury. Idem.

As a general rule the question whether a particular weapon is deadly or not is one of law for the court and not of fact for the jury. Idem.

An indictment which specifically accuses the defendant "of the crime of murder" instead of using the general words "of a felony" is unobjectionable. State v. Harris, 12 Nev. 414, 418.

The words "contrary to the form of the statute" are not essential in an indictment for murder, which is a common-law offense. Idem.

Cited, Ex Parte Curnow, 21 Nev. 41 (24 P. 430).

The crime must be directly and positively charged and not argumentatively. State v. Logan, 1 Nev. 110, 113–115.

The want of a direct allegation of anything material to the description of the subject, nature or manner of the offense cannot be supplied by any intendment, or implication whatever. Idem.

An indictment should charge a statutory offense in the words of the statute creating it or words of similar import. Idem.

Cited, State v. Salge, 2 Nev. 323; State v. Ah Chew, 16 Nev. 54.

In an indictment against a county treasurer for embezzlement, it is sufficient to allege and prove the felonious conversion to his own use of any money that came into his possession or was under his control by virtue of his office, without specifying with certainty the particular kind of funds embezzled, or the particular time when the money was received. State v. Carrick, 16 Nev. 120, 124.

Cited, State v. Charlie Hing, 16 Nev. 308; State v. McKiernan, 17 Nev. 227 (30 P. 831).

An indictment for an overt attempt to escape from state prison, which alleges that the prisoner, while lawfully confined in the state prison under the judgment of a competent court for the crime of burglary, did make an overt attempt to escape therefrom, and did unlawfully, forcibly and feloniously break out of the cell in said prison in which he was confined and out of the building in which said cell was and is, contains a sufficient statement of facts to show the commission of the crime charged. State v. Angelo, 18 Nev. 425, 426 (4 P. 1080).

Where an indictment for burglary charged that defendant broke into a certain room occupied by a certain company in a particular building, it was not necessary to allege the ownership of the building, since the allegation that the defendant entered the room occupied by the prosecutor sufficiently laid the ownership of the premises entered in the company. State v. Simas, 25 Nev. 432, 443 (62 P. 242).

A defective description of the grand jury in the body of the indictment may be cured by the title and preamble. State v. Buralli, 27 Nev. 41, 48 (71 P. 532).

7051. Indictment, form of, signed by district attorney.

SEC. 201. The indictment may be substantially in the following form:

State of Nevada, County of..... The State of Nevada, plaintiff, against A. B., defendant (or John Doe, whose real name is unknown). Defendant A. B., above named, is accused by the grand jury of the county of....., of a felony (or of the crime of murder or other name of crime), committed as follows: The said A. B., on the ..... day of ....., A. D. 19...., or thereabouts, at the county of....., State of Nevada, without authority of law and with malice aforethought, killed Richard Roe, by shooting with a pistol (or with a gun or other weapon, according to the facts)."

If the offense be an assault with an intent to commit murder, the statement may be as follows: "The said A. B., on the.....day of....., A. D. 19...., in the county of....., without authority of law, and with

malice aforethought, did shoot the said Richard Roe with a pistol with the intention of killing him."

If the offense be a misdemeanor, it may be designated by the name or style by which the offense is usually defined or known, or simply as a misdemeanor, and the facts constituting the offense may be stated in a manner similar to the examples above stated. The indictment must be signed by the district attorney.

Kerr, Pen. C., 951.

"The said Paul Lovelace did in the night-time of the 11th day of May, 1904, or in the night-time of some day thereabouts to the said 11th day of May, 1904," etc., would sufficiently comply with the statute to constitute the charge of burglary. The authorities show that courts should give a liberal interpretation of indictments to uphold the same rather than a rigid interpretation. State v. Lovelace, 29 Nev. 43, 46 (83 P. 330).

That the mere grammatical, punctuational, rhetorical or linguistic error does not always vitiate, is fully sustained by decisions of courts and text-writers. Idem.

When questioned for the first time on appeal, an indictment will be held sufficient unless it is so defective that by no construction within the reasonable limits of the language used can it be said to charge the offense for which defendant was convicted. State v. Hughes, 31 Nev. 270, 273 (102 P. 562).

The phrase "in pursuance of" means in accordance with; in prosecution or fulfillment of"; and an indictment alleging that defendant assaulted prosecutor with a deadly weapon, and "in pursuance of said assault" attempted to rob him, etc., means "in fulfillment of," rendering the indictment sufficient to charge an assault with intent to rob. Idem.

In an indictment alleging that defendant assaulted the prosecutor and attempted to feloniously rob him, the word "feloniously" means "done with intent to commit" the crime. Idem.

See State v. Logan, and State v. Salge, under sec. 200 of this act.

That part of the indictment which first charges that defendant has committed a certain crime is merely formal and if the body of the indictment sufficiently shows the offense charged, and the facts constituting the offense, it will be held good, notwithstanding any defects in the first clause. State v. Anderson, 3 Nev. 254, 256, 258.

The first clause in the indictment may charge that the defendant has committed a certain crime (giving its technical name, if it has one) or it may simply charge that he has committed a felony, or has committed a misdemeanor, as the case may be.

It is not indispensable in this clause to give the name or description of the offense charged, nor when the name and description is given is it necessary to say whether it is a felony or a misdemeanor. Idem.

The omission of the word "necessary" from the body of the indictment where the offense is charged is not a fatal defect. To say a weapon is not drawn in self-defense is a broader and stronger expression than to say it is not done in necessary self-defense. The latter is included within the former expression. Idem.

It is not necessary to use the exact words of the statute in defining a statutory offense. Words of similar import will suffice. Idem.

The short form of indictment used in this case held to conform to the requirements of the statute. State v. Millain, 3 Nev. 409, 436–440.

A clause in the constitution of the United States (sec. 175, ante) does not restrict the state legislature in prescribing the form of the indictment. It only requires that a grand jury should in some form express its approval of the prosecution before a party can be put on trial for such offense. Idem.

Any indictment which is good to sustain the simple charge of murder is equally good to sustain a conviction of a higher crime of murder in the first degree. Idem.

The form of indictment given in Stats. 1867, 126, is insufficient in so far as it omits the venue. State v. Chamberlain, 6 Nev. 257, 260.

An allegation of the county wherein a crime was committed is as material in an indictment as any fact constituting the body of the offense. Idem.

The section of the criminal statute giving the form of an indictment and omitting the venue therefrom is controlled by the next section, which requires a statement of all essential facts. Idem.

An indictment which omits to state the venue cannot be amended in that respect. Idem.

The power of the legislature to mold and fashion the form of an indictment is plenary; its substance, however, cannot be dispensed with. State v. O'Flaherty, 7 Nev. 153.

A defendant in a criminal action is entitled to have the essential and material facts charged against him found by a grand jury. Idem.

Where an indictment charged that on a certain day defendant, without authority of law and with malice aforethought did shoot at one N. with a pistol loaded with powder and leaden bullets with intent to kill him, etc., it was held that the technical word "assault" should have been employed and an intent to murder stated, but the statutory form of indictment having been followed and no objection before judgment

made, the indictment should be held sufficient. Idem.

The words "shoot at" in an indictment imply that the person shot at was within range and distance; and where such "shooting at" a person with loaded pistol with intent to kill him is charged, it is permissible and necessary to prove the preparation and efficiency of the weapon, and other circumstances evidencing the ability of defendant. Idem.

An allegation in an indictment that a shooting at another person with a loaded pistol was "without authority of law and with malice aforethought, and with intent to kill him," is sufficient as an allegation of an intent to murder. Idem.

Cited, State v. Silver, 9 Nev. 228.

An indictment is not insufficient on account of containing more than the statute demands, if there be nothing in it to perplex a person of ordinary understanding or injure the defendant. State v. Pierce, 8 Nev. 291.

An indictment for murder which fails to show that the death occurred within a year and a day after the perpetration of the act which produced it fails to state the requisite facts to constitute a complete offense. State v. Huff, 11 Nev. 17, 29.

The indictment charges: "That on the 23d day of February, 1876, or thereabouts, in the county of Storey, without authority of law, and with malice aforethought, with a deadly weapon, to wit, a knife, the said O., then and there being armed, did, without authority of law and with malice aforethought, make an assault in and upon one W., with intent to kill him, the said W.," etc. It was held that the time when the offense was committed is alleged with sufficient certainty. State v. O'Connor, 11 Nev. 416, 421.

The words "and before the finding of this indictment," after the date alleged, though proper, need not necessarily be inserted in an indictment. Idem.

The indictment clearly charges an assault with a knife—a deadly weapon, with intent to kill. Idem.

An indictment for murder, charging that defendant killed the deceased "by then and there shooting him," is sufficient, without stating the character of the weapon used in the commission of the offense. State v. McLane, 15 Nev. 345, 352.

See State v. Carrick, under sec. 200 of this act.

The sufficiency of an indictment must be determined with reference to the crime charged, and if the indictment is good for the crime of "an assault with intent to kill" it is sufficient to sustain a conviction of "an assault with a deadly weapon with intent to inflict bodily injury." The graver charge includes the less. State v. Collyer, 17 Nev. 275, 286 (30 P. 891).

In an indictment for assault with intent to kill, it is not necessary to allege in direct terms that the instrument used was a deadly weapon. Idem.

The means of affecting the criminal intent, or the circumstances evincing the design with which the assault was made, are matters of evidence and need not be set forth in the indictment. Idem.

When there is any doubt as to whether the instrument used in committing the assault was a deadly weapon, it is a question for the court and jury to decide. Idem.

See State v. Carrick, State v. Rigg, and State v. Simas, under sec. 200 of this act.

Cited Ex Parte Curnow, 21 Nev. 41 (24 P. 430).

Courts should give a liberal interpretation to indictments to uphold the same, rather than a rigid interpretation. State v. Lovelace, 29 Nev. 43, 48 (83 P. 330).

An indictment charging that accused feloniously and with malice aforethought killed a human being by striking, cutting and stabbing, by means of which he died, being in substantial conformity to the form prescribed by this section, is not open to the objection that it does not charge accused with murder, or aver that the acts were done with intent to kill. State v. Johnny, 29 Nev. 203, 216 (87 P. 3).

Indictment held sufficient under this section. State v. Luhano, 31 Nev. 278, 279 (102 P. 260).

7052. Indictment, must be direct, to contain what.

SEC. 202. The indictment must be direct and contain, as it regards:

1. The parties charged;

2. The offense charged;

3. The particular facts of the offense charged so far as necessary to constitute a complete offense, but the evidence tending to prove the charge need not be stated.

It shall not be necessary to set forth in the indictment the character of the weapon used, nor that any weapon was used in the commission of the offense, unless the using of such weapon is a necessary ingredient in the commission of the offense.

Kerr, Pen. C., 952.

See State v. Anderson under sec. 201 of this act.

Cited, State v. Millain, 3 Nev. 436, 437; State v. Derst, 10 Nev. 445.

In order to sustain a conviction of murder in the first degree, it is not essential that the indictment should state the words "wilfully, deliberately and premeditatedly,"

in addition to the words "unlawfully and with malice aforethought." State v. Thompson, 12 Nev. 140, 145.

On indictment for murder charging that defendant killed deceased "by then and there shooting him" is sufficient, without stating the character of the weapon used in the commission of the offense. State v. McLane, 15 Nev. 352, 354.

Cited, State v. Luhano, 31 Nev. 278, 279 (102 P. 260); State v. Quinn, 16 Nev. 90.

7053. Indictment, when defendant's name is fictitious or erroneous.

SEC. 203. When a defendant is indicted by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it shall be inserted in the subsequent proceedings and reference shall be made to the fact of his being indicted by the name mentioned in the indictment.

Kerr, Pen. C., 953.

7054. Indictment, to charge only one offense.

SEC. 204. The indictment shall charge but one offense, but it may set forth that offense in different forms under different counts.

Kerr, Pen. C., 954.
See secs. 7097, 7105.

Where indictment for robbery contained two counts, the only difference being that one charged the property taken as that of Wells, Fargo & Co., and the other as that of their messenger in custody thereof at the time, it was held authorized under this section and not amenable to the objection of charging more than one offense. State v. Chapman, 6 Nev. 320, 325.

If an offense is set forth in different counts, it must be done in such a way as to show clearly upon the face of the indictment that the matters and things set forth in the different counts are descriptive of one and the same transaction. State v. Malim, 14 Nev. 288, 290.

An indictment for embezzlement contained two counts, each identical as to the time, place, names of persons and description of property. It was held that the indictment charged but one offense. Idem.

An indictment for burglary with intent to steal certain goods, which after stating the burglary goes on to allege the stealing of the goods, is not objectionable as charging two separate and distinct offenses. State v. Ah Sam, 7 Nev. 127.

An objection to an indictment that charges more than one offense should be taken by special demurrer. State v. Johnson, 9 Nev. 175.

An indictment charging defendant with stealing and driving away particularly described cattle of four different owners, charges but one larceny, and is not duplicitous so as to require the state to elect on which count it stands. State v. Douglas, 26 Nev. 202 (99 A. S. 688, 65 P. 802).

7055. Indictment, time, how stated in.

SEC. 205. The precise time at which an 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 of the same, except when the time is a material ingredient of the offense.

Kerr, Pen. C., 955.

An indictment for murder which fails to show that the death occurred within a year and a day after the perpetration of the act which produced it, fails to state the requisite facts to constitute a complete offense. State v. Huff, 11 Nev. 17, 20.

When it is alleged that the defendant, on a certain day and year, etc., "killed" the deceased, it is to be implied that the act which produced the death and the death occurred on the same day. Idem.

See State v. O'Connor, under sec. 201 of this act.

7056. Indictment, error in describing person injured, effect.

SEC. 206. When an offense involves the commission of, or an attempt to commit 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, shall not be deemed to be material.

Kerr, Pen. C., 956.

Above section given in instructions and held proper under circumstances calling for instruction upon the point. State v. Cleavland, 6 Nev. 181, 185.

7057. Indictment, construction of words used.

SEC. 207. The words used in an indictment shall be construed in the

usual acceptance in common language, except such words and phrases as are defined by law, and these shall be construed according to their legal meaning.

Kerr, Pen. C., 957.

Where it was objected to an indictment for grand larceny of certain "silver-bearing ore" that the property alleged to have been stolen savored of the realty, it was held that as "ore" in its usual acceptation meant something severed from the realty, there was a sufficient statement of facts in the indictment showing it to be personal property. State v. Berryman, 8 Nev. 262, 270.

The words "silver-bearing ore," as used in an indictment charging grand larceny of it, means a portion of the vein matter, which has been extracted and separated from the mass of waste rock and earth and implies severance from the freehold. Idem.

Cited, State v. O'Connor, 11 Nev. 421; State v. Lovelace, 29 Nev. 46, 47 (83 P. 330); State v. Hughes, 31 Nev. 273 (102 P. 562).

7058. Indictment—Words of statute need not be strictly followed.

SEC. 208. 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.

Kerr, Pen. C., 958.

See State v. Anderson, under sec. 201 of this act.

An indictment should charge a statutory offense in the words of the statute creating it, or in words of a similar import. People v. Logan, 1 Nev. 110.

7059. Indictment, when sufficient.

SEC. 209. The indictment shall be 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 accurately set forth.

2. That it was found by a grand jury of the district in which the court was held.

3. That the defendant is named; or if his name cannot be discovered, that he be described by a fictitious name, with a statement that he has refused to discover his real name.

4. That the offense was committed at some place within the jurisdiction of the court.

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

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

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

Kerr, Pen. C., 959.

Sufficiency of indictment. State v. Trolson, 21 Nev. 419 (32 P. 930); In re Waterman, 29 Nev. 288, 11 L. R. A. (N. S.) 424, 89 P. 291.

Rape—Constructive force. State v. Lung, 21 Nev. 209 (37 A. S. 505, 29 P. 235).

Indictment—Selling liquor to Indian. State v. Murphy, 23 Nev. 491 (48 P. 628).

In an indictment alleging that defendant assaulted the prosecutor and attempted to feloniously rob him, the word "feloniously" means "done with intent to commit" the crime. State v. Hughes, 31 Nev. 270 (102 P. 562); State v. Clark, 32 Nev. 145 (104 P. 593).

An indictment for a misdemeanor within the jurisdiction of a justice court was held void for want of jurisdiction of the district court. Moore v. Orr, 30 Nev. 458 (98 P. 398).

Indictment held to sufficiently charge death within a year and a day. State v. Williams, 31 Nev. 360 (102 P. 974).

Upon indictment for offense committed by one Indian against another, it is not necessary to charge or for the state to prove that the offense was committed off a reservation, since it is not necessary that a state prosecution negative the federal jurisdiction nor for the state to prove more than that the offense was committed within the county. State v. Buckaroo Jack, 30 Nev. 325 (96 P. 497).

Appeal—Question first raised on appeal—Sufficiency of indictment—Rule of construction. State v. Hughes, 31 Nev. 270 (102 P. 562).

Indictment — Robbery — Sufficiency of. State v. Luhano, 31 Nev. 278 (102 P. 260).

Under indictment for murder, defendant cannot be convicted of rape. Ex Parte Dela, 25 Nev. 346 (83 A. S. 603, 60 P. 217).

Cited, State v. Anderson, 3 Nev. 257.

Where an indictment for burglary charged that defendants entered into a certain room occupied by a certain company as a store, it is not necessary to allege that the company was either a corporation, an association, or a copartnership. State v. Simas, 25 Nev. 432 (62 P. 242).

An indictment charging defendant with stealing and driving away particularly described cattle of four different owners is sufficient under this section. State v. Douglas, 26 Nev. 196, 203 (99 A. S. 688, 65 P. 802).

Under a statute creating Lyon County where the words "Lyon County" are used in the title, preamble and indorsement of an indictment, and in the charging part the defendant is accused by the grand jury of the "County of Lyon," and the offense is alleged to have been committed at the town of Dayton in the "County of Lyon," held sufficient. State v. Buralli, 27 Nev. 41, 48 (71 P. 532).

If such an indictment were deficient at common law, it would be good under the wise and liberal provisions of our criminal practice act. Idem.

A defective description of the grand jury in the body of the indictment may be cured by the title and preamble. Idem.

Sufficiency of indictment—Assault with intent to murder—Legislative power over form of indictment plenary. State v. O'Flaherty, 7 Nev. 153; State v. Millain, 3 Nev. 410.

Murder. An indictment for murder, drawn in the approved form of the common law: Held, sufficient. State v. Raymond, 11 Nev. 98.

Murder — Deficiency. If not specially demurred to, cured by verdict. State v. Harrington, 9 Nev. 91.

Different degrees of murder need not be charged—Legislative power. State v. Millain, 3 Nev. 409.

Murder. Use of words "malice aforethought" tantamount to averment that the act was "wilful, deliberate and premeditated." State v. Hing, 16 Nev. 307; State v. Thompson, 12 Nev. 140; State v. Crozier, 12 Nev. 300; State v. Huff, 12 Nev. 140.

In charging murder. An indictment which specifically accuses the defendant "of the crime of murder," instead of using the general words "of a felony," is unobjectionable. State v. Harris, 12 Nev. 414.

"Contrary to the form of the statute." The words "contrary to the form of the statute," etc., are not essential in an indictment for murder, which is a common-law offense. Idem.

Murder—Character of weapon used need not be stated. State v. McLane, 15 Nev. 345.

Murder—When defective. An indictment for murder which fails to show that death occurred within a year and a day after the perpetration of the act which produced it, fails to state the requisite facts to constitute a complete offense. State v. Huff, 11 Nev. 17.

Murder. Allegation of shooting without allegation of death of victim: Held, sufficient. State v. Anderson, 4 Nev. 265.

"Assault with intent to kill" sufficient to sustain conviction for "an assault with a deadly weapon." State v. Collyer, 17 Nev. 275 (30 P. 891).

That weapon was deadly need not be averred. Idem.

Indictment for homicide. Verdict of "assault with intent to kill" sustained. Ex Parte Curnow, 21 Nev. 33 (24 P. 430).

Assault with intent to kill. It is not necessary in charging an assault to allege a present ability to kill or inflict injury. State v. Rigg, 10 Nev. 284.

Statement of crime. Statutory designation not necessary. Idem.

Assault with intent to murder—Charging the intent—Battery or injury not necessary to constitute. State v. Roderigas, 7 Nev. 328.

Robbery—Property taken not property of prosecuting witness—Charge held sufficient. State v. Ah Loi, 5 Nev. 99.

Robbery—Ownership of property. The essential averment is that the property did not belong to the defendant: State v. Nelson, 11 Nev. 334.

Grand larceny. Acts done must be set out. State v. Brannan, 3 Nev. 238.

Grand larceny of ore—Larceny of articles severed from freehold. State v. Berryman, 8 Nev. 262, 270.

Forgery. Precise words of statute need not be used. State v. McKiernan, 17 Nev. 224 (30 P. 831).

Attempt to escape from prison. State v. Angelo, 18 Nev. 425 (4 P. 1080).

Embezzlement. Particular kind of funds, or particular time when received, need not be stated. State v. Carrick, 16 Nev. 120.

Embezzlement. Allegation of "wilfully, feloniously, or with intent to steal" not necessary. State v. Trolson, 21 Nev. 419 (32 P. 930).

Selling opium—Statutory offense—Negative exceptions. In an indictment for a statutory offense, it is only necessary to state the negative to an exception to the statute, when the exception is such as to render the negative of it an essential part of the definition or description of the offense charged. State v. Ah Chew, 16 Nev. 50 (40 A. R. 488).

Idem. It is the nature of the exception, and not its locality, that determines the question whether it should be stated in the indictment or not. Idem.

Opium act—Mode of using not essential. State v. On Gee How, 15 Nev. 184.

Indictment. Surplusage in indictment does not vitiate when otherwise good. State v. Lawry, 4 Nev. 161; State v. Harkin, 7 Nev. 377; State v. Pierce, 8 Nev. 291.

Indictment for embezzlement. A clerk may commit more than one embezzlement of his employer's money, and if he does he may be separately indicted for each separate offense. State v. Ricord, 11 Nev. 288.

Indictment for robbery held sufficient. State v. Luhano, 31 Nev. 278 (102 P. 260).

Cited, State v. Hughes, 31 Nev. 273 (102 P. 562); State v. Niblett, 31 Nev. 249 (102 P. 229); State v. Malim, 14 Nev. 292; State v. Simas, 25 Nev. 444 (62 P. 242); State v. Lovelace, 29 Nev. 47 (83 P. 330).

The indictment sufficiently alleged that the acts complained of were done with intent to escape, as the word "feloniously" means "done with intent to commit a crime," and with a design on the part of the accused to commit the felony with which he is charged, and the word "attempt" implies both an intent and an endeavor to accomplish it. State v. Clark, 22 Nev. 145 (104 P. 593).

See State v. Salge, and State v. Harris, under sec. 200 of this act, and State v. Johnny, under sec. 201 of this act.

An indictment for violation of the statute making it an offense to sell liquor to an Indian within the state, averring that "defendant in the town of Tonopah, Nye County, Nevada," sold liquor to an Indian, is sufficient without specific averment that the Indian was at the time within the state; this section warranting the reading of the quoted words to apply to the entire transaction constituting or necessary to constitute the offense. State v. Niblett, 31 Nev. 246 (102 P. 229).

7060. Indictment, defect in form not material when not prejudicial—Amendment.

SEC. 210. No indictment shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matters of form which shall not tend to the prejudice of the defendant; and the court may, on application, direct the indictment to be amended to supply the deficiency or omission when, by such amendments, the nature of the charge shall not be changed and the defendant's defense to the action on the merits will not be prejudiced thereby; *provided,* any amendment made during the trial, or within five days thereof, on motion, and without any showing therefor, shall entitle the defendant to a postponement of the trial until the next term.

Kerr, Pen. C., 960.

See sec. 7469.

See State v. Harris, under sec. 200 of this act, and State v. Buralli, under sec. 209 of this act.

Cited, State v. Millain, 3 Nev. 436; State v. Lovelace, 29 Nev. 43 (83 P. 330).

An indictment which omits to state the value cannot be amended in that respect. State v. Chamberlain, 6 Nev. 257.

A court has no more power to add any material charge, accusation or allegation to an indictment that it has to find a bill in the first instance. Idem.

Cited, State v. Buralli, 29 Nev. 47 (71 P. 532; State v. Hughes, 31 Nev. 273, 278, 279 (102 P. 562).

Courts will take judicial notice of periods within the calendar. State v. Williams, 31 Nev. 360, 364 (102 P. 974).

An indictment charging that a mortal wound was inflicted on a date about four months before the finding of the indictment, and that deceased died from it in the meantime, sufficiently charges that death occurred within a year and a day after the infliction of the wound. Idem.

7061. Indictment, what need not be stated therein.

SEC. 211. Neither presumptions of law, nor mattters of which judicial notice is taken, need be stated in an indictment.

Kerr, Pen. C., 961.

See State v. Buralli, under sec. 207 of this act.

7062. Judgment, how pleaded.

SEC. 212. In pleading a judgment or other determination of or proceedings before a court or officer of special jurisdiction the facts conferring jurisdiction need not be stated, but it may be stated that the judgment or determination was duly made or the proceedings duly had before such court or officer. The facts constituting the jurisdiction, however, must be established on the trial.

Kerr, Pen. C., 962.

7063. Private statute, how pleaded.

SEC. 213. In pleading a private statute, or a right derived therefrom, it

shall be sufficient to refer to the statute by its title and the day of its passage, and the court must thereupon take judicial notice thereof.

Kerr, Pen. C., 963.

7064. Indictment for libel, requisites of.

SEC. 214. An indictment for libel need not set forth any intrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter on which the indictment is founded, but it shall be sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on the trial.

Kerr, Pen. C., 964.

7065. Indictment for forgery—Description of lost instrument—Effect.

SEC. 215. 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 such destruction or withholding is alleged in the indictment and established on the trial, the misdescription of the instrument shall be deemed immaterial.

Kerr, Pen. C., 965.

7066. Perjury, what sufficient.

SEC. 216. In an indictment for perjury, or subornation of perjury, it shall be 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 the person before whom it was taken had authority to administer the same, with proper allegations as to the falsity of the matter of which the perjury is assigned; but the indictment need not set forth the pleadings, record or proceedings with which the oath is connected, or the commission or the authority of the court or person before whom the perjury was committed.

Kerr, Pen. C., 966.

7067. Pleading in indictment for obtaining by false representation.

SEC. 217. In every complaint or indictment for obtaining or attempting to obtain any chose in action, money, goods, wares, chattels, effects or other valuable thing, by false representations or by causing or procuring others to report falsely of his wealth or mercantile character, or by any false pretense whatsoever, it shall be a sufficient description of the offense to charge that the accused did, at a certain time and place, unlawfully obtain, or attempt to obtain, as the case may be, from A. B. his money or property, describing it generally, where it can be done, by means and by use of a cheat, or fraud, or trick, or deception, or false representation, or false pretense, or confidence game, or false and bogus check, or instrument, or coin, or metal, as the case may be, with intent to cheat and defraud the said A. B.

Kerr, Pen. C., 967.

Venue—Insufficiency of allegation. State v. Buralli, 27 Nev. 41 (71 P. 532).

False pretenses—Indictment—Allegations of obtaining property—Necessity. In re Waterman, 29 Nev. 288, 11 L. R. A. (N. S.) 424, 89 P. 291.

7068. Pleading in indictment for larceny or embezzlement.

SEC. 218. In an indictment for the larceny or embezzlement of money, bank notes, certificates of stock, or valuable securities, or for a conspiracy to cheat or 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.

Kerr, Pen. C., 967.

7069. Pleading in indictment for selling or possessing lewd and obscene books.

SEC. 219. 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.

Kerr, Pen. C., 968.

7070. Indictment against several.

SEC. 220. Upon an indictment against several defendants, any one or more may be convicted or acquitted.

Kerr, Pen. C., 970.

7071. Distinction between principal and accessory abrogated.

SEC. 221. No distinction shall exist between an accessory before the fact and a principal in the first and second degree in cases of felony; 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, shall hereafter be indicted, tried and punished as principals.

Kerr, Pen. C., 971.
See sec. 6274.

Under sec. 252 of the act of 1861, 462, it was held, one may be principal in the crime of arson who does not himself apply the torch; if he be present and abetting, he is a principal. State v. Squaires, 2 Nev. 227, 234.

An accessory before the fact to a crime, though not present and in fact out of the state at its commission, may be charged in an indictment, and tried, convicted and sentenced in all respects as a principal. State v. Chapman, 6 Nev. 320, 321, 329–333.

It is not essential to the conviction of accessories before the fact that the prosecution first prove the guilt of the principal; it is only necessary in such case to show that a crime has been committed, and that defendant, if present, aided and assisted, or if not present, advised or encouraged it. State v. Jones, 7 Nev. 409.

Where several confederates act in pursuance of a common plan in a commission of an offense, all are held to be present where the crime is committed and all are principals. State v. Laurie, 13 Nev. 386, 391.

7072. Accessory after the fact. indictment and punishment.

SEC. 222. An accessory after the fact to the commission of a felony may be indicted and punished, though the principal felon many be neither tried nor indicted.

Kerr, Pen. C., 972.
See sec. 6275.

7073. Indictment for compounding and concealing offenses.

SEC. 223. 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 a reward, or an engagement, or understanding, express or implied, to compound or conceal the offense or to abstain from a prosecution therefor or to withhold any evidence thereof, though the person guilty of the original offense has not been indicted nor tried.

CHAPTER 20

BENCH WARRANT AND BAIL

7074. Arraignment of defendant.
7075. Arraignment, defendant must appear personally, when.
7076. Arraignment, officer to bring defendant before court, when.
7077. Failure of defendant discharged on bail to appear for arraignment—Bench warrant, when may issue.
7078. Idem—Bench warrant issued by clerk.
7079. Bench warrant, form of.

7080. Arrest under bench warrant—Bail.
7081. How bench warrant may be served.
7082. When defendant arrested on bench warrant in another county—Magistrate of that county to admit to bail—Amount—Sureties.
7083. Increase of bail, ordering defendant into custody, when.
7084. Defendant, if present, to be committed, if not bench warrant to issue.
7085. Defendant must be informed of right to counsel.
7086. Arraignment, how made.
7087. When defendant does not declare his true name, proceedings.
7088. Time given defendant to answer indictment.
7089. Defendant may answer, demur, or plead to the indictment.

7074. Arraignment of the defendant.

SEC. 224. When the indictment is filed, the defendant must be arraigned thereon before the court in which it is found unless the cause is transferred to some other county for trial.

Kerr, Pen. C., 976.

7075. Arraignment, defendant must appear personally, when.

SEC. 225. If the indictment be for a felony, the defendant must be personally present; but if for a misdemeanor, his personal appearance is unnecessary and he may appear upon arraignment by counsel.

Kerr, Pen. C., 977.

7076. Arraignment, officer to bring defendant before court, when.

SEC. 226. When a defendant's personal appearance is necessary, if he is in custody, the court may direct the officer in whose custody he is to bring him before it to be arraigned, and the officer must do so accordingly.

Kerr, Pen. C., 978.

7077. Failure of defendant discharged on bail to appear for arraignment—Bench warrant, when may issue.

SEC. 227. If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear to be arraigned when his personal attendance is necessary, the court, in addition to the forfeiture of the recognizance, or of the money deposited, may direct the clerk to issue a bench warrant for his arrest. If the defendant is indicted without having been previously charged or held to answer, the court may also direct the clerk to issue a bench warrant for his arrest.

Kerr, Pen. C., 979.

7078. Idem—Bench warrant issued by clerk.

SEC. 228. The clerk, on the application of the district attorney, may accordingly, at any time after the order, whether the court is sitting or not, issue a bench warrant into one or more counties.

Kerr, Pen. C., 980.
Cited, State v. Clark, 32 Nev. 145 (104 P. 593).

7079. Bench warrant, form of.

SEC. 229. The bench warrant upon the indictment shall be substantially in the following form:

County of..... The State of Nevada, to any sheriff, constable, marshal, policeman, or peace officer in this state: An indictment having been found on the.....day of....., A. D. 19...., in the district court of the....., county 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 to answer the indictment; or, if the court is not in session, that you deliver him into the custody of the sheriff of the county of..... By order of the court. Given under my hand with the seal of the court affixed, this.....day of ....., A. D. 19..... (Seal.) E. F., Clerk.

Kerr, Pen. C., 981.

Cited, State v. Clark, 32 Nev. 145 (104 P. 593).

Bail — Criminal prosecutions — Recognizance—Description of offense—Sufficiency. State v. O'Keefe, 32 Nev. 331 (108 P. 2).

7080. Arrest under bench warrant—Bail.

SEC. 230. The defendant, when arrested under a warrant for an offense not bailable, must be held in custody by the sheriff of the county in which the information is filed or the indictment is found, unless admitted to bail after an examination upon a writ of habeas corpus; but if the offense is bailable, there must be added to the body of the bench warrant 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 to the information or indictment"; and the court, upon directing it to issue, must fix the amount of bail, and an indorsement must be made thereon and signed by the clerk, to the following effect: "The defendant is to be admitted to bail in the sum of.....dollars."

Kerr, Pen. C., 982.

Cited, Ex Parte Finlen, 20 Nev. 141, 150 (18 P. 827).

7081. How bench warrant may be served.

SEC. 231. The bench warrant may be served in any county, in the same manner as a warrant of arrest, except that when served in another county it need not be indorsed by a magistrate of that county.

Kerr, Pen. C., 983.

7082. When defendant arrested on bench warrant in another county—Magistrate of that county to admit to bail—Amount—Sureties.

SEC. 232. If the offense charged in the bench warrant is bailable, and the defendant is arrested in another county, the officer must, upon being required by the defendant, take him before the most convenient magistrate in that or any adjoining county, who must admit the defendant to bail in the amount fixed in the bench warrant and take bail from him accordingly, naming therein a time, not more than ten days after the time of taking such bail, for the defendant to appear before the court in which the bench warrant was issued; or, in case the court is not in session at the time so fixed for the defendant to appear, for the defendant to appear before the court in which the bench warrant was issued at the first time it is in session thereafter. The qualification and justification of the sureties shall be as required in the chapter on bail.

See sec. 7308, et seq.

7083. Increase of bail, ordering defendant into custody, when.

SEC. 233. 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 in which it is pending, may order the defendant to be committed to actual custody, unless he gives bail in an increased amount, to be specified in the order.

Kerr, Pen. C., 985.

7084. Defendant, if present, to be committed, if not, bench warrant to issue.

SEC. 234. If such order is made and the defendant is present, he must be forthwith committed. If he is not present, a bench warrant must be issued and proceeded upon in the manner provided in this act.

Kerr, Pen. C., 986.

7085. Defendant must be informed of right to counsel.

SEC. 235. If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he

desires and is unable to employ counsel, the court must assign counsel to defend him.

Kerr, Pen. C., 987.
Guaranty of right to have counsel, U. S. Const., sec. 178; State Const., sec. 237.

7086. Arraignment, how made.

SEC. 236. 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 delivering to him a copy thereof, and of the indorsements thereon, including the list of witnesses indorsed on it, and asking him whether he pleads guilty or not guilty to the indictment.

Kerr, Pen. C., 988.

7087. When defendant does not declare his true name, proceedings.

SEC. 237. When the defendant is arraigned, he must be informed that if the name by which he is indicted is not his true name, he must then declare his true name, or be proceeded against by the name in the indictment. If he gives no other name, the court may proceed accordingly; but if he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he was first charged in the indictment.

Kerr, P. C., 989.

A defendant in a criminal case should be indicted by his true name when known; but if unknown, he may be indicted by any name that is sufficient to identify him; and when arraigned, if he do not give his true name upon request, he cannot complain of being tried by the name specified in the indictment, or the name given upon arraignment, although subsequently found not to be the true name. State v. Burns, 8 Nev. 251, 256.

7088. Time given defendant to answer indictment.

SEC. 238. If, on the arraignment, the defendant requires it, he must be allowed a reasonable time, not less than one day, to answer the indictment.

Kerr, Pen. C., 990.

7089. Defendant may answer, demur, or plead to the indictment.

SEC. 239. The defendant may, in answer to the arraignment, move to set aside, demur, or plead to the indictment.

A motion to set aside an indictment must be made before demurrer or plea. If not so made, it will be deemed to have been waived. State v. Hamilton, 13 Nev. 286.

CHAPTER 21

SETTING ASIDE THE INDICTMENT

7090. Grounds for setting aside indictment.
7091. Objection to indictment, when deemed waived.
7092. Motion, when heard—If denied or granted, what proceedings to be had.
7093. Motion to set aside indictment—Case resubmitted.
7094. Order no bar to further prosecution.

7090. Grounds for setting aside indictment.

SEC. 240. The indictment must be set aside by the court in which the defendant is arraigned, upon his motion, in any of the following cases:

1. Where it is not found, indorsed, and presented as prescribed in this act.

2. When the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, 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, when the charge embraced in the indictment is under consideration, except as provided in section 180.

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.

Kerr, Pen. C., 995.

See State v. Hamilton, under sec. 239 of this act.

Cited, State v. McNamara, 3 Nev. 75.

Where the defendant had the privilege after indictment was found, under the ruling of the court as well as by virtue of the provisions of this section to move to set aside the indictment on any ground which would have been good ground of challenge either to the panel or any individual grand juror, and refused to exercise the privilege, it was held that he was not in a position to complain of the ruling of the court in refusing to set aside the indictment. State v. Larkin, 11 Nev. 314, 325.

Where a defendant had not been held to answer before the finding of an indictment, and he moved to set it aside on the ground that several members of the grand jury were not shown to be qualified grand jurors, the motion was properly overruled, since the ground of the motion was not a statutory ground of challenge to an individual grand juror. State v. Simas, 25 Nev. 432, 442 (62 P. 242).

Where accused, in support of his motion to quash the indictment for the nonresidence of a grand juror, presented an affidavit on information and belief averring that fact, he could not complain of the presentation by the state of an affidavit of the juror averring his residence and the disposition by the court of the motion on the affidavits, and accused, if desiring the presence of the grand juror, should have subpenaed him, or taken his testimony by deposition. State v. Casey, 33 Nev. — (117 P. 5).

The admission of hearsay or secondary evidence may be taken advantage of on motion to set aside the indictment under this section. State v. Logan, 1 Nev. 515.

An objection to an indictment that it does not show that it was found by a grand jury having the proper authority must be raised on motion to set it aside. State v. Roderigas, 7 Nev. 328, 333.

The point that an indictment fails to show that it was found by a proper grand jury, cannot be raised under a general demurrer that the facts charged do not constitute a public offense. Idem.

An objection that an indictment has not been found, indorsed or presented as prescribed by law, is not a ground of demurrer, but must be taken by motion to set aside the indictment before pleading to it. State v. Harris, 12 Nev. 414, 419, 420.

Likewise an objection that the indictment was not signed by the district attorney. Idem.

A motion to quash an indictment because the grand jurors were not selected according to law, ought to be made before plea. State v. Collyer, 17 Nev. 275, 280 (30 P. 891).

Cited, State v. Simas, 25 Nev. 442 (62 P. 242).

7091. Objection to indictment, when deemed waived.

SEC. 241. If the motion to set aside the indictment is not made, the defendant is precluded from afterward taking the objections mentioned in the last section.

Kerr, Pen. C., 996.

See State v. Hamilton, under sec. 239 of this act.

Objection to indictment must be taken by motion to set aside, or by special demurrer, and if not so raised or taken, it is waived. State v. Roderigas, 7 Nev. 328, 333.

7092. Motion, when heard—If denied or granted, what proceedings to be had.

SEC. 242. The motion must be heard at the time it is made, unless for good cause the court postpones the hearing to another time. If the motion is denied, the defendant must immediately answer the indictment, either by demurring or pleading thereto. If the motion is 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 has deposited money instead of bail, that the same be refunded to him, unless it directs that the case be resubmitted to the same or another grand jury; *provided*, that after such order of resubmission the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases, if before indictment filed he has not been examined and committed by a magistrate.

Kerr, Pen. C., 997.

See State v. Hamilton, under sec. 239 of this act.

The failure of respective grand juries to find an indictment is not a bar to further prosecution. Ex Parte Job, 17 Nev. 185, 186 (30 P. 699).

7093. Motion to set aside indictment—Custody—Case resubmitted.

SEC. 243. If the court directs that the case be resubmitted, the defendant, if already in custody, must so remain unless he is admitted to bail; or if already admitted to bail, or money has been deposited instead thereof, the bail or money shall be 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 district is discharged, the court must, on the discharge of such grand jury, make the order prescribed by the preceding section.

Kerr, Pen. C., 998.

7094. Order no bar to further prosecution.

SEC. 244. An order to set aside an indictment, as provided in this act, is no bar to a further prosecution for the same offense.

Kerr, Pen. C., 999.

CHAPTER 22

DEMURRER

7095. Pleadings of defendant, designation of.
7096. Demurrer or plea, when put in.
7097. Grounds for demurrer to indictment.
7098. Form of demurrer to indictment.
7099. Hearing of the demurrer.
7100. Judgment on demurrer.
7101. Demurrer allowed, bar to another prosecution, when.
7102. Demurrer sustained, case not directed to be resubmitted, effect.
7103. Case resubmitted, proceeding.
7104. Proceedings if demurrer disallowed.
7105. Objections, how taken.

7095. Pleading of defendant, designation of.

SEC. 245. The pleading on the part of the defendant is either a demurrer or a plea.

Kerr, Pen. C., 1002.

7096. Demurrer or plea, when put in.

SEC. 246. 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.

Kerr, Pen. C., 1003.

7097. Grounds for demurrer to indictment.

SEC. 247. The defendant may demur to the indictment, when it appears upon the face thereof:

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

2. That it does not substantially conform to the requirements of sections 200 and 201.

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

Kerr, Pen. C., 1004.

The point that an indictment fails to show that it was found by a proper grand jury cannot be raised under a general demurrer that the facts charged do not constitute a public offense. State v. Roderigas, 7 Nev. 328, 333.

When in an indictment for murder, otherwise sufficient, it was substantially charged that defendant with malice aforethought struck deceased, thereby giving him a mortal wound of which he died, and it was objected on general demurrer that the killing was not charged in positive and direct terms, but only argumentatively, it was held, that though such indictment might be held defective on special objection, it was aided on general demurrer. State v. Harkin, 7 Nev. 378, 384.

Objections to the form of an indictment for defects apparent upon its face cannot

be taken advantage of for the first time on appeal. State v. O'Flaherty, 7 Nev. 154, 158.

An objection to an indictment that it charges more than one offense should be taken by special demurrer. State v. Johnson, 9 Nev. 175, 179.

Cited, State v. Thompson, 12 Nev. 143.

An objection that indictment has not been found, indorsed or presented as prescribed by law, is not a ground of demurrer. State v. Harris, 12 Nev. 414, 419.

Likewise an objection that the indictment was not signed by the district attorney. Idem.

A defect in an indictment for murder, which by failing to show that the death occurred within a year and a day, is waived by the failure of the defendant to demur to the indictment. State v. Huff, 11 Nev. 17, 20.

An order of the court sustaining a demurrer to one count cannot be treated as an amendment to the indictment. State v. McKiernan, 17 Nev. 224, 229 (30 P. 831).

7098. Form of demurrer to indictment.

SEC. 248. The demurrer must be in writing, signed by either the defendant or his counsel, and filed. It must distinctly specify the grounds of objection to the indictment, or it must be disregarded.

Kerr, Pen. C., 1005.

It seems that a demurrer to an indictment "that it charges two separate and distinct offenses" is objectionable, for the reason that it does not distinctly specify the grounds of objection as contemplated by this section. State v. Ah Sam, 7 Nev. 127, 129.

See State v. Harkin, and State v. Roderigas, under sec. 247 of this act.

7099. Hearing of the demurrer.

SEC. 249. Upon the demurrer being filed, the argument upon the objections presented thereby shall be heard either immediately or at such time as the court may appoint.

Kerr, Pen. C., 1006.

7100. Judgment on demurrer.

SEC. 250. Upon considering the demurrer, the court must give judgment either allowing or disallowing it, and an order to that effect must be entered in the minutes.

Kerr, Pen. C., 1007.

An appeal in criminal cases may be taken from an order of the district court allowing a demurrer, though final judgment be not entered. People v. Logan, 1 Nev. 110, 114, 115.

7101. Demurrer allowed, bar to another prosecution, when.

SEC. 251. If the demurrer is allowed, 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 the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, directs the case to be submitted to the same or another grand jury; *provided*, that after such order or resubmission, the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases.

Kerr, Pen. C., 1008.

An order resubmitting the case "to the same or another grand jury" was not void for uncertainty. Ex Parte Job, 17 Nev. 184, 186, 188 (30 P. 699).

7102. Demurrer sustained, case not directed to be resubmitted, effect.

SEC. 252. If the court does not direct the case to be resubmitted, the defendant, if in custody, must be discharged, or if admitted to bail, his bail must be exonerated, or if he has deposited money instead of bail, the money must be refunded to him.

Kerr, Pen. C., 1009.

7103. Case resubmitted, proceeding.

SEC. 253. If the court direct that the case be resubmitted the same proceedings must be had thereon as are prescribed in section 243.

Kerr, Pen. C., 1010.

7104. Proceedings if demurrer is disallowed.

SEC. 254. If the demurrer is disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may direct. If he does not plead, judgment may be pronounced against him.

Kerr, Pen. C., 1011.

7105. Objections, how taken.

SEC. 255. When the objections mentioned in section 247 appear upon the face of the indictment, they can only be taken advantage of 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.

Kerr, Pen. C., 1012.
See secs. 7054, 7097, 7469.
See State v. O'Flaherty, under sec. 247 of this act.

Section 7054 states that the indictment shall charge but one offense, which may be set forth in different forms; and section 7097 provides that the defendant may demur on the ground "that more than one offense is charged in the indictment." Section 7105 provides that objections which may be taken by demurrer under section 7097, including the objection that the indictment charges more than one offense, can be taken advantage of only by demurrer, except an objection to the jurisdiction of the court, or that the facts stated do not constitute a public offense, and the decisions hold that the objection that the indictment charges more than one offense is waived unless taken by demurrer.

Section 7219 provides that in all cases the defendant may be found guilty of any offense the commission of which is necessarily included in that which is charged in the indictment, or of any attempt to commit the offense charged. These statutory provisions were not referred to in the opinion in Ex Parte Dela, 25 Nev. 346 (see sec. 6240). In that case, under an indictment charging acts constituting rape on a female under the age of consent, and that by reason of these acts and injuries resulting the girl died, the necessary facts to constitute rape and also to constitute murder resulting therefrom both being detailed in the indictment, and no demurrer being interposed, it was held that a conviction of rape could not be sustained. Apparently the court took the view that rape belongs to a class of offenses different from, and is not included in, murder, although the rape caused the death. But no distinction appears to have been made as to whether the doctrine should apply further than to cases of murder generally, such as those where the killing is caused by shooting or poison, and does not include any other offense. Whether the same rule ought to relate to indictments which charge all the essential facts of a crime, such as rape, arson, burglary or robbery, and that death resulted from commission of acts constituting one of these felonies, is not stated definitely. Nor did the court in the opinion consider the principle that if an indictment charges more than one offense a conviction upon evidence supporting the allegations of either may be sustained in the absence of a demurrer.

In the decision in the case of State v. Johnson, 9 Nev. 175, it was held that where there "were distinct offenses, and the indictment charged more than one offense, objection should have been taken by special demurrer." In State v. Derst, 10 Nev. 443, it was determined that objections which go to the form and not to the substance of allegations in the indictment are waived by failure to demur.

"On an indictment for rape there may, where there are proper allegations, be a conviction of attempt, simple assault, felonious assault, assault with intent to rape, assault and battery, carnal knowledge of a child or imbecile female. * * * And on an indictment for assault with intent to rape there may be a conviction of simple assault or, where a battery is alleged, of assault and battery." 33 Cyc. 1453, and cases cited.

When questioned for the first time on appeal, or by writ of habeas corpus, an indictment will be held to be sufficient, unless it is so defective that by no construction within the reasonable limits of the language used can it be said to charge the offense for which the defendant was convicted. State v. Hughes, 31 Nev. 270; State v. Raymond, 33 Nev. —, 117 P. 18; Breckenridge v. Lamb, 34 Nev. —; Dimmick v. Tompkins, 194 U. S. 551.

Under an indictment for murder, a defendant may be lawfully convicted of an assault with intent to kill. Ex Parte Curnow, 21 Nev. 33.

The objections to an indictment on the ground that it does not state facts sufficient to constitute a public offense may be taken for the first time in the appellate court, and is not waived by a failure in the district court to make the point on demurrer or on motion in arrest of judgment. State v. Trolson, 21 Nev. 419.

Where the evidence shows the defendant to be guilty of robbery, he cannot complain that he was convicted of an attempt to commit the crime. State v. O'Keefe, 23 Nev. 127.

See State v. Huff, under sec. 247 of this act.

Objections to the form of an indictment for defects apparent upon its face cannot be taken advantage of for the first time on appeal. State v. O'Flaherty, 7 Nev. 154.

An objection to an indictment that it does not show that it was found by a grand jury having proper authority must be raised on motion to set it aside or taken by special demurrer, and if not so raised or taken, it is waived. State v. Roderigas, 7 Nev. 328, 333.

An objection to an indictment that charges more than one offense should be taken by special demurrer. State v. Johnson, 9 Nev. 175, 178.

A motion in arrest of judgment can only be sustained upon the ground that the court has no jurisdiction over the subject of an indictment, or that the facts stated do not constitute a public offense. State v. O'Connor, 11 Nev. 416, 422.

CHAPTER 23

THE PLEA

7106. Pleas, kinds of.
7107. Pleas, how put in, form of.
7108. Plea of guilty, how put in.
7109. Plea of not guilty, puts in issue, what.
7110. Plea of not guilty, evidence presentable under.
7111. Plea of former acquittal, effect of.
7112. What is a former acquittal.
7113. Former acquittal or conviction of higher offense, effect of.
7114. When defendant refuses to plead to indictment, plea of not guilty to be entered.

7106. Pleas, kinds of.

SEC. 256. There are four 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 plea of not guilty.

4. Once in jeopardy.

Kerr, Pen. C., 1016.

When a prisoner has pleaded "not guilty," it is in the discretion of the court whether or not to allow him to withdraw that plea to interpose another. State v. Salge, 2 Nev. 321.

A prisoner has, however, an absolute right to withdraw that plea to interpose any good defense which has arisen since the last continuance of the case. Idem.

The court properly refused to allow defendant to withdraw his plea of not guilty, to interpose a plea that was not sufficient in law as a defense and besides being defective in form could not, by amendment, be made available. Idem.

Where the defendant interposed a plea of former acquittal in the exact form prescribed by the statute, the court erred in refusing to allow the plea to be entered of record. State v. Johnson, 11 Nev. 273, 276.

It is not for the court to decide in advance that the plea of former acquittal could not be established. That issue was for the jury, subject, of course, to the right of the court to decide upon the competency and relevancy of the evidence offered in support of the plea. Idem.

Although the plea of former jeopardy might have been superfluous, as the facts set out in it might possibly have been given in evidence under the general issue, or if not, then under the plea of former acquittal, it would have been better if the facts disclosed by it amounted to a defense, to allow it to be entered. Idem.

A plea of former conviction or acquittal is a good plea in bar of another indictment for the same offense, but the pendency of another indictment has never been held to constitute matter in abatement. State v. Lambert, 9 Nev. 321, 323.

7107. Pleas, how put in, form of.

SEC. 257. Every plea must be oral, and must be entered upon the minutes of the court in substantially the following form:

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

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

3. If the defendant plead a former acquittal or conviction: "The defendant pleads that he has already been convicted (or acquitted) of the offense charged in the indictment, by the judgment of the court of.....(naming it), rendered at.....(naming the place), on the.....day of....., 19....."

4. If he plead once in jeopardy: "The defendant pleads that he has been

once in jeopardy for the offense charged in the indictment (specifying the time, place and court)."

Kerr, Pen. C., 1017.
See State v. Johnson, under sec. 256 of this act.

7108. Plea of guilty, how put in.

SEC. 258. A plea of guilty can be put in by the defendant himself only in open court, unless upon indictment against a corporation, in which case it may be put in by counsel. 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.

Kerr, Pen. C., 1018.

7109. Plea of not guilty, puts in issue, what.

SEC. 259. The plea of not guilty puts in issue every material allegation of the indictment.

Kerr, Pen. C., 1019.

7110. Plea of not guilty, evidence presentable under.

SEC. 260. All matters of fact tending to establish a defense, other than that specified in the third subdivision of section 256, may be given in evidence under the plea of not guilty.

Kerr, Pen. C., 1020.
See State v. Johnson, under sec. 256 of this act.
Cited, Ex Parte Maxwell, 11 Nev. 440.

7111. Plea of former acquittal, effect of.

SEC. 261. If the defendant was formerly acquitted on the ground of a variance between the indictment and the proof, or upon an objection to the form or substance of the indictment, 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.

Kerr, Pen. C., 1021.

7112. What is a former acquittal.

SEC. 262. Whenever the defendant is acquitted on the merits, he is acquitted of the same offense, notwithstanding any defect in form or substance in the indictment on which the trial was had.

Kerr, Pen. C., 1022.

7113. Former acquittal or conviction of higher offense, effect of.

SEC. 263. When the defendant is convicted or acquitted, or has been once placed in jeopardy, upon an indictment, the conviction, acquittal, or jeopardy 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.

Kerr, Pen. C., 1023.

When the verdict in a criminal case is so defective that no judgment can be entered upon it, the defendant, who might have had it perfected, is considered as assenting to it, and as waiving any objections to being tried before another jury. State v. Rover, 10 Nev. 388 (21 A. R. 745).

A defendant tried on a criminal charge and found not guilty by a jury, cannot again be put on trial for the same offense. State v. Herrick, 3 Nev. 259.

See State v. Johnson, under sec. 256 of this act.

Whenever the accused has been placed upon trial, upon a valid indictment before a competent court, and a jury duly impaneled, sworn and charged with the case, his jeopardy attaches, and the discharge of the jury before verdict, unless with the consent of the defendant, or the intervention of some unavoidable accident or some overruling necessity, operates as an acquittal. Ex Parte Maxwell, 11 Nev. 428.

The inability of the jury to agree upon a verdict is recognized as creating a necessity that justifies the discharge of the jury. Idem.

Whenever a trial has commenced, whether

for misdemeanor or felony, and the judge discovers any imperfection which will render a verdict void or voidable by him, he may stop the trial, and what has been done will be no impediment in the way of any future proceedings. Idem.

When all the facts are agreed upon by counsel and the only question is whether, upon the agreed facts, the defendant had been in jeopardy, it was held that the court did not invade the province of the jury by giving an instruction that there was no evidence to sustain a plea of former jeopardy. State v. Pritchard, 16 Nev. 102.

Where one charged with murder is convicted of involuntary manslaughter, a lower degree of homicide, and on appeal a new trial is granted him because of a mistrial in the first instance or for irregularity or prejudicial error committed against him, the reversal and remanding sets aside the result of the former trial and leaves accused in the same position as if he had never been tried; and he cannot plead former acquittal of crimes of a greater degree than the one of which he was convicted. In re Somers, 31 Nev. 531 (135 A. S. 700, 103 P. 1073).

Under such circumstances, accused is estopped from pleading rights under the constitution (sec. 237, ante). Idem.

7114. When defendant refuses to plead to indictment, plea of not guilty to be entered.

SEC. 264. If the defendant refuses to answer the indictment by demurrer or plea, a plea of not guilty must be entered.

Kerr, Pen. C., 1024.

The entry of a plea of not guilty in behalf of the accused by the clerk, upon the order of a court after defendant's refusal to plead, is equivalent to a plea of not guilty. State v. Williams, 31 Nev. 361 (102 P. 974).

CHAPTER 24

REMOVAL OF ACTION BEFORE TRIAL

7115. Change of venue, grounds for.
7116. Application for removal, how made.
7117. Court must order change of venue, when.
7118. Order of removal, transmission of.
7119. Proceedings on removal when defendant is in custody.
7120. Authority of court to which action is removed—Transmission of original papers.

7115. Change of venue, grounds for.

SEC. 265. A criminal action, prosecuted by indictment, may be removed from the court in which it is pending on application of the defendant or state, on the ground that a fair and impartial trial cannot be had in the county where the indictment is pending.

Kerr, Pen. C., 1033.

The action of the lower court, in granting or refusing a change of venue, is a matter of judicial discretion. If that discretion is abused, it becomes the duty of an appellate court to afford relief. State v. Millain, 3 Nev. 409; State v. McLane, 15 Nev. 345.

Two circumstances should influence a court to grant a change of venue. One, the impossibility of obtaining a fair and impartial jury; the other, such a state of public excitement against the prisoner as would be likely to overawe and intimidate even a fair jury. Idem.

It is proper for a district judge to overrule a motion for a change of venue, on the ground that there exists in the community such a prejudice that the accused cannot obtain an impartial trial, until it can be shown by an examination of a sufficient number of jurors that a fair and impartial jury cannot be obtained. State v. Gray, 19 Nev. 212 (8 P. 456); State v. Millain, supra.

Showing for change of venue—When insufficient. State v. Lawry, 4 Nev. 161; State v. McLane, supra.

Under this section, before amendment, it was held: Where, in the case of a person charged with crime, the prosecution is unable, on account of public prejudice against him, to procure a competent jury, and the prisoner (who alone under the statute has the right) refuses to apply for a change of venue, it is proper to keep the case pending until a jury can be had, and the prisoner cannot complain of the want of a speedy trial. Ex Parte Stanley, 4 Nev. 114.

The fact that threats were made against the prisoner by parties who were not shown to have been either numerous or influential, was not sufficient to show that there was danger of the jury being intimidated. State v. Millain, 3 Nev. 409.

Evidence in a homicide case showing deceased to be a man favorably and widely known in the county and defendant a stranger, the very general and unqualified belief in the county in defendant's guilt and a bitter feeling against him, and the knowledge of the jurors of such feeling and the possession by many of them of qualified opinions as to his guilt which would require evidence to remove, held to show an abuse of discretion in refusing a change of venue, under this section. State v. Dwyer, 29 Nev. 421, 425 (91 P. 305).

To require a change of venue it must appear that the prejudice against accused is so great as to prevent a fair trial, and it is not sufficient merely to show that great prejudice exists against him. State v. Casey, 33 Nev. — (117 P. 5).

Where there was a great feeling against accused in the town where the offense was committed, but that feeling did not permeate the entire county, which contained between four and five thousand possible jurors, and many of the jurors were drawn from portions of the county where the victim of accused was unknown, and where the crime was hardly known of or discussed, the refusal to grant a change of venue on the ground of the prejudice against accused was not erroneous. Idem.

A motion for a change of venue is addressed to the sound discretion of the trial court, and where it is possible to secure an impartial jury, the denial of the motion is within the court's discretion. Idem.

7116. Application for removal, how made.

SEC. 266. The application for removal must be made in open court, and in writing, verified by the affidavit of the defendant or district attorney, and a copy of said affidavit must be served on the adverse party at least one day prior to the hearing of the application; *provided*, the application may be supported or opposed by other affidavits or other evidence, or other witnesses may be examined in open court. Whenever the affidavit of the defendant shows that he cannot safely appear in person to make such application because popular prejudice is so great as to endanger his personal safety, and such statement is sustained by other testimony, such application may be made by his attorney, and must be heard and determined in the absence of the defendant, notwithstanding the charge then pending against him be a felony, and he has not at the time of such application been arrested or given bail, or been arraigned, or pleaded or demurred to the indictment.

Kerr, Pen. C., 1034.

7117. Court must order change of venue, when.

SEC. 267. If the court is satisfied that the representations of the applicant are true, an order must be made transferring the action to the district court of some convenient county free from a like objection.

Kerr, Pen. C., 1035.
Cited, State v. Millain, 3 Nev. 461.

7118. Order of removal, transmission of.

SEC. 268. The order of removal must be entered on the minutes, and the clerk must immediately make out and transmit to the court to which the action is removed a certified copy of the order of removal, record, pleadings, and proceedings in the action, including the undertakings for the appearance of the defendant and of the witnesses.

Kerr, Pen. C., 1036.

7119. Proceedings on removal when defendant is in custody.

SEC. 269. If the defendant is in custody, the order must direct his removal and he must be forthwith removed by the sheriff of the county where he is imprisoned, to the custody of the sheriff of the county to which the action is removed.

Kerr, Pen. C., 1037.

7120. Authority of court to which action is removed—Transmission of original papers.

SEC. 270. The court to which the action is removed must proceed to trial and judgment therein 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, on the 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.

Kerr, Pen. C., 1038.

CHAPTER 25

MODE OF TRIAL

7121. Issue of fact defined.

SEC. 271. An issue of fact arises:

1. Upon a plea of not guilty.
2. Upon a plea of former conviction or acquittal of the same offense.
3. Upon a plea of once in jeopardy.

Kerr, Pen. C., 1041.

The issue on the plea of former acquittal is for the jury. State v. Johnson, 11 Nev. 273, 276.

7122. Issue of fact, how tried.

SEC. 272. Issues of fact must be tried by jury, unless a trial by jury be waived in cases not amounting to felony, by consent of both parties expressed in open court and entered in its minutes. In cases of misdemeanor the jury may consist of twelve, or any number less than twelve upon which the parties may agree in open court.

Kerr, Pen. C., 1042.

See State v. Johnson, under sec. 271 of this act.

When trial is begun. State v. Jackman, 31 Nev. 511 (104 P. 13).

7123. When presence of defendant is necessary on the trial.

SEC. 273. If the prosecution be for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of 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.

Kerr, Pen. C., 1043.

CHAPTER 26

FORMATION OF TRIAL JURY—CALENDAR

7124. Formation of trial jury.
7125. Calendar to be prepared by clerk.
7126. Idem—Order of disposition of cases.
7127. Defendant entitled to time to prepare for trial.

7124. Formation of trial jury.

SEC. 274. Trial juries for criminal actions are formed in the same manner as trial juries in civil actions.

Kerr, Pen. C., 1046.

See sec. 7129.

Juries in civil cases, sec. 5204.

General statutes relating to jurors and juries, secs. 4925–4942.

Jury trial secured by Const., sec. 232.

It is competent for the legislature to point out the mode of impaneling juries, and the forms of the common law in procuring a jury can be changed and made subject to statutory regulations. State v. McClear, 11 Nev. 39.

Cited, State v. Johnson, 12 Nev. 134; State v. Crozier, 12 Nev. 300, 304.

Adjournment of court while jury being impaneled. State v. Jackman, 31 Nev. 511 (104 P. 13).

Vacation of venire. Idem.

7125. Calendar to be prepared by clerk.

SEC. 275. The clerk must prepare a calendar of all criminal actions pending in the court, enumerating them according to the date of the filing of the indictment, specifying, opposite the title of each action, whether such action is for a felony or a misdemeanor, and whether the defendant is in custody or on bail.

Kerr, Pen. C., 1047.

See sec. 4906.

No terms of district court. State v. Jackman, 31 Nev. 511 (104 P. 13).

7126. Idem—Order of disposition of cases.

SEC. 276. The issues on the calendar must be disposed of in the following order, unless for good cause the court shall direct an action to be tried out of its order:

1. Prosecutions for felony, when the defendant is in custody;
2. Prosecutions for misdemeanor, when the defendant is in custody;
3. Prosecutions for felony, when the defendant is on bail;
4. Prosecutions for misdemeanor, when the defendant is on bail.

Kerr, Pen. C., 1048.

7127. Defendant entitled to time to prepare for trial.

SEC. 277. After his plea, the defendant is entitled to at least two days to prepare for his trial.

Kerr, Pen. C., 1049.

CHAPTER 27

POSTPONEMENT OF TRIAL

7128. Postponement, when and how ordered.

SEC. 278. When an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party by affidavit, direct the trial to be postponed to another day; but in all cases where a continuance is granted upon the application of either party the court may require, as a condition of granting such continuance, that the party applying therefor consent to taking, forthwith, or at any time to be fixed by the court, of the deposition of any witness summoned by the opposite party whose deposition has not previously been taken. Such deposition must be taken in the same manner that depositions are required to be taken in section 147 of this act. The court also has authority to require all witnesses to enter into undertakings in such sum as the court may order, with or without sureties, to appear and testify on the day to which the case may be continued; *provided*, that any witness who is unable to procure sureties for his attendance may be discharged on his own recognizance, upon giving his deposition in the manner prescribed in section 147 of this act. All depositions taken in pursuance of any of the provisions of this act may be read in evidence, subject to the legal objections made at the time of taking the same, on the trial of the cause, whenever it shall appear that the personal attendance of the witness could not, with due diligence, be obtained, or when he has left the state, or become of unsound mind, or is too sick or infirm to attend, or is dead.

Kerr, Pen. C., 1052.

Continuance by court on its own motion. State v. Lawry, 4 Nev. 161.

Continuance. When a prisoner makes out a proper case for continuance, on account of the absence of a material witness, it is error to compel him to go to trial on the admission of the district attorney that the witness, if present, would swear to the facts as stated by the defendant. State v. Salge, 2 Nev. 321; State v. McLane, 15 Nev. 373.

Affidavit for continuance in a criminal case, on account of the absence of witnesses, should give assurance of their attendance at the time to which it is proposed to continue, and show the means of affiant's information; and unless such attendance seems probable the continuance should be denied. State v. Rosemurgey, 9 Nev. 308.

Continuance—Absence of witness—Affidavit. Fatally defective when it fails to show that there are not other persons by whom the defendant could prove the same facts that he expected to prove by the absent witness. State v. Marshall, 19 Nev. 240.

Continuance within discretion of court, and unless there is an abuse of its discretion its action will be sustained. State v. Chapman, 6 Nev. 320; State v. Rosemurgey, 9 Nev. 308.

Objection to affidavit for continuance. Cannot be made for first time in supreme court. Idem.

Affidavit should show diligence on part of defense. Idem.

Continuance. Affidavit defective when does not show due diligence to produce witnesses, or that they could be produced at subsequent term. State v. Gray, 19 Nev. 212 (8 P. 456).

When attachment to bring witness in is offered by the court, continuance properly refused if insisted upon. Idem.

Continuance properly refused. Affidavit fails to show testimony of absent witnesses material, or that an effort had been made to procure their attendance. State v. Davis, 14 Nev. 407.

Affidavit for continuance—Material facts to be stated positively. State v. O'Flaherty, 7 Nev. 153.

Practice on refusal of continuance. Idem.

Although the prisoner may not have made out a very clear case for a continuance, still if the court was of opinion that injustice was done the prisoner because of the absence of his witness, it was justified in granting a new trial. State v. Salge, 2 Nev. 321.

This section confers upon the courts the right to continue the trial of a criminal case upon a proper showing by affidavit; but if the fact authorizing a continuance is within the judicial knowledge of the court, such as the impossibility of impaneling a jury at the term, an affidavit is unnecessary. Ex Parte Stanley, 4 Nev. 113, 117.

If the prosecution in a criminal case makes all reasonable efforts to impanel a jury at the first term at which the case is triable, but without success, and it does not appear that a jury could not be had at the next term, there is good cause for a continuance on its motion for the term. Idem.

An affidavit for continuance on the ground of the absence of a witness is fatally defective when it fails to show that there are not other persons by whom the defendant could prove the same facts that he expected to prove by the absent witness. State v. Antone, 19 Nev. 240 (8 P. 672).

CHAPTER 28

CHALLENGING THE JURY

7129. Challenge to juror defined.
7130. Joint defendants to join in challenges.
7131. Jury panel defined.
7132. Challenge to the panel defined.
7133. Idem—Grounds for.
7134. Challenge to panel, when and how taken.
7135. Exception to challenge—Trial of sufficiency of challenge.
7136. If challenge found sufficient—Amendment.
7137. Denial of challenge, how entered—Trial of.
7138. Challenge for bias of officer, how made and tried.
7139. Effect of allowing or disallowing challenge to panel.
7140. Defendant to be informed of right to challenge.
7141. Challenge to individual jurors.
7142. Idem—When to be taken.
7143. Peremptory challenge defined—How taken.
7144. Idem—Number allowed defendant and state.
7145. Challenge for cause, general or particular.
7146. General causes of challenge.
7147. Particular causes of challenge for bias.
7148. Challenge for implied bias, grounds for.
7149. Exemption is privilege, not cause for challenge.
7150. Challenge for implied and actual bias, how taken.
7151. Exception to challenge, denial.
7152. Trial of challenge.
7153. Idem—Juror as witness.
7154. Other witnesses—Rules of evidence.
7155. Idem—Court to allow or disallow challenge.
7156. Order of taking challenges for cause.
7157. Idem—Order of challenges.
7158. Peremptory challenges, order of taking.

7129. Challenge to juror defined.

SEC. 279. A challenge is an objection made to the trial jurors, and is of two kinds:

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

Kerr, Pen. C., 1055.

7130. Joint defendants to join in challenges.

SEC. 280. When several defendants are tried together, they cannot sever their challenges, but must join therein.

Kerr, Pen. C., 1056.

A similar provision in the law of California was held to apply to peremptory challenges, and it follows that no such challenge can be insisted on, as a matter of right, unless all the defendants on trial unite in making it. State v. McLane, 15 Nev. 358, 359.

7131. Jury panel defined.

SEC. 281. The panel is a list of jurors returned by the proper officer to serve at a particular court, or for the trial of a particular action.

Kerr, Pen. C., 1057.

7132. Challenge to the panel defined.

SEC. 282. A challenge to the panel is an objection made to all the jurors returned, and may be taken by either party.

Kerr, Pen. C., 1058.

Challenge to panel, State v. Johnny, 21 Nev. 203 (87 P. 3); State v. Jackman, 31 Nev. 511 (104 P. 13); State v. Williams, 31 Nev. 360 (102 P. 974).

7133. Idem—Grounds for.

SEC. 283. A challenge to the panel can be founded only on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn.

Kerr, Pen. C., 1059.

Where the defendant interposed a challenge to the panel under this section, and there is nothing in the record to show that any evidence was offered in support of the challenge, it was held that the challenge should be disallowed, as a matter of course. State v. Rigg, 10 Nev. 284.

Cited, State v. Squaires, 2 Nev. 227, 230.

A challenge to the panel of jurors, upon the ground that one juror expressed actual bias against the prisoner and other jurors expressed themselves in such a manner as to imply bias upon their part, and that the law permitting said jurors to be of the panel, is unconstitutional, cannot be considered as an objection to the panel of jurors. State v. Raymond, 11 Nev. 99, 106.

A challenge in writing to a panel of additional jurors, summoned upon an open venire directed to the sheriff, on the ground "that the deputy sheriff who summoned forty of said jurors was biased against defendant," was held insufficient in failing to state whether it was taken for implied or actual bias. State v. Gray, 19 Nev. 212, 217 (8 P. 456).

When the facts upon which a challenge rests are disputed, the proper course is to submit the question to triers; but if neither of the parties ask for triers to settle the issue of fact and submit the evidence to the judge, and take his determination thereon, the decision will be treated as would the decision of triers—as final—and not subject to exceptions or review upon appeal. Idem.

After reciting the issuance of venire and vacation of order for venire and various orders in reference to the same, it was held that, conceding irregularity, there was not a material departure of the forms provided by statute in respect to the drawing and return of the jury, expressly made grounds for challenge by this section; material departures being only such as affect the substantial rights of a defendant in securing an impartial jury. State v. Jackman, 31 Nev. 512, 519 (104 P. 13).

It is within the discretion of the court to vacate an order under which a venire has issued before the return day thereof. Idem.

7134. Challenge to panel, when and how taken.

SEC. 284. A challenge to the panel must be taken before a juror is sworn, and must be in writing or be noted by the stenographer, if there be one, and must plainly and distinctly state the facts constituting the ground of challenge.

Kerr, Pen. C., 1060.

A challenge to the panel of trial jurors must be in writing, specifically stating the grounds of challenge or other facts on which the challenge is based. State v. Millain, 3 Nev. 411, 459.

Cited, State v. Raymond, 11 Nev. 106; State v. Hamilton, 13 Nev. 389.

The proper practice is to dispose of each challenge in the order named in the statute, if there is no challenge to the panel, or if it is made or overruled, questions appertaining alone to general disqualification should then be asked, and a challenge for that cause interposed or waived; next, questions competent in view of a challenge for implied bias only should be propounded, and a challenge for that cause interposed or waived; and last, the same course should be pursued for actual bias. State v. Davis, 14 Nev. 440 (33 A. R. 563).

7135. Exception to challenge—Trial of sufficiency of challenge.

SEC. 285. If the sufficiency of the facts alleged as ground of the challenge is denied, the adverse party may except to the challenge. The exception need not be in writing, but must be entered on the minutes of the court or of the stenographer, if there be one, and thereupon the court must proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true.

Kerr, Pen. C., 1061.

Cited, State v. Baker, 8 Nev. 146.

7136. If challenge found sufficient—Amendment.

SEC. 286. If, on the exception, the court finds the challenge sufficient, it may, if justice requires it, permit the party excepting to withdraw his exception and to deny the facts alleged in the challenge. If the exception is allowed, the court may, in like manner, permit an amendment to the challenge.

Kerr, Pen. C., 1062.
Cited, State v. Hartley, 22 Nev. 354 (28 L. R. A. 33, 40 P. 372).

7137. Denial of challenge, how entered—Trial of.

SEC. 287. If the challenge is denied, the denial may be oral and must be entered on the minutes of the court, or be noted by the stenographer, and the court must proceed to try the question of fact, and upon such trial the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other person, may be examined to prove or disprove the facts alleged as the ground of the challenge.

Kerr, Pen. C., 1063.
Cited, State v. Baker, 8 Nev. 146.

7138. Challenge for bias of officer, how made and tried.

SEC. 288. 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.

Kerr, Pen. C., 1064.
See State v. Gray, under sec. 283 of this act.

7139. Effect of allowing or disallowing challenge to panel.

SEC. 289. If, either upon exception to the challenge or a denial of the facts, the challenge is allowed, the court must discharge the jury, so far as the trial in question is concerned. If it is disallowed, the court must direct the jury to be impaneled.

Kerr, Pen. C., 1065.

7140. Defendant to be informed of right to challenge.

SEC. 290. Before a juror is called, the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror, he must do so when the juror appears and before he is sworn.

Kerr, Pen. C., 1066.

See State v. Marx, under sec. 292 of this act.

The bill of exceptions shows that A. and eleven other jurors were examined and passed by both parties, for cause, and were in the box, when inquiry was made of counsel for appellant whether he had any peremptory challenges; that appellant then refused to exercise his right, and thereafter passed his challenge several times, and did so after notice from the court that, in so passing his challenge, he would be considered as having accepted all the jurors then in the box. The state interposed several challenges, and as often as a juror was challenged another name was drawn, thus keeping the panel full. When the state ceased challenging, no challenge had been taken by appellant, and he then challenged A. It was held that the court erred in disallowing this challenge (Hawley, J., dissenting). State v. Pritchard, 15 Nev. 75.

The facts stated in the bill of exceptions did not constitute a waiver on the part of the defendant to interpose a challenge to the juror A. at any time before the jury was sworn (Hawley, J., dissenting). Idem.

7141. Challenge to individual jurors.

SEC. 291. A challenge to an individual juror is either:

1. Peremptory; or,
2. For cause.

Kerr, Pen. C., 1067.

7142. Idem—When to be taken.

SEC. 292. A challenge to an individual juror 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.

Kerr, Pen. C., 1068.

See State v. Pritchard, under sec. 290 of this act.

The allowance of a peremptory challenge to a juror who has been accepted and sworn is not a matter of right, and refusal to allow it is not error. State v. Anderson, 4 Nev. 265, 275.

Whenever it appears from the examination of a juror upon his voir dire that he is disqualified, the challenge must be interposed before he is sworn; but these provisions have no application to a case where the disqualification or incompetency of the juror is not without any fault of the challenging party, discovered until after the jury is completed. State v. Pritchard, 16 Nev. 102, 113.

The discharge of an incompetent juror after the jury is sworn, does not create a necessity for the discharge of the eleven remaining competent jurors. Idem.

The fact that, after a verdict of guilty has been rendered, the accused ascertains for the first time that before the jury was impaneled a jury had formed and expressed an opinion as to his guilt, is not a ground for a new trial. State v. Marx, 15 Nev. 33, 36.

Under the common law, the statutes and the constitution, the defendant may waive his objections to the qualifications of jurors; and if he fails to challenge before the jury is completed, knowing of the disqualification, he waives his objections, and is estopped from demanding, as a matter of right, a new trial on the ground of such disqualification; and in contemplation of the constitution, he has not in such case constitutional grounds for the objection that he has not been tried by a constitutional jury. State v. Hartley, 22 Nev. 342, 355, 356 (28 L. R. A. 33, 40 P. 372).

7143. Peremptory challenge defined—How taken.

SEC. 293. 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.

Kerr, Pen. C., 1069.

There is a broad distinction between challenges for bias and peremptory challenges. The former challenges exist as matter of right. The latter is by favor of the legislature only. The number of peremptory challenges has always been regulated by statute. State v. McClear, 11 Nev. 39, 49; State v. Crozier, 12 Nev. 304.

On appeal, a party cannot complain of a ruling of the court in denying his challenge to a juror for cause if it appear that, when the jury was completed, his peremptory challenges had not been exhausted. State v. Hartley, 22 Nev. 342 (28 L. R. A. 33, 40 P. 372).

Cited, State v. Millain, 3 Nev. 459.

7144. Idem—Number allowed defendant and state.

SEC. 294. The defendant and the state shall each be entitled to peremptory challenges as follows:

1. If the offense charged is punishable with death or by imprisonment for life, to the number of eight (8).

2. If the offense charged is other than those above mentioned, to the number of four (4).

Kerr, Pen. C., 1070.

If a juror is challenged for cause, that challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise any inference that the challenging party is thereby injured. An injury could only arise in case the challenging party was compelled to exhaust all his peremptory challenges, and afterwards have an objectionable juror placed on the panel for want of another challenge. State v. Raymond, 11 Nev. 107, 108.

See State v. Pritchard, under sec. 290 of this act.

7145. Challenge for cause, general or particular.

SEC. 295. A challenge for cause may be taken by either party. It is an objection to a particular juror, and is either:

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

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

Kerr, Pen. C., 1071.

Citizenship of juror. State v. Salge, 1 Nev. 455.

The supreme court cannot review the action of the court below in disallowing a challenge for cause when the party objecting makes no specification as to the nature of the objection upon which he interposes the challenge. The party challenging should specify the grounds of his challenge. State v. Squaires, 2 Nev. 227; State v. Chapman, 6 Nev. 320, 327.

A juror was excused upon the ground that he entertained such conscientious opinions concerning capital punishment as would preclude his finding defendant guilty of offense punishable with death; it was held that the objection to the juror did not go to the general cause of challenge, that he was disqualified from serving in any case, but to the particular cause that he was disqualified from serving on the case on trial. State v. Hing, 16 Nev. 307, 310.

7146. General causes of challenge.

SEC. 296. General causes of challenge are:

1. A conviction for felony;

2. A want of any of the qualifications prescribed by law to render a person a competent juror;

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

Kerr, Pen. C., 1072.

7147. Particular causes of challenge for bias.

SEC. 297. A particular cause of challenge is:

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 act as implied bias;

2. For the existence of a state of mind on the part of the juror which leads to a just inference, in reference to the case, that he will not act with entire impartiality, which is known in this act as actual bias.

Kerr, Pen. C., 1073.

It is not within the power of the legislature to deprive a citizen accused of crime of the right to challenge a juror for actual bias. State v. McClear, 11 Nev. 44, 45, 67.

The right to challenge for implied bias may, to some extent, be regulated by the legislature, care being always taken to preserve inviolate the right of trial by a jury of twelve impartial men. Idem.

The great purpose of the right to challenge a juror for actual or implied bias, is to secure to the defendant and the state a fair and impartial jury. Idem.

A juror who states that in a case where the punishment is death, he would not find the defendant guilty upon circumstantial evidence is an incompetent juror. State v. Pritchard, 15 Nev. 74; State v. Hing, 16 Nev. 307.

The allowing of challenges by the court for implied bias is not subject to review. State v. Larkin, 11 Nev. 314; State v. Pritchard, 15 Nev. 74; 16 Nev. 101; State v. Hing, 16 Nev. 307.

7148. Challenge for implied bias, grounds for.

SEC. 298. A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution shall have been instituted, or to the defendant;

2. Standing in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, debtor and creditor; or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution shall have been instituted, or in the employment of any such parties;

3. Being a party adverse to the defendant in a civil action, or having complained against or being 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 charge, and whose verdict was set aside, or which was discharged without a verdict, after the case 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. Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged;

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

10. Because he is, or within the year preceding has been, engaged or interested in carrying on any business, calling, or employment the carrying on of which is a violation of law, where the defendant is indicted for a like offense;

11. Because he has been a witness, either for or against the defendant, on the preliminary trial or before the grand jury.

Kerr, Pen. C., 1074.

See State v. McClear, under sec. 297 of this act.

When there is any probability that a juror is disqualified, and the court is unable to determine it by reason of the inability to establish the fact that constitutes such disqualification, it is not required to hazard the regularity of its proceedings by permitting such person to sit as a juror, but may excuse him at any time before he is charged with the case. State v. Kelly, 1 Nev. 224.

"Unqualified opinion or belief" commented on. State v. Millain, 3 Nev. 409, 428–430, 455–460.

When the defendant challenges a juror for implied bias, he must specify the particular grounds upon which he bases his challenge. State v. Raymond, 11 Nev. 99, 106.

A juror who has formed and expressed an opinion that was not unqualified, is not a disqualified juror, especially when he declares that he did not entertain any deliberate or fixed opinion or belief as to the guilt or innocence of the defendant. Idem.

See State v. Hing, under sec. 295 of this act.

A mere suspicion in the mind of a juror that the defendant is guilty does not disqualify him from sitting on a petit jury, especially, if that suspicion mainly arises from the examination to which he is subjected by the prisoner's counsel touching his qualification as a juror. It is only an unqualified opinion that disqualifies. State v. Millain, 3 Nev. 409.

The fact that a juror had formed an unfavorable opinion of defendant's character will not sustain a challenge for implied bias. State v. Davis, 14 Nev. 440.

The allowing of challenges by the court for implied bias is not subject to review (State v. Larkin, 11 Nev. 314, affirmed). State v. Pritchard, 15 Nev. 74, 80.

A juror stated that he had an unqualified opinion that there was a deficiency in the accounts of the defendant, as county treasurer, but had no opinion as to defendant's guilt or innocence. It was held that a challenge to the juror, for implied bias, was properly disallowed. State v. Carrick, 16 Nev. 120.

A juror who states that he would not convict a defendant in a capital case on circumstantial evidence is an incompetent juror. State v. Pritchard, 16 Nev. 101, 108, 113, 126.

If a challenge be made for implied bias, it is properly overruled unless it set forth the ground upon which the challenge is made. State v. Gray, 19 Nev. 212, 218 (8 P. 456); State v. Vaughan, 22 Nev. 285, 296 (39 P. 733).

Where some answers of a jury to questions by defendant's counsel tended to show that a juror had formed an opinion concerning the guilt or innocence of defendant from what he had heard on the street, but he stated that he had not formed any opinion, it was not error not to remove such juror. State v. Simas, 25 Nev. 434 (62 P. 242).

Where a juror testified that he had formed an opinion concerning the guilt or innocence of defendant from what he had read in the newspapers; that he would be wholly governed by the evidence given in the case, and disregard any opinion that he may have formed from newspaper accounts; and that he had no prejudice or bias for or against defendant, and knew of no reason why he could not give him a fair trial, it was not error not to remove such juror. Idem.

The formation or expression of an unqualified opinion, when shown not to have been based on newspaper accounts alone, renders a juror incompetent, though, in response to a question of the court, he says that he can put aside what he has heard and read and give the defendant an impartial trial. State v. Roberts, 27 Nev. 448, 468 (17 P. 598).

The expressing of an unqualified opinion touching the guilt or innocence of the defendant, when such opinion is not based solely on newspaper reports, is a disquali-

fication of a juryman, regardless of what opinion the talesman may actually have at the time of his examination. State v. Dwyer, 29 Nev. 421, 425 (91 P. 305).

In determining the condition of a juror's mind as to his qualifications, all of his examination on voir dire should be considered, and doubts as to his qualification resolved in favor of accused. State v. Casey, 34 Nev. — (117 P. 5).

A challenge to a juror, who on voir dire testified that he entertained an opinion which he could lay aside without any evidence, and that he could determine the case according to the evidence and the instructions, and that he had not expressed any opinion, but that he had at the present time some belief on the guilt or innocence of accused, based on what he had heard, was properly denied. Idem.

A challenge to a juror, who on voir dire admitted that he entertained a prejudice against the defense of hereditary insanity and acute alcoholic insanity and did not believe in their existence, but who stated that if legal insanity was shown by the evidence and the instructions, he would give proper credit to the defense, was properly denied. Idem.

The existence of a mere abstract opinion of a juror, in which no element of malice or of unnecessary prejudice enters, does not form a just ground for the rejection of the juror, though he admits that the defense of insanity, owing to its abuse, raises a feeling of hostility to accused, and where the evidence shows that, notwithstanding his feeling against the defense, the juror will be guided by the testimony, uninfluenced by any bias, he is competent. Idem.

7149. Exemption is privilege, not cause for challenge.

SEC. 299. An exemption from service on a jury is not a cause for challenge, but the privilege of the person exempted.

Kerr, Pen. C., 1075.

Exemption from jury duty, secs. 3356, 4016, 4932, 4941, 4612.

7150. Challenge for implied and actual bias, how taken.

SEC. 300. In a challenge for implied bias, one or more of the causes stated in section 298 must be alleged. In a challenge for actual bias, it must be alleged that the juror is biased against the party challenging him; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public press, 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 submitted to him. The challenge may be oral, but must be entered in the minutes of the court or of the stenographer.

Kerr, Pen. C., 1076.

Cited, State v. Millain, 3 Nev. 459; State v. Baker, 8 Nev. 146.

When the defendant challenges a juror for implied bias, he must specify the particular grounds upon which he bases his challenge. State v. Raymond, 11 Nev. 99, 106.

Where, on a trial for burglary, a juror was challenged by the defendant "for cause," such challenge was insufficient. State v. Simas, 25 Nev. 434, 450 (62 P. 242).

Challenge to juror and exception. State v. Hartley, 22 Nev. 342 (28 L. R. A. 33, 40 P. 372); State v. Vaughan, 22 Nev. 285 (39 P. 733).

Opinion from reading newspapers. State v. Simas, supra; State v. Roberts, 27 Nev. 499 (77 P. 598); State v. Williams, 28 Nev. 395 (82 P. 353).

7151. Exception to challenge, denial.

SEC. 301. 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 are prescribed in section 285, except that if the challenge is allowed the juror must be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge.

Kerr, Pen. C., 1077.

7152. Trial of challenge.

SEC. 302. If the facts are denied, the challenge must be tried by the court.

Kerr, Pen. C., 1078.

See State v. Gray, under sec. 283 of this act.

7153. Idem—Juror as witness.

SEC. 303. 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 must answer every question pertinent to the inquiry.

Kerr, Pen. C., 1081.

7154. Other witnesses—Rules of evidence.

SEC. 304. 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 evidence on the trial of the challenge.

Kerr, Pen. C., 1082.

7155. Idem—Court to allow or disallow challenge.

SEC. 305. The court must allow or disallow the challenge, and its decision must be entered in the minutes of the court.

Kerr, Pen. C., 1083.

Denial of proper challenge, when not judicial error. State v. Hartley, 22 Nev. 342 (28 L. R. A. 33, 40 P. 372).

Doubt as to qualifications. State v. Buralli, 27 Nev. 41 (71 P. 532).

Waiver of objections. State v. Hartley, supra.

7156. Order of taking challenges for cause.

SEC. 306. All challenges to an individual juror, except peremptory, must be taken, first by the defendant, and then by the state, and each party must exhaust all his challenges before the other begins.

Kerr, Pen. C., 1086.

See State v. Pritchard, under sec. 290 of this act.

7157. Idem—Order of challenges.

SEC. 307. 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 an implied bias;
4. To an individual juror, for an actual bias.

Kerr, Pen. C., 1087.

See State v. Davis, under sec. 284 of this act.

Cited, State v. Pritchard, 15 Nev. 82.

7158. Peremptory challenges, order of taking.

SEC. 308. If all challenges on both sides are disallowed, either party, first the state and then the defendant, may take a peremptory challenge, unless the parties' peremptory challenges are exhausted.

Kerr, Pen. C., 1088.

Sec. 354, Stats. 1861, 435, as amended by Stats. 1875, 117, sec. 7, was held unconstitutional in State v. McClear, 11 Nev. 39; State v. Raymond, 11 Nev. 98; State v. Johnson, 11 Nev. 148.

See State v. Pritchard, under sec. 290 of this act.

CHAPTER 29

THE TRIAL

7159. Order of trial.
7160. Defendant may testify in own behalf, when.
7161. Defendant not compelled to testify—Failure not evidence of guilt.
7162. Argument may be restricted.
7163. Defendant presumed innocent—Reasonable doubt.
7164. Reasonable doubt defined.
7165. Idem—No other definition to be given.
7166. When doubt as to degree—Conviction to be of lowest.
7167. Defendants charged jointly—Separate or joint trial.
7168. Defendant discharged, to testify for the state.
7169. Defendant discharged, to testify for codefendant.

7170. Idem—Order deemed bar and acquittal.
7171. Rape, proof necessary.
7172. Brand of cattle prima facie evidence of ownership.
7173. Conspiracy—Pleading and proof.
7174. Murder, burden of proof.
7175. Forgery, proof of corporate existence—Expert testimony.
7176. Proof of corporate existence generally.
7177. Abortion or enticing female—Testimony of the woman not sufficient.
7178. Lottery tickets, sale, proof.
7179. False pretenses—Evidence in writing or proof by two witnesses.
7180. Conviction on testimony of accomplice—Corroboration.
7181. Mistake in charging offense—Discharged or new prosecution.
7182. When proof shows higher offense than that charged, proceedings.
7183. Indictment for higher offense not found or dismissed, proceedings.
7184. Want of jurisdiction—Discharge of jury.
7185. Idem—Defendant discharged—Exception.
7186. Idem—When jurisdiction lies in another county—Defendant held.
7187. Idem—Arrest on warrant from proper county, or discharge.
7188. Facts not constituting an offense—Discharge or resubmission.
7189. Case submitted anew, proceedings.
7190. Juror knowing facts concerning case must testify.
7191. View by jury—Oath of officer attending.
7192. Jurors permitted to separate, when—Oath of officer.
7193. Jury to be admonished at each adjournment.
7194. Sickness of judge or juror, procedure.
7195. Court to decide questions of law.
7196. Jury to determine law and fact in libel cases.
7197. Court to decide law, jury to decide fact.
7198. Charge to jury, what to be stated in.
7199. Either party may present written charge to court—Must be given, when.
7200. The court to indorse and sign instructions to jury.
7201. Jury to decide in court or retire—Officers sworn.
7202. Defendant may be committed though on bail, when.
7203. Court may advise acquittal, when—Jury not bound by advice.

7159. Order of trial.

SEC. 309. The jury having been impaneled and sworn, the trial shall proceed in the following order:

1. If the indictment be for felony, the clerk must read the indictment 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 cause, and offer the evidence in support of the indictment;

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

4. The parties may then respectively offer rebutting testimony only, unless the court, for good reasons, in furtherance of justice, permit them to offer evidence upon their original cause;

5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, or unless a demand be made to have the jury instructed in advance of the argument as hereafter provided in this section, the counsel for the people must open and must conclude the argument;

6. The judge shall then charge the jury, if requested by either party; he may state the testimony and declare the law, but shall not charge the jury in respect to matters of fact; such charge shall be reduced to writing before it is given; and in no case shall any charge or instructions be given to the jury otherwise than in writing, unless by the mutual consent of the parties. If either party request it, the court must settle and give the instructions to the jury before the argument begins, but this shall not prevent the giving of further instructions which may become necessary by reason of the argument.

Kerr, Pen. C., 1093.

The court cannot give any instruction verbally unless the prisoner assents, and that assent must appear affirmatively. People v. Bonds, 1 Nev. 33, 36.

The statute which requires the charge or instructions of the court to be in writing, is not violated by the judge telling the jury that he could not instruct them as to matters of fact. State v. Waterman, 1 Nev. 544, 550.

In a criminal trial, if a district court allows a departure from the ordinary order of proof and permits a reopening of the case, it will be presumed, nothing being shown to the contrary, that its discretion was properly exercised. State v. Harrington, 9 Nev. 91, 94.

Where the defendant in a capital trial was not allowed to close the argument to the jury, but it appeared that two counsel on each side argued the case and that they alternated, the prosecution having the close, was held no error. State v. Pierce, 8 Nev. 291, 296.

The court has the right to give instructions to the jury in a criminal case. Idem.

The privilege of closing the argument in a criminal case belongs to the state. State v. Smith, 10 Nev. 106.

Reading certain sections from the statute as instructions to the jury, is not giving oral instructions. State v. Stewart, 9 Nev. 121, 132.

Where in a criminal case, the state was represented by two attorneys, and after the first had opened the argument to the jury, the defendant's attorney submitted the case and objected to any further argument, but the other attorney for the state was allowed to address the jury, it was held no abuse of discretion. Idem.

The trial of a criminal case does not begin, strictly speaking, until the jury is impaneled and sworn. State v. Jackman, 31 Nev. 511, 518 (104 P. 13).

Misstatements of law made by the prosecuting attorney in his argument to the jury should be corrected by proper instructions and not by motion to strike out. A motion to strike out in such case affords no adequate relief. State v. O'Keefe, 23 Nev. 127 (62 A. S. 768, 43 P. 918).

Where, in a prosecution for homicide, defendant's counsel did not avail himself of the privilege of securing an alleged confession in the possession of the state and offer it in evidence, the fact that the prosecuting attorney in his opening statement erroneously referred to such confession as having been voluntarily made by defendant, and stated some of the facts contained therein, and that he "might" introduce it in evidence, which he subsequently failed to do, did not constitute reversible error. State v. Williams, 28 Nev. 395 (82 P. 353).

Where a prosecuting attorney, in reply to the argument of defendant's counsel that an alleged confession, if introduced, would have been beneficial to accused, stated that defendant could have taken the stand and testified with reference to the confession, referred to by the state but not introduced in evidence, if he had so desired, and the court, in response to an objection, stated that the fact that defendant was not a witness could not be considered against him, the argument of the prosecuting attorney was not reversible error. Idem.

In a prosecution for assault upon a woman with intent to kill, it is reversible error for the prosecuting attorney, in his argument to the jury, to charge the accused with being a "macque" although the court admonished the jury to disregard the statement. State v. Rodriguez, 31 Nev. 342 (102 P. 863).

In a prosecution for uxoricide, in which the defense was sadistic insanity, in objecting to accused's medical witness detailing statements made by accused during a physical examination of him before trial by the witness, the state's attorney stated that he objected to a conversation occurring in a jail three or four days before trial, as it was highly improper, and no doubt was manufactured for the physician's benefit, and that he knew there were eye witnesses to the killing, and that a legitimate defense of insanity would not avail accused. Held, that striking out such remarks and instructing the jury to disregard them cured any injury that might have resulted therefrom, they being merely the expression of the state's attorney's opinion. State v. Petty, 32 Nev. 324.

See Const., sec. 327, ante.

7160. Defendant may testify in own behalf, when.

SEC. 310. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; the credit to be given his testimony being left solely to the jury, under the instructions of the court.

Kerr, Pen. C., 1323.

Instruction as to weight to be given defendant's testimony held correct. State v. Streeter, 20 Nev. 404 (22 P. 758).

Cited. State v. Newton, 4 Nev. 112.

In a criminal case the jury has the right to believe such portions of defendant's own testimony as they consider true, and to disbelieve such portions as they consider false; his testimony, like that of other witnesses, is to be weighed and determined by the jury from all the surrounding circumstances of the case. State v. Stewart, 9 Nev. 120, 130.

For instruction as to weight and effect to be given testimony of accused, see State v. Hartley, 22 Nev. 343, 360 (28 L. R. A. 33, 40 P. 372).

Where defendant in a criminal case offers himself as a witness in his own behalf, he is to be held and treated so far as an ordinary witness for the defense that he can be cross-examined and in the discretion of the court be called for further cross-examination. State v. Cohn, 9 Nev. 179, 188.

Though an accused person may become a witness in his own behalf and thereby sub-

ject himself to cross-examination, the prosecution cannot make him, against his consent, its own witness. Idem.

If the defendant voluntarily testifies in his own behalf, the same rights exist in favor of the district attorney to comment upon his testimony or his refusal to answer any proper question, or to draw all proper inferences from his failure to testify upon any material matter within his knowledge, as with other witnesses. State v. Harrington, 12 Nev. 125, 129.

7161. Defendant not compelled to testify—Failure not inference of guilt.

SEC. 311. Nothing herein contained shall be construed as compelling any such person to testify; and in all cases wherein the defendant in a criminal action declines to testify, the court shall specially instruct the jury that no inference of guilt is to be drawn against him for that cause.

Kerr, Pen. C., 1323.

See sec. 6857.

Guaranty that an accused person shall not be compelled to testify against himself, U. S. Const., sec. 175; State Const., sec. 237.

This section has no application to a case where the defendant voluntarily makes himself a witness in his own behalf. State v. Harrington, 12 Nev. 125, 129.

7162. Argument may be restricted.

SEC. 312. If the indictment be for an offense punishable with death, two counsel on each side may argue the case to the jury, but in such case as well as in all others the counsel for the people must open and must conclude the argument. If it be for any other offense, the court may in its discretion restrict the argument to one counsel on each side.

Kerr, Pen. C., 1095.

See State v. Pierce, State v. Smith, and State v. Stewart, under sec. 309 of this act.

Argument of counsel—Order of. State v. Pearce, 15 Nev. 188

7163. Defendant presumed innocent—Reasonable doubt.

SEC. 313. A defendant in a criminal action is presumed to be innocent until the contrary be proved; and in case of a reasonable doubt whether his guilt be satisfactorily shown, he is entitled to be acquitted.

Kerr, Pen. C., 1096.

In criminal prosecutions, the guilt of the accused must be proved beyond a reasonable doubt, but if such doubt be raised it makes no difference whether it be raised by the evidence for the prosecution or by that for the defendant. State v. McCluer, 5 Nev. 132, 136.

In criminal cases, evidence tending to prove guilt must be established beyond a reasonable doubt; that tending to mitigate or disprove, by a preponderance of testimony. State v. Pierce, 8 Nev. 292, 300, 302.

Cited, State v. McClear, 11 Nev. 48.

7164. Reasonable doubt defined.

SEC. 314. A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual and substantial, not mere possibility or speculation.

Kerr, Pen. C., 1097.

The charge of the court and instructions given in regard to reasonable doubt, held as favorable to the defendant as the law would warrant. State v. Raymond, 11 Nev. 98, 105.

Instructions as to reasonable doubt refused. State v. Hamilton, 13 Nev. 386, 394.

An instruction upon the term "reasonable doubt" construed and held to be correct. State v. McLane, 15 Nev. 347, 365, 366.

Instruction upon this term held to relate merely to the rules by which the jury ought to be governed in their consideration of the evidence in the case, and not prejudicial to defendants. State v. Potts, 20 Nev. 389, 396, 399 (22 P. 754); State v. Streeter, 20 Nev. 404, 409 (22 P. 758).

The statutory definition of this term held to be well expressed and that judges should follow the exact language of the statute, and not attempt any further information. Idem.

7165. Idem—No other definition to be given.

SEC. 315. No other definition of reasonable doubt shall be given by the court to juries in criminal actions in this state.

7166. When doubt as to degree—Conviction to be of lowest.

SEC. 316. When it legally appears that a defendant has committed a public offense, and there is a reasonable ground for doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only.

Kerr, Pen. C., 1097.
See State v. Pierce, under sec. 313 of this act.

7167. Defendants charged jointly—Separate or joint trial.

SEC. 317. When two or more defendants shall be jointly charged with a felony, any defendant requiring it must be tried separately. In other cases the defendants jointly charged may be tried separately or jointly, in the discretion of the court.

Kerr, Pen. C., 1098.

A defendant, jointly indicted with another, who intends to demand a separate trial, must make his motion before the formation of a jury is commenced. State v. McLane, 15 Nev. 345, 358.

Cited, Ex Parte Gafford, 25 Nev. 101, 104 (83 A. S. 568, 57 P. 484).

Two persons jointly indicted were jointly tried. After the state had rested, defendant J. rested and moved that the case be given to the jury at that time, before any testimony was offered on behalf of his codefendant. It was held that the motion was properly denied, for, if granted, it would have given the defendant a separate trial, which could only be granted on application made before the commencement of the formation of the jury. State v. Johnny, 29 Nev. 203, 216 (87 P. 3).

7168. Defendant discharged, to testify for the state.

SEC. 318. When two or more persons shall be included in the same charge, the court may, at any time before the defendants have gone into their defense, on the application of the district attorney or other counsel for the state, direct any defendant to be discharged, that he may be a witness for the state.

Kerr, Pen. C., 1099.
See State v. Johnny, under sec. 317 of this act, and State v. Smith, under sec. 330 of this act.
Cited, State v. Luhano, 31 Nev. 279 (102 P. 260).

7169. Defendant discharged, to testify for codefendant.

SEC. 319. 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 shall order him to be discharged from the indictment, before the evidence shall be deemed closed, that he may be a witness for his codefendant.

Kerr, Pen. C., 1100.
See State v. Johnny, under sec. 317 of this act.
Cited, State v. Luhano, 31 Nev. 279 (102 P. 260).

7170. Idem—Order deemed bar and acquittal.

SEC. 320. The order mentioned in the last two sections shall be deemed an acquittal of the defendant discharged, and shall be a bar to another prosecution for the same offense.

Kerr, Pen. C., 1101.

7171. Rape, proof necessary.

SEC. 321. Proof of actual penetration, however slight, into the body is sufficient to sustain an indictment for rape, or for the crime against nature.

Kerr, Pen. C., 263.
See sec. 6443.

The slightest proof of penetration will justify submitting the question to the jury, and such proof can be inferred from circumstances. In this case there was proof of penetration. State v. Depoister, 21 Nev. 107 (25 P. 1000).

7172. Brand of cattle prima facie evidence of ownership.

SEC. 322. Upon the trial of any public offense which concerns any neat cattle, horse, mule, or other animal running at large upon any range in this state, the brand and other marks upon such animal shall be prima facie evidence of ownership.

See secs. 6640-6641.

The identification and ownership of cattle may be proved by the marks and brands on the hides therefrom. Whether the evidence upon this point in any given case is sufficient as to the ownership of the cattle, is a question of fact to be determined by the jury. State v. Cardelli, 19 Nev. 319, 328 (10 P. 433).

7173. Conspiracy—Pleading and proof.

SEC. 323. Upon a trial for conspiracy, in a case where an overt act shall be necessary to constitute the offense, the defendant shall not be convicted unless one or more overt acts shall be expressly alleged in the indictment, nor unless one of the acts alleged shall have been proved; but other overt acts not alleged may be given in evidence.

Kerr, Pen. C., 1104.
See sec. 6377.

A statement of an accomplice, who conspired with accused to steal ore, that he had made thousands of dollars for accused, was not admissible in evidence in a prosecution for larceny, it not appearing whether the transaction referred to was illegal, and it not relating to the conspiracy. State v. Smith, 34 Nev.—(117 P. 19).

In a prosecution for larceny by conspiring with others to steal ore, evidence of a statement by one of the conspirators after arrest, that another of them was a big boob or he never would have been caught, etc., was not admissible in evidence; the conspiracy being then at an end. Idem.

7174. Murder, burden of proof.

SEC. 324. 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, shall devolve upon him, unless the proof on the part of the prosecution tends to show that the crime committed amounts only to manslaughter, or that the defendant was justifiable or excusable.

Kerr, Pen. C., 1105.

7175. Forgery, proof of corporate existence—Expert testimony.

SEC. 325. 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 shall not be 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 shall be competent witnesses to prove that such a bill or note shall have been forged or counterfeited.

Kerr, Pen. C., 1107.
See sec. 6683.

7176. Proof of corporate existence generally.

SEC. 326. If, upon a trial or proceeding in a criminal case, the existence, constitution, or powers of any corporation shall become material, or be in any way drawn in question, it is not necessary to produce a certified copy of the articles or acts of incorporation, but the same may be proved by general reputation, or by the printed statutes of the state, or government, or country by which such corporation was created.

Mont. P. C., 2086; Utah, 4859.

7177. Abortion or enticing female—Testimony of the woman not sufficient.

SEC. 327. Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away any female of previous chaste character, for the purpose of prostitution, or aiding or assisting therein, the defendant shall not be convicted upon the testimony of the woman upon or with whom the offense shall have been committed, unless she is corroborated by other evidence.

Kerr, Pen. C., 1108; Utah, 4858.

7178. Lottery tickets, sale, proof.

SEC. 328. Upon a trial for violation of any of the provisions of the crimes and punishment act, concerning lotteries or the sale of lottery tickets, it shall not be necessary to prove the existence of any lottery in which any lottery ticket shall purport to have been issued, nor to prove the actual signing of any such ticket or share, or pretended ticket or share of any pretended lottery, nor that any lottery ticket, share, or interest was signed or issued by the authority of any manager, or of any person assuming to have authority as manager; but in all cases proof of the sale, furnishing, bartering, or procuring of any ticket, share, or interest therein, or of any instrument purporting to be a ticket, or part or share of any such ticket shall be evidence that such share or interest was signed and issued according to the purport thereof.

Kerr, Pen. C., 1109.
Lotteries are prohibited by Const., sec. 282.

7179. False pretenses—Evidence in writing or proof by two witnesses.

SEC. 329. 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 shall not be convicted if the false pretense shall have been expressed in language, unaccompanied by a false token or writing, unless the pretense or some note or memorandum thereof be in writing, subscribed by or in the handwriting of the defendant, or unless the pretense be proved by the testimony of two witnesses, or that of one witness and corroborating circumstances; but this section shall not apply to a prosecution for falsely representing or personating another, and, in such assumed character, marrying, or receiving any money or property.

Kerr, Pen. C., 1110.
See sec. 6704, 6705.

7180. Conviction on testimony of accomplice—Corroboration.

SEC. 330. A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

Kerr, Pen. C., 1111.
See sec. 7451.

When the wife of an accomplice is called her testimony is entitled to at least the same weight and effect as that of an accomplice. State v. Waterman, 1 Nev. 543, 549.

Where, on appeal in a criminal case, it was claimed that certain evidence given for the purpose of corroborating that of an accomplice was not sufficient, it was held, that the question before the supreme court was not as to the weight of the evidence, but as to whether it was corroborative within the meaning of this section. State v. Chapman, 6 Nev. 320, 324.

The evidence to corroborate the testimony of an accomplice is sufficient if it tends to connect the defendant with the

commission of the offense. State v. Streeter, 20 Nev. 403, 405 (22 P. 758).

An accomplice is not incompetent to give testimony, but the weight thereof is for the jury, under proper instruction subject to the restriction of this section. State v. Douglas, 20 Nev. 196, 204 (99 A. S. 688, 65 P. 802).

The finding of a jury as to whether one was an accessory is conclusive. State v. Smith, 34 Nev.—(117 P. 19).

One who feigned participation in a larceny of ore which he was employed to watch in order to assist in the detection of accused, was not an "accomplice" so as to make his testimony subject to rules regarding accomplices' testimony. Idem.

In a prosecution for larceny of ore statements of an accomplice, relating in part to the taking of the ore and its division according to agreement, were admissible in evidence, some ore having been taken thereafter, and the statements being material. Idem.

7181. Mistake in charging offense—Discharged or new prosecution.

SEC. 331. When it appears, at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant must not be discharged, if there appears good cause to detain him in custody; but the court must commit him, or require him to give bail for his appearance to answer to the offense; and may also require the witnesses to give bail for their appearance.

Mont. P. C., 2090; N. D., 8198.

7182. When proof shows higher offense than that charged, proceedings.

SEC. 332. If it appears 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.

7183. Indictment for higher offense not found or dismissed, proceedings.

SEC. 333. If an indictment for the higher offense be dismissed by the grand jury, or be not found at its next session, the court shall again proceed to try the defendant on the original indictment.

7184. Want of jurisdiction—Discharge of jury.

SEC. 334. The court may also direct the jury to be discharged when 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.

Kerr, Pen. C., 1113.
Cited, State v. Luhano, 31 Nev. 279.

7185. Idem—Defendant discharged—Exception.

SEC. 335. If the jury is discharged because the court has not jurisdiction of the offense charged, and it appears that it was committed out of the jurisdiction of this state, the defendant must be discharged, unless the court orders that he be detained for a reasonable time, to be specified in the order, to enable the county attorney to communicate with the chief executive officer of the country, state, territory, or district where the offense was committed.

N. D., 8202.

7186. Idem—When jurisdiction lies in another county—Defendant held.

SEC. 336. If the offense was committed within the jurisdiction of another county of this state, the court may direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the proper county for his arrest; or if the offense is a misdemeanor only it may admit him to bail in an undertaking, with sufficient sureties, that he will, within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county; and, if not sooner arrested thereon, will attend at the office of the sheriff of the county where

the trial was had, at a certain 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, to be mentioned in the undertaking; and the clerk must forthwith transmit a certified copy of the indictment, and of all the papers filed in the action, to the district attorney of the proper county, the expenses of which transmission is chargeable to that county.

Kerr, Pen. C., 1115.

7187. Idem—Arrest on warrant from proper county, or discharge.

SEC. 337. If the defendant is not arrested on a warrant from the proper county, as provided in the next preceding section, he must be discharged from custody, or his bail in the action is exonerated, or money deposited instead of bail must be refunded, as the case may be, and the sureties in the undertaking, as mentioned in that section, must be discharged. If he is arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant issued by a magistrate.

Kerr, Pen. C., 1116.
See sec. 6940.

7188. Facts not constituting an offense—Discharge or resubmission.

SEC. 338. If the jury be discharged because the facts as charged do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged, or if admitted to bail, that his bail be exonerated, or if he has deposited money instead of bail, that the money deposited be refunded to him, unless in the opinion of the court, a new indictment can be framed, upon which the defendant can be legally convicted, in which case it may direct that the case be submitted to the same or another grand jury.

Kerr, Pen. C., 1117.

7189. Case submitted anew, proceedings.

SEC. 339. If the court direct that the case be submitted anew, the same proceedings must be had thereon as are prescribed in section 243.

Kerr, Pen. C., 1117.

7190. Juror knowing facts concerning case must testify.

SEC. 340. If a juror has any personal knowledge respecting a fact in controversy in the case, he must declare the same in open court, during the trial. If, during the retirement of a jury, a juror declare any 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.

Kerr, Pen. C., 1120.

7191. View by jury—Oath of officer attending.

SEC. 341. When, in the opinion of the court, it is proper that the jury should view the place in which the offense is 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 the officer, to the place, which must be shown to them by a person appointed by the court for that purpose; and the officer must be sworn to suffer no person to speak or communicate with the jury, nor do so himself on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

Kerr, Pen. C., 1119.

Cited, State v. Stanley, 4 Nev. 74.

A view of the premises is not taking evidence in the case. It is means provided by statute to enable the jury more satisfactorily to weigh the evidence given in court. When the action of the court is

taken and the view is made on motion of the defendant, and no request or expression of a desire on his part to be present was made, his absence is not ground for new trial nor is the absence of the judge legal ground of complaint. State v. Hartley, 22 Nev. 343, 357 (28 L. R. A. 33, 40 P. 372).

The order of court should specify the place to be inspected, and should designate some person who knows the place to point it out to the jury. The person so designated, and none other, except the officer in charge, should conduct the jury to the spot and should leave them to make their own observations without any comment or explanations whatever. State v. Lopez, 15 Nev. 407, 410, 411.

When the jury arrived at the premises, they found a person who had never been sworn as a witness in the case. This person, in response to questions addressed him by members of the jury, pointed out to them all the special features of the premises. It was held a violation of the statute, and a denial of the right of the defendant to be confronted with the witnesses against him. Idem.

When it is shown that a clear, legal right of the defendant has been transgressed it devolves upon the state to prove that he was not harmed thereby. Idem.

7192. Jurors permitted to separate, when—Oath of officer.

SEC. 342. The jurors sworn to try a criminal action may, at any time before the submission of the case to the jury, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. The officer must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial, and to return them into court at the next meeting thereof.

Kerr, Pen. C., 1121.

It is error to allow a jury to disperse after impanelment without the consent of the prisoner. But a jury is not properly impaneled until they are sworn and charged with the case. State v. Squaires, 2 Nev. 227, 232.

Cited, State v. Pritchard, 15 Nev. 100.

The fact that one of the jurors was where he could exchange a single word with a stranger without being overheard by the officer in charge is sufficient to establish a technical separation of the jury. State v. Harris, 12 Nev. 414.

An officer in charge of a jury in a criminal case ought not to permit strangers to have access to a juror out of his sight or hearing, and thus afford an opportunity for tampering with or prejudicing the juror. Idem.

Where the jury separates by consent of counsel and no objection is made by defendant, verdict upheld. State v. McMahan, 17 Nev. 365, 369 (30 P. 1000).

7193. Jury to be admonished at each adjournment.

SEC. 343. The jury must also, at each adjournment of the court, whether they be permitted to separate or be 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 cause is finally submitted to them.

Kerr, Pen. C., 1122.

Cited, State v. Lopez, 15 Nev. 411.

The failure of the court to admonish the jury will not affect their verdict when it is clearly shown that the accused was not injured by such failure. State v. Gray, 19 Nev. 213, 222 (8 P. 456).

7194. Sickness of judge or juror, procedure.

SEC. 344. If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterwards impaneled. If the judge becomes sick he may discharge the jury.

Kerr, Pen. C., 1123; Mont. P. C., 2101.

After a jury has been sworn, and the evidence admitted in a capital case, the court may, in its discretion, excuse a juror against defendant's objection, on proof that he is disqualified, the fact of his disqualification having come to the knowledge of the prosecution during the trial. State v. Vaughan, 23 Nev. 103, 113 (43 P. 193).

Under such circumstances it is error to accept the other jurors without first discharging them and giving the defendant the privilege asked for of reexamining them as to their then state of mind before being resworn to try the case with the new juror. Idem.

7195. Court to decide questions of law.

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

Kerr, Pen. C., 1124.

7196. Jury to determine law and fact in libel case.

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

Kerr, Pen. C., 1125.
See Const., sec. 238.

7197. Court to decide law, jury to decide 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, saving the right of the defendant to except and questions of fact 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.

Kerr, Pen. C., 1126.
Cited, State v. Van Winkle, 6 Nev. 349, 350.

7198. Charge to jury, what to be stated in.

SEC. 348. In charging the jury, the court shall state to them all such matters of law as it shall think necessary for their information in giving their verdict.

Kerr, Pen. C., 1127.

Instructions—

See, generally, State v. Waterman, 1 Nev. 543.

Justifiable homicide—Unlawful act. State v. Levigne, 17 Nev. 435 (30 P. 1084).

Province of. Idem.

Property unlawfully detained—Assault not justified. Idem.

When court should give. Idem.

Possession of property immaterial—Manslaughter. Idem.

Assumption of fact—Assault. Idem.

Good character. Idem.

Testimony of good character. Idem.

Not necessary that defendant except for refusal to give. State v. McNamara, 3 Nev. 71.

Neglect same as refusal. Idem.

Not to charge as to matters of fact, see citations under Const., sec. 327, ante.

Must be considered as an entirety. State v. Lindsey, 19 Nev. 47; State v. Donovan, 10 Nev. 36; State v. Raymond, 11 Nev. 98; State v. Pritchard, 15 Nev. 74; State v. McLane, 15 Nev. 345.

Defendant should ask for, when. If the defendant desires the court to charge the jury upon any given point, it is his right and his business to prepare such an instruction, and ask the court to give it. State v. Smith, 10 Nev. 106; State v. Davis, 14 Nev. 407; State v. St. Clair, 16 Nev. 207; State v. Hing, 16 Nev. 307; State v. McLane, 15 Nev. 345.

Defendant has a right to have his instructions given when clearly law. People v. Bonds, 1 Nev. 33.

Court cannot instruct the jury as to the existence or nonexistence of a disputed fact. Idem.

Testimony of defendant—Erroneous. State v. Vasquez, 16 Nev. 42.

Charge of the court—Murder the result of malice. State v. Raymond, 11 Nev. 98.

Homicide, not justified by provocation. State v. Crozier, 12 Nev. 300.

Improper instruction not cured by others though proper. State v. Vaughan, 22 Nev. 285 (39 P. 733).

Insanity—Burden of proof — Presumptions. Held, correct. State v. Lewis, 20 Nev. 334.

Preponderance of evidence. Insanity as a defense to crime must be established by a preponderance of evidence. Idem; State v. Casey, 34 Nev.—(117 P. 5).

Insanity and intoxication. State v. Thompson, 12 Nev. 140.

Defendant not prejudiced because court failed to give form of verdict for manslaughter. State v. St. Clair, 16 Nev. 207.

Intent to murder—Use of deadly weapon. State v. Newton, 4 Nev. 410.

Accidental shooting—Instruction, murder or manslaughter. State v. Kelly, 1 Nev. 224.

Homicide—Justification. Where there is any testimony to support the plea of justifiable homicide, the court has no right to withdraw that question from the jury. State v. Frazer, 14 Nev. 210.

Instruction. Degree of proof to rebut presumption of murder. Error to instruct jury that mitigating circumstances must be proven beyond a reasonable doubt, or by preponderating proof. State v. McGinnis, 5 Nev. 337.

Accused person is entitled to reasonable doubt, however arising. Idem.

Instruction as to good character of defendant—When properly refused—Instruc-

tion as to criminal intent, when properly refused. State v. McGinnis, 6 Nev. 109.

Charging circumstantial to be superior to direct evidence, error. State v. Van Winkle, 6 Nev. 340.

Instruction—No option. The jury may be instructed that if they find that the accused shot and killed the deceased while attempting to perpetrate a robbery on him, they had "no option but to find the perpetrator guilty of murder in the first degree." State v. Gray, 19 Nev. 212 (8 P. 456).

Instruction that jury shall only consider the good character of defendant, when they have a reasonable doubt of his guilt, is not an erroneous instruction. People v. Gleason, 1 Nev. 173.

Venue — Entitled to instruction as to. Idem.

Ambiguous instruction properly refused—False definition of murder. State v. Anderson, 4 Nev. 265.

Constitutional provision as to charging juries. The constitutional provision that "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law," was intended to prevent judges from charging that facts testified to are not established, but was not intended to prevent, and does not prevent, them from charging what would be the legal effect of facts if found to be established. Idem.

Instruction may contain correct principle of law, but may be refused because not applicable to the case. State v. Squaires, 2 Nev. 226; State v. Ah Loi, 5 Nev. 99.

Arson. An instruction which assumes that the defendant could only be principal if he himself set the fire is erroneous, and should not be given. Idem.

Charge of the court, murder case—Modifying an instruction, when not erroneous. When the court in modifying a correct instruction does not alter its sense, the modification cannot be claimed to be erroneous. State v. Smith, 10 Nev. 106.

Instruction in murder case that certain facts would not amount to more than manslaughter, and verdict of manslaughter found. Held, not erroneous. State v. Hutchinson, 7 Nev. 53.

Explicit instructions—Reasonable doubt. State v. Davis, 14 Nev. 440.

Charge of the court on evidence. On a trial for murder, if there is no evidence tending to establish the crime of manslaughter, the court may so inform the jury, and charge them not to consider the question. State v. Donovan, 10 Nev. 36.

Murder in first or second degree or acquittal. State v. Millain, 3 Nev. 410.

Voluntary killing with deadly weapon, not necessarily murder in the first degree. Contrary instruction held error. State v. Lopez, 15 Nev. 408.

Instruction in murder case that time of deliberation is not material, so long as there is determination to kill, to constitute murder in the first degree: Held, not prejudicial, State v. Ah Mook, 12 Nev. 369.

Charge assuming proof of material facts — Error — Retreat not necessary, when. State v. Kennedy, 7 Nev. 374.

Self-defense—Remarks of judge in refusing instructions, error. State v. Warren, 18 Nev. 459.

Antecedent threats alone do not justify homicide. State v. Hall, 9 Nev. 58.

Justification of homicide in case of combat. State v. Ferguson, 9 Nev. 106.

Self-defense in case of combat, cannot take advantage of instruction. State v. Smith, 10 Nev. 106.

Assault with intent to commit murder. State v. Keith, 9 Nev. 15.

Assault with intent to kill. State v. Marks, 15 Nev. 33.

Forgery. State v. Cleavland, 6 Nev. 181.

Assault with intent to commit robbery. State v. Glovery, 10 Nev. 24.

Burglary. State v. Watkins, 11 Nev. 30.

Court may modify to remove ambiguity. Idem.

Larceny—Lucri causa. State v. Slingerland, 19 Nev. 135 (7 P. 280).

When judgment will be reversed for improper. Idem.

"Indicating" defined. State v. Loveless, 17 Nev. 424 (30 P. 1080).

Possession of stolen property. State v. Espinozei, 20 Nev. 209 (19 P. 677).

Remarks of court in refusing, when improper. State v. Warren, 18 Nev. 459 (5 P. 134).

Irrelevant instructions, when prejudicial. State v. Vaughan, 22 Nev. 286 (39 P. 733).

Accomplice—Where none, instruction properly refused. State v. Burns, 27 Nev. 289 (74 P. 983).

Bad in part, the whole properly refused. Idem.

Burglary—Breaking not essential. State v. Simas, 25 Nev. 433 (62 P. 242).

Circumstantial evidence. State v. Mandich, 24 Nev. 336 (54 P. 516).

Confession as evidence. State v. Simas, 25 Nev. 437 (62 P. 242).

Determination of admissibility of confession—Province of court and jury. State v. Williams, 31 Nev. 360 (102 P. 974).

Duty of judge. State v. Hennessy, 29 Nev. 320 (90 P. 221).

Defense of another. Idem.

Defendant's testimony. State v. Hartley, 22 Nev. 343 (28 A. R. 33, 40 P. 372); State v. Johnny, 29 Nev. 203 (87 P. 3).

Denial of requested instruction, when given in substance. State v. Buralli, 27 Nev. 41 (71 P. 532); State v. Burns, 27 Nev. 289 (74 P. 983); State v. Maher, 25 Nev. 465 (62 P. 236); State v. Johnny, 29 Nev. 203 (87 P. 3).

Duty of court to indorse action on. State v. Maher, 25 Nev. 465 (62 P. 236).

Error in refusing—Must affirmatively appear by record. State v. Maher, 25 Nev. 465 (62 P. 236).

Evidence admitted to be limited by instructions—Failure to give, when not error. State v. Simas, 25 Nev. 432 (62 P. 242).

Duty of juror. State v. Hennessy, 29 Nev. 320 (90 P. 221).

Erroneous, when not prejudicial. S. Nev. M. Co. v. Holmes M. Co., 27 Nev. 108 (103 A. S. 759, 73 P. 759).

As to false testimony refused. State v. Burns, 27 Nev. 289 (74 P. 983).

Given by court of its own motion—Must be excepted to. Idem.

Must be embodied in bill of exceptions. State v. Hill, 32 Nev. 185.

Insanity. State v. Hartley, 22 Nev. 342 (28 L. R. A. 33, 40 P. 372).

Presumption of innocence. State v. Grady, 32 Nev. 154.

Witness testifying falsely. State v. Martel, 32 Nev. 395.

Intoxication as defense to murder. State v. Johnny, 29 Nev. 204 (87 P. 3).

Jury are sole judges of facts. State v. Simas, 25 Nev. 433 (62 P. 242); State v. Grady, 32 Nev. 154; State v. Williams, 31 Nev. 360 (102 P. 974); State v. Buralli, 27 Nev. 41 (71 P. 532).

Laying stress on particular parts of evidence. Idem.

Murder first degree. State v. Wong Fun, 22 Nev. 336 (40 P. 95).

Must not assume facts not admitted. State v. Buralli, 27 Nev. 41 (71 P. 532).

On appeal—Error not urged. State v. Guilieri, 26 Nev. 31 (62 P. 497).

Ownership of building. State v. Simas, 25 Nev. 433 (62 P. 242).

Manslaughter—May be refused in homicide case, when. State v. Johnny, 29 Nev. 204 (87 P. 3).

Self-defense. State v. Hartley, 22 Nev. 342 (28 L. R. A. 33, 40 P. 372).

Sufficiency of the proof to convict. State v. Maher, 25 Nev. 465 (62 P. 236).

Threats. State v. Jackman, 29 Nev. 403 (91 P. 143).

The court has the power to charge the jury on its own motion. State v. Burns, 8 Nev. 251.

The charge given by a court on its own motion cannot be considered on appeal, unless it be properly carried up by bill of exceptions. Idem.

Sections 386 and 387 of said former act relate to two distinct classes of instruction; the former to those given by the court on its own motion; the latter, those asked by either party; and it is the latter only which are made, by secs. 426, 450 of said act, a part of the record and deemed accepted. Idem.

The charge given by the court of its own motion is not a part of the record unless it is included in the bill of exceptions. State v. Ah Mook, 12 Nev. 369, 374.

It is the duty of the clerk to attach the bill of exceptions to the rest of the judgment roll before it is filed, just as it was left by the judge who signed it. He must not add to it, or subtract from it anything whatever. Idem.

7199. Either party may present written charge to court—Must be given, when.

SEC. 349. Either party may present to the court any written charge, and request that it may be given. If the court thinks it correct and pertinent, it must be given; if not, must be refused.

Kerr, Pen. C., 1127.

See State v. Burns, and State v. Ah Mook, under sec. 348 of this act.

When the court approves an instruction asked, and intends to give it, but by some oversight neglects to do so, it is just as injurious to defendant as if positively refused; and if the instruction is important, entitles the defendant to a new trial. State v. McNamara, 3 Nev. 71, 78.

It is not error to refuse an instruction which has already been given in substance, and in terms as clear, full and favorable to the defendant as those in which the court is asked to repeat it. State v. O'Connor, 11 Nev. 416, 425.

7200. The court to indorse and sign instructions to jury.

SEC. 350. Upon each charge so presented and given, or refused, the court shall indorse its decision, and shall sign it. If part be given and part refused, the court shall distinguish, showing by the indorsement what part of the charge was given and what part refused.

Kerr, Pen. C., 1127.

See State v. Ah Mook, under sec. 348 of this act.

Instructions which are filed with the indorsement of the judge thereon as to his action in giving or refusing them are a part of the record, and the action of the court thereon may be reviewed without any formal bill of exceptions. People v. Gleason, 1 Nev. 173.

See State v. O'Connor, 11 Nev. 416, 425.

7201. Jury to decide in court or retire—Officers sworn.

SEC. 351. After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring, an officer must be sworn to keep them together in some private and convenient place, and not permit any person to speak to or communicate with them,

nor to do so himself, unless by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they shall have so agreed, or when ordered by the court.

Kerr, Pen. C., 1128.

7202. Defendant may be committed though on bail, when.

SEC. 352. When a defendant who shall have given bail shall appear 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, to abide the judgment or further order of the court, and he must be committed and held in custody accordingly.

Kerr, Pen. C., 1129.

7203. Court may advise acquittal, when—Jury not bound by advice.

SEC. 353. If, at any time after the evidence on either side is closed, the court deem the same insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury shall not be bound by such advice, nor must the court for any cause prevent the jury from giving a verdict, except as provided in sections 318, 319, and 320.

Kerr, Pen. C., 1118.

CHAPTER 30

CONDUCT OF JURY

7204. Room to be provided for the jury—Expense, how paid.
7205. Sheriff to provide food and lodging for jury.
7206. Jury may take written instructions, certain papers, and own notes of trial.
7207. Jury may return for further instructions—Notice.
7208. Jury may be discharged for sickness of juror and other causes.
7209. Jury not to be discharged until verdict rendered—Exception.
7210. Discharge without verdict, retrial.
7211. Adjournment during absence of jury.
7212. Final adjournment, effect of.

7204. Room to be provided for jury—Expense, how paid.

SEC. 354. A room shall be provided by the sheriff of each county for the use of the jury upon their retirement for deliberation, with suitable furniture, fuel, lights and stationery, unless the same have been already furnished by the county. 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, shall be a county charge.

Kerr, Pen. C., 1135.

7205. Sheriff to provide food and lodging for jury.

SEC. 355. While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, they shall be provided by the sheriff, at the expense of the county, with suitable and sufficient food and lodging.

Kerr, Pen. C., 1136.

7206. Jury may take written instructions, certain papers and own notes of trial.

SEC. 356. Upon retiring for deliberation, the jury may take with them all papers, except depositions which shall have been received as evidence in the case, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them the written instructions given, and notes of the testimony or other proceed-

ings on the trial, taken by themselves or any of them, but none taken by any other person.

Kerr, Pen. C., 1147.
See State v. McNamara, under sec. 349 of this act.
Cited, State v. Stewart, 9 Nev. 132.

7207. Jury may return for further instructions—Notice.

SEC. 357. After the jury have retired for deliberation, if there is any disagreement between them as to any part of the testimony, or if they desire to be informed on any 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 shall be given in the presence of, or after notice to, the district attorney and the defendant or his counsel.

Kerr, Pen. C., 1138.

7208. Jury may be discharged for sickness of juror and other causes.

SEC. 358. If, after the retirement of the jury, one of them is taken so sick as to prevent the continuance of his duty, or any other accident or cause occurs to prevent their being kept for deliberation, the jury may be discharged.

Kerr, Pen. C., 1139.

The inability of the jury to agree upon a verdict is recognized as creating a necessity that justifies the discharge of the jury. Ex Parte Maxwell, 11 Nev. 428, 435; State v. Pritchard, 16 Nev. 109.

The power of the court to discharge a jury, without the consent of the defendant, is not an absolute power, and must be exercised in accordance with established legal rules, and a sound legal discretion in the application of such rules to the facts and circumstances of each particular case. Idem.

The fact that the jury could not agree is an essential fact, the existence of which ought to be determined by the court and established by the record. Idem.

7209. Jury not to be discharged until verdict rendered—Exception.

SEC. 359. Except as provided in the last section, the jury shall not 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 may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

Kerr, Pen. C., 1140.
See Ex Parte Maxwell, under sec. 358 of this act.

7210. Discharge without verdict, retrial.

SEC. 360. In all cases where a jury are discharged or prevented from giving a verdict by reason of any 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.

Kerr, Pen. C., 1141.

7211. Adjournment during absence of jury.

SEC. 361. While the jury are absent, the court may adjourn from time to time, as to other business, but it shall nevertheless be deemed to be open for every purpose connected with the cause submitted to the jury, until a verdict be rendered or the jury discharged.

Kerr, Pen. C., 1142.

This section and the following section refers to the situation existing after the jury has been impaneled and sworn and have the case under deliberation, and not to where only seven jurors have been passed, subject to peremptory challenge. State v. Jackman, 31 Nev. 511, 517 (104 P. 13).

7212. Final adjournment, effect of.

SEC. 362. A final adjournment of the court discharges the jury.

Kerr, Pen. C., 1143.
See sec. 4906.
See State v. Jackman, under sec. 361 of this act.

CHAPTER 31

THE VERDICT

7213. Return of jury, effect when part fail to appear.
7214. Defendant required to be present at verdict, when.
7215. Jury to declare verdict.
7216. Forms of verdict.
7217. Acquittal by reason of insanity, confinement in the hospital for mental diseases.
7218. Degree of crime to be found by jury.
7219. Defendant may be found guilty of any offense included in one charged.
7220. Joint defendants, verdict against one or more—Retrial.
7221. Reconsideration of verdict directed, when.
7222. Informal verdict — No conviction unless verdict express.
7223. Jury may be polled.
7224. Verdict to be read to jury and recorded —Disagreement.
7225. Verdict of acquittal—Discharge of defendant.
7226. Verdict of conviction—Commitment.

7213. Return of jury, effect when part fail to appear.

SEC. 363. When the jury have agreed upon their verdict, they must be conducted into court by the officers having them in charge. Their names must then be called, and if all do not appear, the rest shall be discharged without giving a verdict. In such a case, the cause must be again tried.

Kerr, Pen. C., 1147.

7214. Defendant required to be present at verdict, when.

SEC. 364. If the indictment be for a felony, the defendant must, before a verdict, appear in person. If it be for a misdemeanor, the verdict may be rendered in his absence.

Kerr, Pen. C., 1148.

Cited, State v. Murphy, 23 Nev. 391 (48 P. 628).

The slightest proof of penetration will justify submitting the question to the jury and such proof can be inferred from circumstances. In this case there was proof of penetration. State v. Depoister, 25 Nev. 108, 118 (25 P. 1000).

7215. Jury to declare verdict.

SEC. 365. If the jury appear, they shall be asked by the court or the clerk whether they have agreed upon a verdict, and if the foreman answer in the affirmative, they shall, on being required, declare the same.

Kerr, Pen. C., 1149.

7216. Forms of verdict.

SEC. 366. A verdict upon a plea of not guilty shall be 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 shall be either "for the state" or "for the defendant." When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be "not guilty by reason of insanity." When the defendant is acquitted on the ground of variance between the indictment and the proof, the verdict must be, "not guilty by reason of variance between indictment and proof."

Kerr, Pen. C., 1151.

Murder case—Verdict of guilty must state degree. State v. Rover, 10 Nev. 388; State v. Lindsey, 19 Nev. 47 (3 A. S. 776, 5 P. 822).

The court may always suggest to the jury a correction of their verdict as to form. State v. Waterman, 1 Nev. 543.

The court should have disregarded the request of the jury for instructions as to their duty in recommending the defendant to the mercy of the court. The duty of the jury is to find a verdict as to the guilt or innocence of the defendant. State v. Vasquez, 16 Nev. 42.

A recommendation to mercy constitutes no proper part of a verdict; but a refusal of the court to strike it out is not prejudicial to defendant. State v. Gray, 19 Nev. 212 (8 P. 456); State v. Stewart, 9 Nev. 120.

A verdict of acquittal on a good indictment puts an end to all further prosecution for the offense charged in that indictment notwithstanding any errors that may have been committed during the progress of the trial. State v. Hall, 3 Nev. 172.

A defendant tried on a criminal charge and found not guilty by a jury cannot again be put on trial for the same offense. State v. Herrick, 3 Nev. 259.

In a prosecution for an assault with a deadly weapon with the intent to inflict upon the person of another a bodily injury, properly charged, a verdict of "guilty" is in effect a verdict of guilty as charged in the indictment. State v. Lawry, 4 Nev. 161, 167.

7217. Acquitted by reason of insanity, confinement in the hospital for mental diseases.

SEC. 367. Where on a trial a defense of insanity is interposed by the defendant and he is acquitted by reason of that defense the finding of the jury shall have the same force and effect as if he were regularly adjudged insane as now provided by law, and the judge thereupon shall forthwith order that the defendant be confined in the hospital for mental diseases until he be regularly discharged therefrom in accordance with law.

See secs. 7252, 7336.

7218. Degree of crime to be found by jury.

SEC. 368. 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.

Kerr, Pen. C., 1157.

7219. Defendant may be found guilty of any offense included in one charged.

SEC. 369. In all 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 may be found guilty of an attempt to commit the offense charged.

Kerr, Pen. C., 1159.

See sec. 6290.

Where there is no testimony tending to show defendant guilty of an offense of a lower grade than the one charged, it is not error to instruct the jury they must find the prisoner guilty as charged or acquit him. If, however, there is any testimony tending to reduce the offense to a lower grade, the whole question should be submitted to the jury. State v. Millain, 3 Nev. 410, 442.

An indictment charging an assault with intent to commit murder will sustain a conviction of an assault with a deadly weapon with intent to inflict a bodily injury. State v. Robey, 8 Nev. 312, 320.

By virtue of this provision, a person indicted for murder may be convicted of manslaughter. State v. Watkins, 11 Nev. 30, 34.

By virtue of this section, the defendant might have been convicted of "an attempt to commit rape," even if the child consented to all he did, but it was error to instruct the jury that he could, under such circumstances, be convicted of "assault with intent to commit rape." State v. Pickett, 11 Nev. 255, 259 (2 L. R. A. 754).

Defendant was indicted for the crime of an assault with intent to kill, and was found guilty of an "assault." The judgment imposed a fine of $500 and taxed the costs against defendant. From this judgment an appeal was taken. It was held that the supreme court had no jurisdiction (Belknap, J., dissenting). State v. McCormack, 14 Nev. 347; affirmed, State v. Quinn, 16 Nev. 89, 90.

The sufficiency of an indictment must be determined with reference to the crime charged, and if the indictment is good for the crime of "an assault with intent to kill," it is sufficient to sustain a conviction of "an assault with a deadly weapon with intent to inflict a bodily injury." The graver charge includes the less. State v. Collyer, 17 Nev. 275, 287 (30 P. 891).

Under an indictment for murder a defendant may be lawfully convicted of an assault with intent to kill. Ex Parte Curnow, 21 Nev. 33, 34 (24 P. 430).

Where the evidence shows the defendant to be guilty of robbery, he cannot complain that he was convicted of an attempt to commit the crime. State v. O'Keefe, 23 Nev. 127, 132 (62 A. S. 768, 43 P. 918).

Cited, Ex Parte Dela, 25 Nev. 353 (83 A. S. 603, 60 P. 217).

This section applies to all cases then or thereafter defined by statute, and therefore one charged under a later statute with selling liquor to an Indian may be convicted of an attempt to commit that offense. Ex Parte Finnegan, 27 Nev. 57 (71 P. 642).

7220. Joint defendants, verdict against one or more—Retrial.

SEC. 370. 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 shall be entered accordingly, and the case as to the rest may be tried by another jury.

Kerr, Pen. C., 1160.

A judgment against two defendants jointly on a joint verdict, is not void, the court having jurisdiction though the same may be erroneous, but whether erroneous or not, cannot be determined on habeas corpus. Ex Parte Gafford, 25 Nev. 101, 104 (83 A. S. 568, 57 P. 484).

7221. Reconsideration of verdict directed, when.

SEC. 371. When there shall be 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 shall be a verdict of acquittal, the court shall not require the jury to reconsider it. If the jury render an informal verdict, the court may direct them to reconsider it, and it shall not be recorded until it is rendered in some form from which it can be clearly understood what the intent of the jury is.

Kerr, Pen. C., 1161; Utah, 4996.

7222. Informal verdict—No conviction unless verdict express.

SEC. 372. 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 shall be entered in the terms in which it is found, and the court shall give judgment of acquittal. But no judgment of conviction can be given unless the jury find expressly against the defendant upon the issue.

Kerr, Pen. C., 1162.

7223. Jury may be polled.

SEC. 373. 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 shall be severally asked whether it be their verdict, and if anyone answer in the negative, the jury shall be sent out for further deliberation.

Kerr, Pen. C., 1163.

7224. Verdict to be read to jury and recorded—Disagreement.

SEC. 374. When the verdict is given, and is such as the court may receive, the clerk must immediately record it in full on the minutes, and must read it to the jury and inquire of them whether it be their verdict. If any juror disagree, the fact must be entered in the minutes and the jury again sent out; but if no disagreement be expressed, the verdict is complete, and the jury must be discharged from the case.

Kerr, Pen. C., 1164.

The provisions of the statute authorizing the court "to receive a verdict or discharge a jury" carries with it the power to have the verdict recorded, and authorizes the court to make such other orders as may be incident to the power given, such as designating a day when it would pronounce judgment on the verdict. State v. Rover, 13 Nev. 18, 23.

7225. Verdict of acquittal—Discharge of defendant.

SEC. 375. If judgment of acquittal be given on a verdict, and the defendant be not detained for any other legal cause, he must be discharged as soon as the verdict is given.

Kerr, Pen. C., 1165.

7226. Verdict of conviction—Commitment.

SEC. 376. If a verdict is rendered against the defendant, he must be

remanded, if in custody; or if on bail, he may be committed to the proper officer to await the judgment of the court upon the verdict. When committed, his bail shall be exonerated; or if money is deposited instead of bail, it must be refunded to the defendant.

Kerr, Pen. C., 1166; Utah, 4900.

CHAPTER 32

EXCEPTIONS

7227. Exceptions may be taken by defendant, how.
7228. Idem—Exception may be taken by district attorney.
7229. What deemed excepted to by defendant.
7230. Written charges to form part of record.
7231. What deemed excepted to by either party.

7227. Exceptions may be taken by defendant, how.

SEC. 377. On the trial of an indictment, exceptions may be taken by the defendant to a decision of the court upon a matter of law in any of the following cases:

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

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.

Kerr, Pen. C., 1170.

Bill of exceptions. The bill of exceptions, properly settled and signed by the judge, together with the rest of the record as provided for in section 413, is all that the supreme court will notice in the examination of a criminal case on appeal. State v. Johnson, 12 Nev. 121; State v. Roderigas, 7 Nev. 328; State v. Baker, 8 Nev. 141; State v. Ah Hung, 11 Nev. 428; State v. McLane, 15 Nev. 346; State v. Darling, 4 Nev. 413; State v. Wilson, 5 Nev. 43.

Objections to the admission in evidence of certain bills of sale will not be considered on appeal because the bills of sale are not embodied in the bill of exceptions. State v. Potts, 20 Nev. 389 (22 P. 754).

An appeal presented without any statement or bill of exceptions will be dismissed (State v. Fellows, 8 Nev. 311, affirmed). State v. Lamb, 20 Nev. 181 (19 P. 33).

The expression "minutes of the trial," in sec. 413 of this act, means only the minutes as kept by the clerk, and recorded in the minute book containing the proceedings of the trial, that are daily read by the clerk and approved by the court. State v. Larkin, 11 Nev. 314, 325.

The reporter's notes of the proceedings of a trial can only be considered when adopted by the court as correct, and including the bill of exceptions, settled and signed by the judge. Idem.

Cited, State v. Pritchard, 15 Nev. 83.

Evidence stricken and then allowed, any error in former ruling thereby cured. State v. Vaughan, 22 Nev. 285 (39 P. 733).

Challenge to juror and exception. State v. Hartley, 22 Nev. 342 (28 L. R. A. 33, 40 P. 372); State v. Simas, 25 Nev. 432 (62 P. 242); State v. Vaughan, 22 Nev. 285 (39 P. 733).

Alleged errors which do not appear in the bill of exceptions need not be discussed by the supreme court. State v. Lawrence, 28 Nev. 440 (82 P. 614).

The overruling of a general objection to evidence, the grounds of which are not specified, and to which ruling no exception is taken, is not error. Idem.

The particular ground of an objection or exception to the admission of evidence must be stated in order to make the ruling reviewable on appeal. State v. Mangana, 33 Nev. — (112 P. 694).

7228. Idem—Exception may be taken by district attorney.

SEC. 378. The exceptions may be taken by the district attorney, or other counsel for the state, to a decision of the court upon a matter of law in any of the cases specified in the third subdivision of the preceding section.

Kerr, Pen. C., 1172.

7229. What deemed excepted to by defendant.

SEC. 379. The decision of the court in a criminal action or proceeding upon a matter of law shall be deemed excepted to by the defendant in the following cases:

1. In refusing to grant a motion for a change of place of trial;

2. In refusing to postpone the trial on motion of the defendant.

When the verdict of the jury is against the defendant, it shall be deemed excepted to by him.

Kerr, Pen. C., 1173; N. D., 8260; Utah, 4945.

Sec. 423 of the act of 1861, 435, cited, People v. Gleason, 1 Nev. 173, 175; State v. Salge, 1 Nev. 456, 459; State v. Baker, 8 Nev. 141, 145; State v. Huff, 11 Nev. 24; State v. Larkin, 11 Nev. 322; State v. Campbell, 20 Nev. 125 (17 P. 620).

Sec. 424 of the act of 1861, 435, cited, State v. Huff, 11 Nev. 23, 24; State v. Larkin, 11 Nev. 322; State v. Hill, 32 Nev. 187 (105 P. 1025).

7230. Written charges to form part of record.

SEC. 380. When any written charge has been requested and given, or refused, or given by the court of its own motion, the question or questions contained in such charge need not be excepted to, but the written charge, given or refused, with the indorsements showing the action of the court, shall form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal in like manner as if presented in a bill of exceptions.

Kerr, Pen. C., 1176.

Instructions which are filed with the indorsement of the judge thereon as to his action in giving or refusing them are a part of the record, and the action of the court thereon may be reviewed without any formal bill of exceptions. People v. Gleason, 1 Nev. 175; State v. Waterman, 1 Nev. 559; State v. McNamara, 3 Nev. 71, 79; State v. Stanley, 4 Nev. 71, 77; State v. Dowling, 4 Nev. 413, 414; State v. Forsha, 8 Nev. 137; State v. Burns, 8 Nev. 251, 254, 255; State v. Ah Mook, 12 Nev. 373, 374; State v. Bouton, 26 Nev. 34, 41 (62 P. 595); State v. Burns, 27 Nev. 290, 294 (74 P. 983).

Under former practice, instructions given by the court of its own motion could not be considered on appeal in the absence of exceptions thereto. (See cases above.)

The simple reservation of an exception is not sufficient, the point of the exception must be stated at the time the exception is taken, or it will be disregarded. McGurn v. McInnis, 24 Nev. 370 (55 P. 304).

A contention that the court erred in refusing an instruction must be disregarded, if no objection or exception appears to have been made to the action of the court. McNamee v. Nesbitt, 24 Nev. 400 (56 P. 37).

Under former practice instructions given by the court of its own motion were not a part of the record on appeal unless embodied in the bill of exceptions. State v. Hill, 32 Nev. 185 (105 P. 1025).

7231. What deemed excepted to by either party.

SEC. 381. The decision of the court in a criminal action or proceeding upon a matter of law shall be deemed excepted to by either party in the following cases:

1. In granting or refusing a motion to set aside an indictment;
2. In allowing or disallowing a demurrer to an indictment;
3. In granting or refusing a motion in arrest of judgment;
4. In granting or refusing a motion for a new trial;
5. In making or refusing to make an order after judgment affecting any substantial right of the parties.

Kerr, Pen. C., 1172; N. D., 8259; Utah, 4944.

CHAPTER 33

NEW TRIAL

7232. New trial defined—Effect of granting—Procedure on.
7233. Application must be made before judgment entered.
7234. Grounds for new trial.
7235. Idem—When based upon affidavit.
7236. Idem—Proceedings may be stayed until motion disposed of.
7237. Court may grant not more than two new trials on its own motion.

7232. New trial defined—Effect of granting—Procedure on.

SEC. 382. A new trial is a reexamination of the issue in the same court before another jury, after a verdict has been given. It places the parties in the same condition as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to

either in evidence or in argument, nor be pleaded in bar of any conviction which might have been had under the indictment.

Kerr, Pen. C., 1179.

Where one charged with murder is convicted of involuntary manslaughter, and on appeal a new trial is granted him because of a mistrial in the first instance, or for irregularity or prejudicial error committed against him, the reversal and remanding sets aside the result of the former trial and leaves accused in the same position as if he had never been tried; and he cannot plead former acquittal of crimes of a greater degree than the one of which he was convicted. In re Somers, 31 Nev. 531, 533, 536 (135 A. S. 700, 103 P. 1073).

7233. Application must be made before judgment entered.

SEC. 383. The application for a new trial must be made before the judgment is entered in the cause and shall be made upon motion orally or in writing, stating one or more of the grounds specified in the preceding section.

Kerr, Pen. C., 1182.

Cited, State v. Huff, 11 Nev. 24.

7234. Grounds for new trial.

SEC. 384. The court in which a trial is had upon the issue of fact, has power to grant a new trial where a verdict has been rendered against the defendant upon his application, in the following cases only:

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

2. When the jury has received any evidence out of court other than that resulting from a view, as provided in section 341.

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

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, but no more than two new trials shall be granted for this cause alone.

Kerr, Pen. C., 1181.

The first four grounds for new trial may be presented simply by affidavit without either statement or bill of exceptions. State v. Stanley, 4 Nev. 71, 74, 76.

The fact that after a verdict of guilty has been rendered, the accused ascertains for the first time that before the jury was impaneled, a juror had formed and expressed an opinion as to his guilt, is not a ground for a new trial. State v. Marks, 15 Nev. 33, 36.

Cited, State v. Lopez, 15 Nev. 410.

7235. Idem—When based upon affidavit.

SEC. 385. A motion for a new trial, if made for any of the causes mentioned in subs. 1, 2, 3, and 4, of section 384, must be based upon affidavit to which counter affidavits may be filed.

Mont., 2194; Utah, 4954.

7236. Idem—Proceedings may be stayed until motion disposed of.

SEC. 386. The court may make an order staying further proceedings in the case until the motion for a new trial is disposed of.

7237. Court may grant not more than two new trials on its own motion.

SEC. 387. The court may grant not more than two new trials upon its own motion, when, to the actual prejudice of the defendant and the miscarriage of justice, the court has misdirected the jury or erred in the decision of any question of law, or where there has been such plain disregard by the jury of the instructions of the court or the evidence in the case as

to satisfy the court that the verdict was rendered under a misapprehension of the instructions or under the influence of passion or prejudice.

CHAPTER 34

ARREST OF JUDGMENT

7238. Arrest of judgment defined—Grounds for.
7239. Idem—By court of its own motion.
7240. Idem—Effect of allowance.
7241. Proceedings after allowance of arrest of judgment.

7238. Arrest of judgment defined—Grounds for.

SEC. 388. A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant on a plea of a former conviction or acquittal or once in jeopardy. It may be founded on any of the defects in the indictment mentioned in section 247, unless the objection shall have been waived by a failure to demur, and must be made before or at the time the defendant is called for judgment.

Kerr, Pen. C., 1185; Utah, 4901.

Objections to the form of an indictment for defects apparent upon its face cannot be taken advantage of for the first time on appeal. State v. O'Flaherty, 7 Nev. 154, 158.

A motion in arrest of judgment can only be sustained upon the ground that the court has no jurisdiction over the subject of the indictment, or that the facts stated do not constitute a public offense. State v. O'Connor, 11 Nev. 416.

7239. Idem—By court of its motion.

SEC. 389. The court may also, on its own view of any of these defects, arrest the judgment without motion.

Kerr, Pen. C., 1186.

7240. Idem—Effect of allowance.

SEC. 390. The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before the indictment was found.

Kerr, Pen. C., 1187.

See State v. O'Connor, under sec. 388 of this act.

7241. Proceedings after allowance of arrest of judgment.

SEC. 391. If, from the evidence on the trial, there is reasonable ground to believe the defendant guilty, and a new indictment can be framed upon which he may be convicted, the court may order him to be recommitted to the officers of the proper county, or admitted to bail anew to answer the new indictment. If the evidence show him guilty of another offense, he shall be committed or held thereon, and in neither case shall the verdict be a bar to another prosecution or indictment. But if no evidence appear sufficient to charge him with any offense, he shall, if in custody, be discharged; or, if admitted to bail, his bail shall be exonerated; or, if money has been deposited instead of bail, it shall be refunded to the defendant, and the arrest of judgment shall operate as an acquittal of the charge upon which the indictment was founded.

Kerr, Pen. C., 1188.

CHAPTER 35

THE JUDGMENT

7242. Court to appoint time for pronouncing judgment.
7243. Time appointed to be two days—Exception.
7244. Upon a plea of guilty, court to determine degree.
7245. Presence of defendant required for judgment in felony case—Misdemeanor, not.
7246. Bench warrant for absent defendant—Bail forfeited.
7247. Bench warrant isued to several counties on application of district attorney.
7248. Bench warrant, form of.
7249. Bench warrant served same as warrant of arrest.

7250. Idem — Arrest and disposition of defendant.
7251. Appearance for judgment—Defendant asked to show cause.
7252. May set up insanity, or cause for arrest of judgment, or for new trial.
7253. Rendition of judgment.
7254. Idem—Facts may be shown in mitigation or aggravation—Notice.
7255. Idem—How prevented—Limitation.
7256. Conviction of two or more offenses—Terms begin, when.
7257. Imprisonment to satisfy fine at rate of two dollars per day.
7258. Judgment for fine constitutes lien.
7259. Court may suspend sentence.
7260. Indeterminate sentences.
7261. Board of pardons to determine period of imprisonment when minimum served.
7262. When complainant to pay costs—Judgment—Execution.
7263. Entry of judgment, record of action, what to include.

7242. Court to appoint time for pronouncing judgment.

SEC. 392. After a plea or verdict of guilty, or after a verdict against the defendant, on a plea of a former conviction or acquittal, or once in jeopardy, if the judgment be not arrested or a new trial granted, the court shall appoint a time for pronouncing judgment.

Kerr, Pen. C., 1191.

The judgment in a criminal case recites that the prisoner was brought into court and plead guilty, "whereupon the court sentenced the said S." If this record shows affirmatively that there was no interval of time between the plea of guilty and sentence, it only shows error on the part of the court, and defendant should have excepted to the action of the court and taken an appeal if dissatisfied. Habeas corpus is not the proper remedy to correct errors. Ex Parte Smith, 2 Nev. 338, 341.

Oral evidence is not admissible to show error in the proceedings of the court below. Idem.

7243. Time appointed to be two days—Exception.

SEC. 393. The time appointed shall be at least two days after the verdict, if the court intend to remain in session so long; or, if not, as remote a time as can reasonably be allowed. But in no case shall judgment be rendered in less than six hours after the verdict.

Kerr, Pen. C., 1191.

7244. Upon plea of guilty, court to determine degree.

SEC. 394. Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree.

Kerr, Pen. C., 1192.

7245. Presence of defendant required for judgment in felony case—Misdemeanor not.

SEC. 395. For the purpose of judgment, if the conviction be for a felony, the defendant must be personally present; if it be for misdemeanor, judgment may be pronounced in his absence.

Kerr, Pen. C., 1193.

7246. Bench warrant for absent defendant—Bail forfeited.

SEC. 396. If the defendant shall have been discharged on bail, or shall have deposited money instead thereof, and does not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the recognizance, or of the money deposited, may direct the clerk to issue a bench warrant for his arrest.

Kerr, Pen. C., 1195.

7247. Bench warrant issued to several counties on application of district attorney.

SEC. 397. 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.

Kerr, Pen. C., 1196.

7248. Bench warrant, form of.

SEC. 398. The bench warrant must be substantially in the following form:

State of Nevada, county of..... The State of Nevada, to any sheriff, constable, marshal, policeman, or other peace officer in this state: A. B. having been on the.....day of....., A. D. 19...., duly convicted in the.....judicial district court of the State of Nevada and in and for 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, that you deliver him into the custody of the sheriff of the county of..... Given, by order of the court, under my hand with the seal of said court affixed, this the.....day of....., A. D. 19.... (Seal.) E. F., Clerk.

Kerr, Pen. C., 1197.

7249. Bench warrant served same as warrant of arrest.

SEC. 399. The bench warrant may be served in any county, in the same manner as a warrant of arrest.

Kerr, Pen. C., 1198.

7250. Idem—Arrest and disposition of defendant.

SEC. 400. Whether the bench warrant shall be served in the county in which it is 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.

Kerr, Pen. C., 1199.

7251. Appearance for judgment—Defendant asked to show cause.

SEC. 401. When the defendant appears for judgment, he shall 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 there are, and shall be asked whether he have any legal cause to show why judgment should not be pronounced against him.

Kerr, Pen. C., 1200.
Cited, State v. Huff, 11 Nev. 24; Ex Parte Dela, 25 Nev. 350 (83 A. S. 603, 60 P. 217).

7252. May set up insanity, or cause for arrest of judgment, or for new trial.

SEC. 402. 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 insanity must be tried, as provided by law. 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 must be committed to the hospital for mental diseases until he becomes sane; and when notice shall have been given of that fact, as provided in section 542, 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.

Kerr, Pen. C., 1201.
See secs. 7217, 7336.
Cited, State v. Huff, 11 Nev. 24.

7253. Rendition of judgment.

SEC. 403. If no sufficient cause be alleged or appears to the court why judgment should not be pronounced, it must thereupon be rendered.

Kerr, Pen. C., 1202.

Clerk should put judgment in form. When adopted by court, it is part of record. Ex Parte Salge, 1 Nev. 449.

It is indispensable to the validity of a judgment that it be rendered at the time and place prescribed by law. State v. Roberts, 8 Nev. 239.

A judgment which does not specify any time for the imprisonment to commence is not void. The better practice is not to fix the commencement of the term, but merely to state its duration and place of confinement. State v. Smith, 10 Nev. 107.

In the absence of a statute to the contrary, a sentence to imprisonment for a definite term is not void because it fails to state when the term begins. Ex Parte Gafford, 25 Nev. 101 (83 A. S. 568, 57 P. 484).

Where the second sentence of a defendant already sentenced for another offense fails to state the commencement of the term, it will run concurrently with the first. Idem.

An error in a sentence, in assigning a wrong place of imprisonment, may be rejected as surplusage and will not vitiate the entire sentence. Ex Parte Tani, 29 Nev. 385, 13 L. R. A. (N. S.) 518, 91 P. 137.

Imprisonment for nonpayment of fine must be in county jail. Idem.

Imprisonment for unpaid fine must be ordered in the judgment. Ex Parte Patterson, 29 Nev. 226 (87 P. 2).

A person who has been imprisoned the number of days specified in the sentence is entitled to his discharge, though the fine has not been paid. Idem.

7254. Idem—Facts may be shown in mitigation or aggravation—Notice.

SEC. 404. After a plea or verdict of guilty, when a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral 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.

Kerr, Pen. C., 1203.

7255. Idem—How presented—Limitation.

SEC. 405. The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness shall be so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, shall be offered to or received by the court or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the next preceding section.

Kerr, Pen. C., 1204.

7256. Conviction of two or more offenses—Terms begin, when.

SEC. 406. If the defendant has been convicted of two or more offenses before judgment on either, the judgment may be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of the offenses.

N. D., 8294; Utah, 4918.

See sec. 6303.

See Ex Parte Gafford, under sec. 403 of this act.

7257. Imprisonment to satisfy fine at rate of two dollars per day.

SEC. 407. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every two dollars of the fine, or in that proportion.

Kerr, Pen. C., 1205.

Relators were found guilty of assault and battery, fined in the sum of one hundred dollars each "and the costs of this action." It was held that this was only a judgment for the amount of the fine; that the judgment relating to costs, the amount not being stated, was surplusage and nugatory. State ex rel. Burbank v. Jameson, 13 Nev. 429, 430.

Relator could be imprisoned for the fine. The judgment for costs can be enforced only by execution. State ex rel. Quinn v. District Court, 16 Nev. 76, 77.

The criminal practice act does not provide for a cost bill. The court has the power to tax the costs from an examination of the fees charged by the respective officers. Idem.

If the court erred in allowing any costs that were not taxable against the relator, it was not an excess of jurisdiction, and its action, in this respect, cannot be reviewed upon certiorari. Idem.

The provisions of this section apply to all cases of contempt, when criminal, as well as to other misdemeanors. Ex Parte Sweeney, 18 Nev. 74, 76 (1 P. 379).

A contempt for the disobedience of a decree and violation of an injunction is in the nature of a criminal offense, and the proceeding for its punishment is in the nature of a criminal proceeding. Idem.

Designation of erroneous place of imprisonment for nonpayment of fine, does not vitiate the entire sentence. Ex Parte Tani, 29 Nev. 385, 13 L. R. A. (N. S.) 518, 91 P. 137.

Imprisonment for unpaid fine must be ordered in the sentence. Ex Parte Patterson, 29 Nev. 226 (87 P. 2).

On conviction of a felony, the sentence imposed was within the discretion vested in the district court as to the amount of the fine and the time of alternative imprisonment in the event that the fine was not paid, and was erroneous only in that it declared that such alternative imprisonment should be in the state prison, whereas, it should have declared that the same should be in the county jail. Held, that, in habeas corpus proceedings, such direction as to the place of imprisonment might be rejected as surplusage, and did not vitiate the entire sentence. Ex Parte Tani, 29 Nev. 386, 388, 13 L. R. A. (N. S.) 518, 91 P. 137.

Imprisonment for nonpayment of fine must be in county jail. Idem.

Fines cannot be paid under protest so as to be recovered if judgment reversed on appeal. State v. Pray, 30 Nev. 206 (94 P. 218).

7258. Judgment for fine constitutes lien.

SEC. 408. A judgment that the defendant shall pay a fine shall constitute a lien in like manner as a judgment for money rendered in a civil action.

Kerr, Pen. C., 1206.
See sec. 5277.

7259. Court may suspend sentence.

SEC. 409. Whenever any person shall be convicted of any crime except murder, burglary in the first degee, arson in the first degree, robbery, carnal knowledge of a female child under the age of ten years, or rape, the court may in its discretion, at the time of imposing sentence upon such person, direct that such sentence be staid and suspended and that the defendant be released from custody on such conditions as the court may impose until otherwise ordered by such court.

7260. Indeterminate sentences.

SEC. 410. Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, the court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the state prison, for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and where no minimum term of imprisonment is prescribed by law, the court shall fix the minimum term in his discretion at not less than one year nor more than five years; and where no maximum term of imprisonment is prescribed by law, the court shall fix such maximum term of imprisonment.

A sentence on a conviction of grand larceny is not void because the court imposes as a part of the penalty "at hard labor." State v. Maher, 25 Nev. 465 (62 P. 236).

7261. Board of pardons to determine period of imprisonment when minimum served.

SEC. 411. The board of pardons may at any time after the expiration of the minimum term of imprisonment for which such prisoner was committed thereto, direct that any prisoner confined in such institution shall be released on parole upon such terms and conditions as in their judgment they may prescribe in each case.

Constitutional powers of board of pardons, sec. 307.

7262. When complainant to pay costs—Judgment—Execution.

SEC. 412. In all cases of criminal prosecution where the defendant is

A '13 275

not found guilty, the court may require the complainant, if it appears that the prosecution was malicious or without probable cause, to pay the costs of the action, or to give security to pay the same within thirty days. If the complainant does not comply with the order of the court, judgment may be entered against him for the amount thereof. Such judgments may be enforced and appealed from in the same manner as those rendered in civil actions.

Mont., 2708, 2709.

7263. Entry of judgment, record of action, what to include.

SEC. 413. When judgment upon a conviction is rendered, the clerk shall enter the same in the minutes, stating briefly the offense for which the conviction has been had, and shall, within five days, annex together and file the following papers, which shall constitute the record of the action:

1. A copy of the minutes of any challenge which may have been interposed by the defendant to the panel of the grand jury, or to any individual grand juror, and the proceedings thereon;

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

3. A copy of the minutes of any challenge which may have been interposed to the panel of the grand jury, or an individual juror, and the proceedings thereon;

4. A copy of the minutes of the trial;

5. A copy of the minutes of the judgment;

6. The decision of the court upon matters of law deemed excepted to, if such decision is in writing, and a copy of the minutes showing any decision deemed excepted to.

7. Any written charges given or refused by the court, with the indorsements thereon;

8. The affidavits and counter affidavits, if any, used on the hearing of a motion for a new trial;

9. The bill of exceptions, if any, when settled, shall be attached to the foregoing and become a part of the record.

Kerr, Pen. C., 1207.

A judgment in a criminal case, showing the parties thereto, the court in which it was rendered, directing the term of imprisonment, the prison in which defendant is to be confined, and reciting the offense for which the defendant is to be punished, is all the statute requires. Ex Parte Salge, 1 Nev. 453.

A certificate of a clerk showing that the judgment or sentence entered is different from that which was orally delivered by the judge, proves nothing. The law does not authorize the clerk to certify what the judge may have said. He can only certify to the records in his court. Idem.

Cited, State v. Forsha, 8 Nev. 137; State v. Burns, 8 Nev. 251, 255; State v. Huff, 11 Nev. 24.

There is no provision of the statute that will authorize the supreme court to review or examine the evidence in a criminal case, unless it is embodied in a bill of exceptions. State v. Larkin, 11 Nev. 314, 321.

"Minutes of the trial" means only the minutes as kept by the clerk and recorded in the minute book containing the proceedings of the trial, that are daily read by the clerk and approved by the court. Idem.

The bill of exceptions, properly settled and signed by the judge, together with the rest of the record as provided in this section, is all that the supreme court will notice in the examination of a criminal case on appeal. State v. Mills, 12 Nev. 403, 405.

The papers that constitute the record or judgment roll in a criminal case are specified in this section, and it is the duty of the clerk to fasten them together and file within five days after entry of a judgment of conviction. State v. Ah Mook, 12 Nev. 369, 373, 374.

See State v. Mills, 12 Nev. 403.

The record in a criminal case consists only of such matter as is required by this section and section 445 of this act. State v. Rover, 13 Nev. 17, 20.

Affidavits as to misconduct of jurors, not embodied in bill of exceptions, or in any properly certified statement, cannot be considered on appeal. State v. McMahan, 17 Nev. 365, 374 (30 P. 1000).

Where there is no statute directing what the record shall be upon an appeal by the state in a criminal case, the alleged errors must be presented by a bill of exceptions. If not so presented the appeal will be dismissed. State v. Murphy, 21 Nev. 332 (31 P. 513).

The recitals of the commitment at the

time of passing sentence, are mere matters of procedure and no part of the judgment. Ex Parte Dela, 25 Nev. 346 (83 A. S. 603, 60 P. 217).

Requisites of valid conviction. Ex Parte Webb, 24 Nev. 238 (51 P. 1027).

A judgment reciting that defendant was informed of an indictment found against him for the crime of escaping from an officer and that his plea of guilty was duly entered, and that it was adjudged that he be punished for the crime for which he had "pleaded guilty," sufficiently stated the offense for which the conviction was had. Ex Parte Doyle, 26 Nev. 281 (66 P. 949).

A bill of exceptions, when properly settled, should be filed, and it then becomes a part of the record. State v. Hill, 25 Nev. 185 (105 P. 1025).

Cited, State v. Bouton, 26 Nev. 39 (62 P. 595).

CHAPTER 36

THE EXECUTION

7264. Authority for execution, what is.
7265. Execution for fine, same as on judgment in civil action.
7266. Judgment of imprisonment—Commitment.
7267. Idem—Delivery to warden of state prison—Return of officer.
7268. Judgment of death—Form of warrant.
7269. Idem—Statement to be transmitted to board of pardons.
7270. Suspension of judgment of death.
7271. Inquiry into sanity of defendant.
7272. Idem—Attorney-general and district attorney to attend.
7273. Certificate of inquisition to be signed and filed.
7274. Procedure when defendant found sane.
7275. Idem—When defendant found insane.
7276. Inquiry into pregnancy of female convict.
7277. Idem—Execution suspended during pregnancy.
7278. When governor satisfied defendant no longer pregnant may order execution.
7279. Judgment of death remaining unexecuted, another warrant drawn.
7280. Idem—Execution of judgment.
7281. Death penalty inflicted by hanging or shooting, at defendant's election.
7282. Warden to make return on death warrant.

7264. Authority for execution, what is.

SEC. 414. When a judgment has been pronounced, a certified copy of the entry thereof in the minutes shall 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 the execution thereof, except when judgment of death is rendered.

Kerr, Pen. C., 1213.

While the statute authorizes officers to carry into effect the judgments of criminal courts in all cases where the punishment is less than death, upon receipt of a certified copy of a judgment or sentence, thus dispensing with the necessity of a regular warrant for execution, still it does not prevent the officer from proceeding to execution of the judgment upon receipt of a formal warrant reciting the judgment of the court, and requiring the officer to execute that judgment. Ex Parte Smith, 2 Nev. 338, 340.

Cited, State v. Angelo, 18 Nev. 427 (4 P. 1080); State v. Murphy, 23 Nev. 402 (48 P. 628); Ex Parte Dela, 25 Nev. 349 (83 A. S. 603, 60 P. 217).

See Ex Parte Doyle, under sec. 413 of this act.

Recitals in commitment are no part of the judgment. Ex Parte Dela, 25 Nev. 346 (83 A. S. 603, 60 P. 217).

7265. Execution for fine, same as on judgment in civil action.

SEC. 415. If the judgment be for a fine alone, execution may be issued thereon as on a judgment in a civil action.

Kerr, Pen. C., 1214.
See sec. 5281.

7266. Judgment of imprisonment—Commitment.

SEC. 416. If the judgment be imprisonment, or a fine and imprisonment until it is satisfied, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with.

Kerr, Pen. C., 1215.
Cited, State v. Murphy 23 Nev. 402 (48 P. 628); Ex Parte Tani, 29 Nev. 388, 13 L. R. A. (N. S.) 518, 91 P. 137; State v. Pray, 30 Nev. 206, 218 (94 P. 218).

7267. Idem—Delivery to warden of state prison—Return of officer.

SEC. 417. If the judgment is for imprisonment in the state prison, the sheriff of the county must, upon receipt of a certified copy thereof, take and deliver the defendant to the warden of the state prison. He must also deliver to the warden the certified copy of the judgment, and take from the warden a receipt for the defendant, and make return thereof to the court.

Kerr, Pen. C., 1216; Utah, 4927.

7268. Judgment of death—Form of warrant.

SEC. 418. When judgment of death is rendered, a warrant, signed by the judge and attested by the clerk, under the seal of the court, must be drawn and delivered to the sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than sixty days nor more than ninety days from the time of the judgment, and must direct the sheriff to deliver the defendant within seven days, or as soon thereafter as travel will permit, to the warden of the state prison of this state, for execution, such prison to be designated in the warrant.

Kerr, Pen. C., 1217.

It is the warrant and not the judgment which fixes the time for executing the death sentence; and the court may at any time issue the warrant in due form of law. State v. Summers, 9 Nev. 269, 270.

7269. Idem—Statement to be transmitted to board of pardons.

SEC. 419. The judge of the court at which a conviction requiring judgment of death shall have been had, shall immediately after the conviction transmit to the governor, as chairman of the board of pardons, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial.

Kerr, Pen. C., 1218.

Powers of board of pardons, Const., sec. 307.

Statutory provisions relating to board of pardons, sec. 7622, et seq.; rules of the board, sec. 7629.

Cited, State ex rel. Watkins v. Bonnifield, 10 Nev. 401.

It is the duty of the district judge to transmit the testimony in a capital case to the governor. The statute does not authorize the clerk to perform any such duty or to make any charge therefor. State ex rel. Beck v. Washoe Co., 14 Nev. 66, 70.

7270. Suspension of judgment of death.

SEC. 420. No judge, court or officer, other than the governor, can suspend the execution of a judgment of death, except the warden of the state prison to whom he is delivered for execution, as provided in the eight succeeding sections, unless an appeal is taken. When an appeal is taken from a judgment of death, the appellate court, and any judge thereof in vacation, may suspend the execution until the appeal is heard and determined.

Kerr, Pen. C., 1220.

7271. Inquiry into sanity of defendant.

SEC. 421. If, after judgment of death, there is good reason to suppose that the defendant has become insane, the warden of the state prison to whom he is delivered for execution, with the concurrence of the judge of the district court of the county in which such prison is situated, may summon from the list of jurors selected by the county commissioners for the year, a jury of twelve persons, to inquire into the supposed insanity, and must give immediate notice thereof to the attorney-general and the district attorney of said county.

Kerr, Pen. C., 1221.

7272. Idem—Attorney-general and district attorney to attend.

SEC. 422. The attorney-general and the district attorney shall attend the inquisition and may produce witnesses before the jury, for which pur-

pose they, or either of them, 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 that court.

Kerr, Pen. C., 1222.

7273. Certificate of inquisition to be signed and filed.

SEC. 423. A certificate of the inquisition must be signed by the jurors and the warden, and filed with the clerk of the district court of the county in which such prison is situated.

Kerr, Pen. C., 1223.

7274. Procedure when defendant found sane.

SEC. 424. If it is found by the inquisition that the defendant is sane, the warden must execute the judgment; but if it is found that he is insane, the warden must suspend the execution of the judgment until he receives a warrant from the governor, or from the judge of the district court of the county in which such state prison is situated, directing the execution of the judgment.

Kerr, Pen. C., 1224.

7275. Idem—When defendant found insane.

SEC. 425. If the inquisition finds that the defendant is insane, the warden 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.

Kerr, Pen. C., 1224.

7276. Inquiry into pregnancy of female convict.

SEC. 426. If there is good reason to suppose that a female against whom a judgment of death is rendered is pregnant, the warden of the state prison to whom she is delivered for execution, with the concurrence of the district court of the county in which such state prison is situated, may summon a jury of three physicians to inquire into the supposed pregnancy. Immediate notice thereof must be given to the attorney-general and the district attorney of such county, and the provisions of sections 422 and 423 apply to the proceedings upon the inquisition.

Kerr, Pen. C., 1225.

7277. Idem—Execution suspended during pregnancy.

SEC. 427. If it is found by the inquisition that the female is not pregnant, the warden must execute the judgment; if it is found that she is pregnant, the warden must suspend the execution of the judgment, and transmit the inquisition to the governor.

Kerr, Pen. C., 1226.

7278. When governor satisfied defendant no longer pregnant may order execution.

SEC. 428. When the governor is satisfied that such female is no longer pregnant, he may issue his warrant appointing a day for the execution of the judgment.

Kerr, Pen. C., 1226.

See the next succeeding section and secs. 258, 306, 307.

7279. Judgment of death remaining unexecuted, another warrant drawn.

SEC. 429. If for any reason the judgment of death has not been executed, and it remains in force, the court in which the conviction was had must, upon the application of the attorney-general or the district attorney of the county in which the conviction was had, cause another warrant to be drawn, signed by the judge and attested by the clerk under the seal of the court, and delivered to the warden of the state prison. Said warrant must

state the conviction and judgment and appoint a day on which the judgment is to be executed, which must be not less than fifteen days nor more than thirty days after the date of said warrant.

Kerr, Pen. C., 1227.

A judgment of conviction of murder in the first degree, which fixes a time for the execution of the sentence more than sixty days from its date, is not therefor void; for the reason that such fixing of time is not properly a part of the judgment and may be rejected as surplusage. State v. Summers, 9 Nev. 269, 270.

7280. Idem—Execution of judgment.

SEC. 430. When the remittitur showing the affirmation of the judgment appealed from has been filed with the clerk of the court from which the appeal has been taken, the court in which the conviction was had must inquire into the facts, and if no legal reasons exist against the execution of the judgment, must make and enter an order that the warden of the state prison shall execute the judgment at a specified time; *provided*, that the presence of the defendant in said court at the time the order of execution is made and entered, or the warrant is issued, as in this section provided, shall not be required.

Kerr, Pen. C., 1227.

See State v. Summers, under sec. 429 of this act.

7281. Death penalty inflicted by hanging or shooting, at defendant's election.

SEC. 431. The punishment of death shall be inflicted by hanging the defendant by the neck until he is dead, or by shooting him, at his election. If the defendant refuse or neglect to make the election, the court at the time of rendering the sentence must declare the mode of execution and enter the same as a part of its judgment. The execution shall take place within the limits of the state prison, and a suitable and efficient enclosure shall be provided by the board of prison commissioners for the purpose. The warden of the prison where the execution is to take place must be present at the execution, and must invite the presence of a physician, the attorney-general of the state, and at least twelve reputable citizens to be selected by him; and he shall, if requested by the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may deem proper to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

Kerr, Pen. C., 1228.

7282. Warden to make return on death warrant.

SEC. 432. After the execution, the warden must make a return upon the death warrant to the court by which the judgment was rendered, showing the time, place, mode and manner in which it was executed.

CHAPTER 37

BILL OF EXCEPTIONS

7283. Bill of exceptions, how prepared, filed and settled—Appeal without —Time shortened or extended—Appeal on errors in record without bill.
7284. Bill of exceptions, what to contain—Judge after his term or supreme court may settle.
7285. Idem—Supreme court may settle if judge does not according to facts.

7283. Bill of exceptions, how prepared, filed and settled—Appeal without—Time shortened or extended—Appeal on errors in record without bill.

SEC. 433. A bill of exceptions in order to become a part of the record of

the case must be settled and certified in the following manner: Within ten days after the entry of the judgment, a proposed bill of exceptions shall be filed with the clerk of the court and a copy thereof, upon the same day, shall be served upon the adverse party or the attorney for the adverse party. Within ten days after the service of a copy of such proposed bill of exceptions, the adverse party shall, in like manner file and serve any proposed amendments he may have to such proposed bill of exceptions. Within five days thereafter, the party filing the proposed bill of exceptions may serve upon the adverse party or the attorney for the adverse party a notice in writing that he declines to accept such proposed amendments or any part thereof. If either party as the case may be, shall fail to propose amendments to the proposed bill of exceptions, or shall fail to serve a notice that he declines to accept the proposed amendments or any part thereof, the former shall be deemed to have waived proposing amendments and the latter to have accepted the amendments proposed. If no amendments are proposed or if proposed are accepted, the proposed bill of exceptions shall be presented to the judge who tried the case at the earliest opportunity for settlement and approval. If amendments are proposed which are not agreed to, either party, upon five days' notice to the other, may apply to the court, or judge thereof, to have the bill of exceptions settled. The court of its own motion, or the judge who tried the case of his own motion, may set a time for the settlement of the bill of exceptions, upon not less than two days' notice to both parties. When the bill of exceptions is settled it shall be signed by the judge and the clerk of the court shall embody the same in the record of the case. The time in this section mentioned for the performance of any act, upon stipulation or good cause shown, may be shortened or extended. Errors which appear in the record of the action, when no bill of exceptions is filed, may be taken advantage of upon appeal notwithstanding there is no bill of exceptions.

Kerr, Pen. C., 1170–1178.

The time prescribed by the practice act within which a bill of exceptions in a criminal case is to be signed by the judge is merely directory. State v. Salge, 1 Nev. 459.

In a prosecution for murder, where the record on appeal only stated that the motions made by defendant as to the regularity of the grand jury were denied by the court, there being nothing to show upon what the court acted in denying the motions, are all presumptions being in favor of the proceedings below, it will be assumed that defendant's objections were not supported by evidence. Ex Parte Bronzo, 30 Nev. 311 (95 P. 1001).

Where the record of an appealed case is in two volumes, only one of which is certified "to be a true and correct transcript of the appeal herein," the supreme court can only consider the volume so certified. State v. Hill, 32 Nev. 185 (105 P. 1025).

A bill of exceptions, when properly settled, should be filed, and it then becomes a part of the record. Idem.

7284. Bill of exceptions, what to contain—Judge, after his term, or supreme court may settle.

SEC. 434. The bill of exceptions shall 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 shall, upon the settlement of the bill, whether agreed to by the parties or not, strike out evidence and other matters not material to the questions to be raised. If the judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may nevertheless settle such bill, or, in the event of his failure or refusal to do so, either party may, as provided in the next section, apply to the supreme court for leave to prove the same.

Kerr, Pen. C., 1174.

7285. Idem—Supreme court may settle if judge does not according to facts.

SEC. 435. If the judge in any case refuses to allow an exception in

accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court, for leave to prove the same. The application and proof shall be made in the mode and manner, and under such regulations as that court may prescribe; and the bill, when proven, must be certified by the chief justice, or, in his absence or inability to act, by one of the associate justices, to be correct, and filed with the clerk of the court in which the action was tried, and when so filed it shall have the same force and effect as if settled by the judge who tried the cause.

Kerr, Pen. C., 1175.

CHAPTER 38

APPEAL

7286. To and from what courts appeal may be taken.
7287. Appeal to supreme court taken on questions of law only.
7288. Designation of parties on appeal.
7289. Intermediate order or proceeding may be reviewed on appeal.
7290. Appeal from judgment or order to be taken within three months.
7291. Appeal taken by filing and serving notice—One notice sufficient.
7292. Idem—Service of notice by publication.
7293. Appeal by state, effect of—Entry of judgment on reversal.
7294. Appeal does not stay execution, unless certificate issued.
7295. Record and notice transmitted, time for.
7296. Dismissal of appeal for substantial irregularity.
7297. Dismissal for failure to make return.
7298. Criminal appeals to be determined at first term after record filed.
7299. Affirmance may be granted without argument, reversal not.
7300. Number of counsel in argument on appeal.
7301. Defendant need not be present.
7302. Court to give judgment without regard to technical errors.
7303. Power of appellate court.
7304. Reversal of judgment—Duty of appellate court—Bail exonerated.
7305. On affirmance original judgment to be executed.
7306. Entry of judgment—Papers remitted to court below.
7307. Orders after remittitur to be made by court to which case remitted.

7286. To and from what courts appeal may be taken.

SEC. 436. The party aggrieved in a criminal action, whether that party be the state or the defendant, may appeal as follows:

1. To the district court of the county from a final judgment of the justice's court.

2. To the supreme court from a final judgment of the district court in all criminal cases. Also, from an order of the district court allowing a demurrer or granting or refusing a new trial.

Jurisdiction of district court on appeal, secs. 321, 4840; of supreme court, secs. 319, 4833.

An appeal in criminal cases may be taken from an order of the district court allowing a demurrer, though final judgment be not entered. People v. Logan, 1 Nev. 110, 113.

An order of the district court quashing an indictment, discharging the defendant and exonerating his bail is a final judgment from which an appeal may be taken. State v. Logan, 1 Nev. 509, 514, 515.

A judgment is final which completely disposes of the action. To make it final it is not necessary that the rights of the parties should be finally determined, or that it be upon the merits. It is final if it disposes of the particular suit in which it is rendered. Idem.

The statute provides for an appeal from an order sustaining a demurrer to an indictment, but makes no provision for a record of such case (Stats. 1861, 485, sec. 469). It was held that such record should be by bill of exceptions and that in the absence of such bill the appeal should be dismissed. State v. Fellows, 8 Nev. 311.

The right of appeal in criminal cases is restricted to cases where the punishment adjudged is a sentence to confinement in the state prison, or to death. State v. McCormick, 14 Nev. 347; State v. Quinn, 16 Nev. 89. See Const., ante, 319.

Alleged errors in a charge or instruction can only be brought to the attention of the supreme court in one of three ways: Either by being embodied in a bill of exceptions, or in a settled statement, or indorsed by the judge as provided by section 380 of this act; and unless presented in one of these ways the supreme court will not notice them. State v. Darling, 4 Nev. 413.

Appeal by state—Bill of exceptions required. State v. Murphy, 21 Nev. 332. (31 P. 513).

Appeal — Insufficiency of evidence. A judgment in a criminal case will not be disturbed by the supreme court on the ground of insufficiency of the evidence, if there be any evidence tending to prove the allegations of the indictment. State v. McGinnis, 6 Nev. 109.

Objections to indictment in appellate

court. An objection to an indictment on the grounds that it does not state facts sufficient to constitute a public offense may be taken for the first time in the appellate court, and is not waived by a failure in the district court to make the point on demurrer or on motion in arrest of judgment. State v. Trolson, 22 Nev. 419 (32 P. 930).

Appeal from new trial order—Too late after appeal from judgment disposed of. State v. Summers, 9 Nev. 399.

Cited, State v. Murphy, 23 Nev. 403 (48 P. 628).

See Ex Parte Smith, under sec. 392 of this act.

Certiorari does not lie from the supreme court to review a conviction before a justice on the ground that the statute authorizing the conviction is unconstitutional, since the constitutional question may be raised before the justice and an appeal taken from any judgment rendered by him. Chapman v. Justice Court, 29 Nev. 154, 158 (86 P. 552).

An "appeal" is a statutory right, and is the continuation of the original suit; while a "writ of error" is an independent action, in the nature of a new and original suit. State v. Preston, 30 Nev. 301 (95 P. 918).

Whether one convicted of a crime is entitled to have the judgment reviewed on writ of error cannot be determined on a petition for a rehearing after the dismissal of his appeal, but only on appropriate proceedings for the writ, when all parties interested can be heard. Idem.

7287. Appeal to supreme court taken on questions of law only.

SEC. 437. The appeal to the supreme court from the district court can be taken on questions of law alone.

Kerr, Pen. C., 1235.

Where there is evidence to support the verdict, the supreme court cannot reverse the judgment on the ground of the insufficiency of the evidence. State v. Wong Fun, 23 Nev. 336 (40 P. 95); Watt v. N. C. R. R. Co., 23 Nev. 155 (62 A. S. 772, 44 P. 423); State v. V. & T. R. R., 23 Nev. 284 (35 L. R. A. 759, 46 P. 723); State v. Thompson, 31 Nev. 209 (101 P. 557); State v. Weber, 31 Nev. 385 (103 P. 411).

Habeas corpus proceedings cannot be used to authorize the exercise of appellate jurisdiction. Ex Parte Gafford, 25 Nev. 101 (83 A. S. 568, 57 P. 484).

Substantial compliance with the statute regulating criminal appeals is essential to the supreme court's jurisdiction of an appeal. State v. Preston, 30 Nev. 301 (95 P. 918).

The statutory appeal from a judgment of conviction and from an order denying a new trial clothes the supreme court with power to review every action affecting the rights of accused, provided substantial compliance is had with the statutes. Idem.

The supreme court will not determine questions of fact on which the verdict is based. Idem.

All presumptions are in favor of the regularity of the action of the trial court. State v. Williams, 31 Nev. 361 (102 P. 974).

7288. Designation of parties on appeal.

SEC. 438. The party appealing shall be known as the appellant, and the adverse party as the respondent.

Kerr, Pen. C., 1236.

7289. Intermediate order or proceeding may be reviewed on appeal.

SEC. 439. Upon the appeal, any decision of the court in an intermediate order or proceeding, forming a part of the record, may be reviewed.

Kerr, Pen. C., 1259.

Objections to the form of an indictment for defects apparent upon its face cannot be taken advantage of for the first time on appeal. State v. O'Flaherty, 7 Nev. 154, 158.

7290. Appeal from judgment or order to be taken within three months.

SEC. 440. An appeal from a judgment or order must be taken within three months after its rendition.

Utah, 4959.

Cited, State v. Murphy, 23 Nev. 391 (48 P. 628); State v. Preston, 30 Nev. 303 (95 P. 918).

7291. Appeal taken by filing and serving notice—One notice sufficient.

SEC. 441. An appeal is taken by filing, with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same and serving a similar notice or a copy thereof upon the adverse party or the attorney for the adverse party. When the appeal is from both the judgment and from an order denying a motion for a new trial one notice of appeal so specifying is sufficient.

Cited, State v. Murphy, 23 Nev. 391 (48 P. 628).

The trial court has no authority to make an order staying the execution of a judgment of imprisonment, and no authority to release or order the release of a defendant under a cognizance or otherwise, after judgment of imprisonment has been rendered against him, except after an appeal therefrom has been taken, and any recognizance given for that purpose at such a time is void. State v. Murphy, 23 Nev. 391, 403 (48 P. 628).

A notice that it is appellant's "intention" to appeal is defective. State v. Preston, 30 Nev. 301, 303 (95 P. 918).

When defendant appeals, filing and service of a proper notice are essential to confer jurisdiction on the supreme court. Idem.

A notice that two persons convicted of murder and manslaughter respectively intend to appeal from "the judgment of the district court herein" is fatally defective as insufficiently identifying the judgment or judgments from which appeal was intended to be taken, and for failing to show that each appealed from the judgment against him. Idem.

Substantial compliance with statutes regulating criminal appeals is essential to the supreme court's jurisdiction of an appeal. Idem.

7292. Idem—Service of notice by publication.

SEC. 442. If personal service of the notice cannot be made, the judge of the court in which the action was tried, upon proof thereof, may make an order for the publication of the notice in some newspaper for a period not exceeding thirty days. Such publication shall be equivalent to personal service.

7293. Appeal by state, effect of—Entry of judgment on reversal.

SEC. 443. An appeal taken by the state shall in no case stay or affect the operation of a judgment in favor of the defendant; *provided*, if the appeal by the state is from an order sustaining a demurrer to an indictment, or granting a motion to set aside an indictment, and upon such appeal said order is reversed, the defendant shall thereupon be liable to arrest and trial upon said indictment. If the appeal by the state be from an order allowing a motion in arrest of judgment, or granting a motion for a new trial, and upon appeal such order is reversed, the trial court shall enter judgment against the defendant.

When there is no statute directing what the record shall be upon an appeal by the state in a criminal case, the alleged errors must be presented by means of a bill of exceptions. If not so presented, the appeal will be dismissed. State v. Murphy, 21 Nev. 332 (31 P. 513).

7294. Appeal does not stay execution, unless certificate issued.

SEC. 444. An appeal to the supreme court from a judgment of conviction shall stay the execution of the judgment upon filing with the clerk of the court in which the conviction shall have been had a certificate of the judge of such court, or of a justice of the supreme court, that in his opinion there is probable cause for the appeal, but not otherwise.

See secs. 7314, 7326.

An appeal from a judgment of imprisonment does not operate as a stay of execution thereof, and the defendant, if in custody, must so continue, unless admitted to bail. State v. Murphy, 23 Nev. 391 (48 P. 628).

Sec. 479, Stats. 1861, 435, cited, State v. Murphy, 23 Nev. 403 (48 P. 628); State v. Pray, 30 Nev. 206, 218 (94 P. 218); State v. Smith, 34 Nev. — (111 P. 929).

7295. Record and notice transmitted, time for.

SEC. 445. Upon the appeal being taken, the clerk with whom the notice of appeal is filed, must, within ten days thereafter, without charge, transmit to the clerk of the supreme court the notice of appeal and the record in said action, and if the appeal be by the state from an order sustaining a demurrer to or setting aside an indictment, or allowing a motion for a new trial or a motion in arrest of judgment, the clerk shall within said time likewise prepare and forward the indictment, demurrer, order of the court sustaining said demurrer, and notice of appeal, which shall constitute the record on appeal.

On appeal from an order granting a new trial in a criminal case where a reversal is urged on the ground that there was no statement or bill of exceptions in the court below, the transcript must affirmatively show that there was no such statement or bill of exceptions. State v. Stanley, 4 Nev. 71.

The certificate of the clerk to a transcript on appeal, that no statement or bill of exceptions on a motion for a new trial had been filed in his office, is not sufficient evidence that none was presented to the court below to authorize a reversal on that ground of an order granting a new trial. Idem.

There is no law authorizing the review of an action of the lower court upon the simple certificate of the clerk as to how or upon what evidence it acted. Idem.

The failure to file a statement or bill of exceptions on motion for new trial in a criminal case would not justify a reversal of an order granting a new trial, the transcript not affirmatively showing that none was presented to the court. Idem.

On appeal from an order sustaining a demurrer to an indictment, the record should be by bill of exceptions. State v. Fellows, 8 Nev. 311.

The record in a criminal case consists only of such matter as is required by this section and section 413 of this act. State v. Rover, 13 Nev. 17, 20.

Where there is no statute directing what the record shall be upon an appeal by the state in a criminal case, the alleged errors must be presented by means of a bill of exceptions. If not so presented the appeal will be dismissed. State v. Murphy, 21 Nev. 332, 333 (31 P. 513).

Cited, State v. Murphy, 23 Nev. 403 (46 P. 628); State v. Bouton, 26 Nev. 39 (62 P. 595); State v. Hill, 32 Nev. 187 (105 P. 1026).

The supreme court, in the examination of the transcript on appeal in a criminal case, cannot look at anything contained therein that is outside of the record provided for by statute. State v. Ah Mook, 12 Nev. 369, 372.

7296. Dismissal of appeal for substantial irregularity.

SEC. 446. If the appeal is irregular in any substantial particular, but not otherwise, the appellate court may, on a day in term, on motion of the respondent, upon five days' notice, with copies of the papers upon which the motion is founded, unless the irregularity can be cured by amendment and is so cured, order the same to be dismissed.

Kerr, Pen. C., 1248.

See sec. 7469.

A record is fatally defective in not showing the fact that the defendant neglected to appear upon some one of the occasions designated in sec. 486 of this act. State v. Murphy, 23 Nev. 391 (48 P. 628).

Fine cannot be paid under protest so as to be recovered if judgment is reversed on appeal. State v. Pray, 30 Nev. 206 (94 P. 218).

An appeal will be dismissed where the judgment is for a fine only when the fine has been paid. Idem.

Though the supreme court has adopted a liberal practice in granting applications to amend defects in transcripts, where no move is made to obviate a valid objection to a transcript, there is no other alternative than to sustain the objection. State v. Hill, 32 Nev. 185 (105 P. 1025).

7297. Dismissal for failure to make return.

SEC. 447. The court may, also, upon like motion, dismiss the appeal, if the return be not made as provided in section 445, unless for good cause it shall enlarge the time for that purpose.

Kerr, Pen. C., 1249.

7298. Criminal appeals to be determined at first term after record filed.

SEC. 448. All appeals in criminal cases shall be tried and determined at the first term of the appellate court after the record is filed.

Kerr, Pen. C., 1252.

7299. Affirmance may be granted without argument—Reversal not.

SEC. 449. Judgment of affirmance may be granted without argument, if the appellant fail to appear. But judgment of reversal can only be given upon argument, orally or upon written brief, though the respondent fail to appear.

Kerr, Pen. C., 1253.

See supreme court rule 11, p. 1423.

Where the appellant fails to appear and file any points or authorities in a criminal case, the supreme court may affirm the judgment appealed from without examining the assignment of errors in the record. State v. Myatt, 10 Nev. 163, 166.

When the defendant in a criminal case fails to put in an appearance in the appellate court, the judgment of conviction will be affirmed upon motion. State v. Chin Wah, 12 Nev. 118.

7300. Number of counsel in argument on appeal.

SEC. 450. Upon the argument of the appeal, if the offense is punishable with death, two counsel shall be heard on each side, if they require it. In any other case the court may, in its discretion, restrict the argument to one counsel on each side.

Kerr, Pen. C., 1254.

7301. Defendant need not be present.

SEC. 451. The defendant need not appear in the appellate court.

Kerr, Pen. C., 1255.

7302. Court to give judgment without regard to technical errors.

SEC. 452. After hearing the appeal, the court shall give judgment without regard to technical error or defect which does not affect the substantial rights of the parties.

Kerr, Pen. C., 1258.

See sec. 7469.

Error in admitting the evidence of one witness of a confession by an accused is harmless where the same confession is proved by other witnesses. State v. Buster 23 Nev. 346, 348 (47 P. 194).

The judgment of the trial court will not be reversed for errors which do not affect the substantial rights of the defendant. State v. Depoister, 21 Nev. 107 (25 P. 1000); State v. Vaughan, 22 Nev. 285 (39 P. 733); State v. Hartley, 22 Nev. 342 (28 L. R. A. 33, 40 P. 372); State v. Buster, 23 Nev. 346 (47 P. 194); S. N. M. Co. v. Holmes M. Co., 27 Nev. 108 (103 A. S. 759, 73 P. 759); State v. Williams, 31 Nev. 360 (102 P. 974); State v. Jackman, 31 Nev. 511 (104 P. 13); State v. Skinner, 32 Nev. 70 (104 P. 223); State v. Simpson, 32 Nev. 138 (104 P. 244); State v. Petty, 32 Nev. 384 (108 P. 934); State v. Martel, 32 Nev. 395 (108 P. 1097).

Cited and explained, State v. Smith, 34 Nev.—(117 P. 25).

7303. Power of appellate court.

SEC. 453. The appellate court may reverse, affirm, or modify the judgment appealed from, and may, if necessary or proper, order a new trial.

Kerr, Pen. C., 1260.

On a murder trial, the court instructed the jury that under the law and evidence it would not be justified in finding a verdict for any higher grade of offense than manslaughter. It was held that this was not necessarily a charge that the state had made out a case of manslaughter. State v. Little, 6 Nev. 281, 282.

Where the defendant in a criminal case is convicted and appeals, and the judgment is reversed, it was held that the supreme court may order a new trial, although the defendant did not move for one, and denies the power of the court to grant it. State v. Rover, 10 Nev. 388, 400.

Cited, State v. Murphy, 23 Nev. 400 (48 P. 628); State v. Luhano, 31 Nev. 279.

Powers of court on appeal. State v. Preston, 30 Nev. 301 (95 P. 918).

7304. Reversal of judgment—Duty of appellate court—Bail exonerated.

SEC. 454. If a judgment against the defendant is reversed, without ordering a new trial, the appellate court shall direct, if he is in custody, that he be discharged therefrom, or if he is admitted to bail, that his bail be exonerated, or if money be deposited instead of bail, that it be refunded to the defendant.

Kerr, Pen. C., 1262.

7305. On affirmance original judgment to be executed.

SEC. 455. On a judgment of affirmance against the defendant, the original judgment shall be carried into execution, as the appellate court shall direct.

Kerr, Pen. C., 1263.

7306. Entry of judgment—Papers remitted to court below.

SEC. 456. When the judgment of the supreme court shall have been

given, it must be entered on the minutes, and a certified copy of the entry, together with the papers transmitted to the supreme court on appeal, remitted to the clerk of the court from which the appeal shall have been taken.

See supreme court rule 40, p. 1424.

7307. Orders after remittitur to be made by court to which case remitted.

SEC. 457. After the certificate of judgment has been remitted, the appellate court shall have no further jurisdiction of the appeal, or of the proceedings thereon, and all orders which may be necessary to carry the judgment into effect shall be made by the court to which the certificate is remitted.

Kerr, Pen. C., 1265.

CHAPTER 39

BAIL

7308. Bail defined.
7309. Taking of bail, of what it consists.
7310. Who may be admitted to bail—Grounds.
7311. Person charged with offense punishable with death not to be admitted, when.
7312. Notice to district attorney, when to be given.
7313. Admission to bail before conviction.
7314. Admission to bail after conviction.
7315. Bail after conviction and upon appeal.
7316. Bail, when defendant has been held to answer.
7317. Bail, how put in—Form of undertaking.
7318. Qualifications of bail.
7319. Justification of bail.
7320. Examination of bail by magistrate as to qualifications.
7321. When offense bailable arresting officer must take defendant before magistrate to fix bail.
7322. When offense not bailable officer to deliver defendant into custody.
7323. Defendant to be held by sheriff unless bail ordered on habeas corpus.
7324. Bail on bench warrant, form of undertaking.
7325. Qualifications of bail.
7326. Bail on appeal, who may admit.
7327. Notice of application to be given district attorney.
7328. Bail on appeal, qualification of sureties, how furnished.
7329. Surety companies may be accepted as bail.
7330. Cash deposit in lieu of bail.
7331. Defendant may make deposit in lieu of undertaking.
7332. Money deposited as bail to be applied in satisfaction of judgment.
7333. Bail may surrender defendant—Defendant may surrender—Exoneration of bail.
7334. Sureties may arrest and surrender defendant.
7335. When defendant surrenders, deposit to be returned.
7336. Undertaking or deposit to be forfeited, when.
7337. Idem—If defendant appears court may order forfeiture discharged.
7338. Idem—When action on undertaking may be had.
7339. Clerk to pay forfeited bail to county treasurer.
7340. Recommitted after bail.
7341. Order of recommitment, what to contain.
7342. Arrest on order of recommitment.
7343. Commitment of defendant on order when he fails to appear for judgment.
7344. Idem—If for other causes he may be admitted to bail.
7345. Idem—Who may take bail.
7346. Form of undertaking on recommitment.
7347. Qualifications of bail.

7308. Bail defined.

SEC. 458. Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon the taking of bail.

Kerr, Pen. C., 1268.
Excessive bail not to be required, Const., sec. 235.
Bonds by surety companies, sec. 695.
Bail held excessive. Ex Parte Douglas, 25 Nev. 425 (62 P. 49).

7309. Taking of bail, of what it consists.

SEC. 459. The taking of bail consists in the acceptance by a competent court or magistrate, of the undertaking of sufficient sureties for the appearance of the defendant, according to the terms of the undertaking, or that the bail will pay to the State of Nevada a specified sum.

Kerr, Pen. C., 1269.

7310. Who may be admitted to bail—Grounds.

SEC. 460. A person charged with an offense may be admitted to bail before conviction, as follows:

1. As a matter of discretion in all cases where the punishment is death;
2. As a matter of right in all other cases.

Kerr, Pen. C., 1270, 1271.
See Const., sec. 236.

7311. Person charged with offense punishable with death not to be admitted, when.

SEC. 461. No person shall be admitted to bail where he is charged with an offense punishable with death, when the proof is evident or the presumption great.

Kerr, Pen. C., 1270.

A nisi prius court has the right, upon the application of a petitioner, who is charged with murder, and whose case has been resubmitted to another grand jury to hear the testimony and decide for itself whether the proof of defendant's guilt was evident or the presumption great. Ex Parte Isbell, 11 Nev. 295, 299.

When it appears that the presiding judge has acted upon petitioner's application for bail, no other court or judge would be warranted in discharging petitioner or admitting him to bail, unless it clearly appears that the presiding judge had acted arbitrarily in the premises. Idem.

As the petition for the writ of habeas corpus contained allegations which, if true, showed the offense of petitioner to be manslaughter only, he was entitled to have the evidence of the witnesses before the grand jury reviewed for the purpose of enabling the court or judge to ascertain whether the proof is evident or the presumption great and thereby to determine whether the offense committed—as shown by this and other testimony—is a bailable offense. Ex Parte Finlen, 20 Nev. 141, 144, 152 (18 P. 827).

7312. Notice to district attorney, when to be given.

SEC. 462. When the admission to bail is a matter of discretion, the court, or officer by whom it may be ordered, shall require such notice of the application therefor as he may deem reasonable to be given to the district attorney of the county where the examination is had.

Kerr, Pen. C., 1274.

7313. Admission to bail before conviction.

SEC. 463. Before conviction, a defendant may be admitted to bail:

1. For his appearance before a magistrate, on the examination of the charge, before being held to answer;
2. To appear at the court to which the magistrate is required to return the depositions and statement upon the defendant being held to answer after examination;
3. After indictment, either before the bench warrant issued for his arrest, or upon an order of the court committing or enlarging the amount of bail, or upon his being surrendered by his bail to answer the indictment in the court in which it is found, or to which it may be sent or removed for trial.

Kerr, Pen. C., 1273.

7314. Admission to bail after conviction.

SEC. 464. After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail:

1. As a matter of right, where the appeal is from a judgment imposing a fine only;
2. As a matter of discretion in all other cases.

Kerr, Pen. C., 1272.
See secs. 7294–7326.
Cited, State v. Murphy, 23 Nev. 403 (48 P. 628).

7315. Bail after conviction and upon appeal.

SEC. 465. After conviction, and upon an appeal, the defendant may be admitted to bail as follows:

1. If the appeal be from a judgment imposing a fine only, on a recognizance of bail, that he will pay the same, or such part of it as the appellate court may direct, if the judgment be affirmed or modified, or the appeal be dismissed;

2. If judgment of imprisonment has been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that, in case the judgment is reversed and the cause is remanded for a new trial, he will appear in the court to which said cause may be remanded, and at all times render himself amenable to the orders and process of the court, and if again convicted, shall appear for judgment and render himself in execution thereof.

Kerr, Pen. C., 1273.

Cited, State v. Murphy, 23 Nev. 400 (48 P. 628).

The defendant was convicted of larceny, and refused bail on application to the trial court. It was held that, as the discretion of the trial judge is not to be disturbed except for clear abuse, the defendant would not be admitted to bail by the supreme court, especially when the case would shortly be heard on its merits. State v. Smith, 34 Nev. — (111 P. 929).

Upon application to the supreme court to be admitted to bail, notice to the district attorney of the county in which the offense was committed was held to be a necessary prerequisite. Idem.

7316. Bail, when defendant has been held to answer.

SEC. 466. When the defendant has been held to answer upon an examination for a public offense, except as otherwise provided in capital cases, the admission to bail may be by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of habeas corpus.

Kerr, Pen. C., 1277.

7317. Bail, how put in—Form of undertaking.

SEC. 467. Bail is put in by a written undertaking, executed by two sufficient sureties (with or without the defendant, in the discretion of the court or magistrate), and acknowledged before the court or magistrate in substantially the following form: "An order having been made on the..... day of....., A.D. 19...., by A. B., a justice of the peace of..... county (or as the case may be), that C. D. be held to answer upon a charge of (stating briefly the nature of the offense), upon which he has been duly admitted to bail in the sum of.....dollars; we, E. F. and G. H. (stating their place of residence), hereby undertake that the above-named C. D. shall appear and answer the charge above mentioned, in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court, and, if convicted, shall appear for judgment and render himself in execution thereof, or, if he fail to perform any of these conditions, that we will pay to the State of Nevada the sum of .....dollars (inserting the sum in which the defendant is admitted to bail)."

Kerr, Pen. C., 1278.

Concerning undertakings by surety companies, see sec. 695.

A recognizance which gives the name of the offense for which the principal is held is sufficient. State v. Birchim, 9 Nev. 95 99, 100.

The reasons for setting forth the particulars of the offense in a commitment do not exist in the case of a recognizance; and therefore the construction requiring such particularity given to the words "briefly stating the offense," as used in the statutory form of commitments (sec. 142 of this act) is not applicable to the same words as used above. Idem.

It seems that a failure to follow the statutory form in giving a recognizance would not, if the obligations were in other respects plain, release the obligors from their liability. Idem.

An action upon a bail bond is an action upon an obligation founded upon an instrument in writing, and is not an action for a forfeiture or penalty to the state which must

be commenced within two years after right of action has accrued. The right of action is, therefore, barred by the six-year clause of the statute. State v. Murphy, 23 Nev. 390, 398 (48 P. 628).

A contention that a recognizance is void, for the reason that no time, place or court is named therein, is not tenable, as the law designates the time, place and court in which the defendant must appear and surrender himself in execution of the judgment. Idem.

Where the transcript on appeal shows that the recognizance was made a record by order of the court, and the complaint avers that it was filed, a contention that the recognizance is void for the reason that it was never filed or became a record in the cause or court, is not tenable. Idem.

In a recognizance the details of the offense need not be stated with the particularity required by the indictment, but it suffices if any word is used by way of recital which is commonly employed to designate the particular offense. State v. O'Keefe, 32 Nev. 331 (108 P. 2).

A recognizance reciting that "an indictment having been found charging W. with the crime of uttering and passing false paper," etc., sufficiently designated the crime without stating that the false paper was passed with intent to defraud. Idem.

7318. Qualifications of bail.

SEC. 468. The qualifications of bail are as follows:

1. Each of them must be a resident, and a householder or freeholder within the state;

2. They must each be worth the amount specified in the recognizance, exclusive of property exempt from execution; but the court or magistrate, on taking bail, may allow more than two bail to justify severally in amounts less than that expressed in the recognizance, if the whole justification be equivalent to that of two sufficient sureties.

Kerr, Pen. C., 1279.

7319. Justification of bail.

SEC. 469. The bail shall, in all cases, justify by affidavit, taken before the court or magistrate, as the case may be. The affidavit must state that they each possess the qualifications provided in the preceding section.

Kerr, Pen. C., 1280.

7320. Examination of bail by magistrate as to qualifications.

SEC. 470. The court or magistrate may thereupon further examine the bail, upon oath, concerning their sufficiency, in such manner as the court or magistrate may deem proper.

Kerr, Pen. C., 1283.

7321. When offense bailable arresting officer must take defendant before magistrate to fix bail.

SEC. 471. When the offense charged in the indictment is bailable, the officer serving the bench warrant must, if required by the defendant, take him before a magistrate in the county in which it is issued, or if he is arrested in another county, before a magistrate in that county or an adjoining county, for the purpose of allowing the defendant to furnish bail in the amount fixed on the bench warrant. If the defendant be taken into custody under a warrant of arrest for an offense which is bailable, the officer must, if so required by the defendant, take him before a magistrate for the purpose of allowing the defendant to be admitted to bail in the amount fixed in the warrant of arrest, and in accordance with the provisions for admission to bail when the defendant is taken into custody under a warrant of arrest.

See sec. 6940, et seq.

7322. When offense not bailable officer to deliver defendant into custody.

SEC. 472. If the offense charged is not bailable, or if bail be not given, the officer arresting the accused shall deliver him into custody according to the command of the bench warrant or the warrant of arrest.

Cited, Ex Parte Finlen, 20 Nev. 150 (18 P. 827).

7323. Defendant to be held by sheriff unless bail ordered on habeas corpus.

SEC. 473. When the offense is not bailable, and the defendant is delivered into custody, he shall be held by the sheriff unless admitted to bail on examination upon a writ of habeas corpus.

7324. Bail on bench warrant, form of undertaking.

SEC. 474. When the defendant has been arrested upon a bench warrant, the bail must be put in by a written undertaking, executed by two sufficient sureties (with or without the defendant, in the discretion of the court or magistrate), and acknowledged before the court or magistrate, in substantially the following form:

An indictment having been found, on the.....day of.....A. D. 19...., in the court of the district of.....(as the case may be), charging A. B. with the crime of (designating it generally), and he having been duly admitted to bail in the sum of.....dollars, we, C. D. and E. F. (stating their place of residence), hereby undertake that the above-named A. B. shall appear and answer the indictment above mentioned, in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and processes of the court, and, if convicted, shall appear, for judgment and render himself in execution thereof; or, if he fail to perform either of these conditions, that we will pay to the State of Nevada the sum of.....dollars (inserting the sum in which the defendant is admitted to bail).

Kerr, Pen. C., 1287.
See State v. O'Keefe, under sec. 467 of this act.

7325. Qualifications of bail.

SEC. 475. The provisions contained in sections 468 and 470, both inclusive, in relation to bail, shall apply to the qualifications of the bail, and to all the proceedings respecting the putting in and justifying of bail, and incident thereto.

Kerr, Pen. C., 1288.

7326. Bail on appeal, who may admit.

SEC. 476. In the cases in which the defendant may be admitted to bail, upon an appeal, the order admitting him to bail may be made by the court or judge who tried the case or by the court to which the appeal is taken or the judge or a justice thereof.

Kerr, Pen. C., 1291.
See secs. 7294, 7314.

7327. Notice of application to be given district attorney.

SEC. 477. When the admission to bail is a matter of discretion, the court or judge by whom it may be ordered shall require such notice of the application therefor as he may deem reasonable to be given to the district attorney of the county in which the verdict or judgment was originally rendered.

Kerr, Pen. C., 1274.

7328. Bail on appeal, qualification of sureties, how furnished.

SEC. 478. The sureties must possess the qualifications, and the bail must be furnished in all respects as before provided, except that the condition of the recognizance shall be to the effect that the defendant will in all respects abide the orders and judgment of the appellate court upon the appeal.

Kerr, Pen. C., 1292.
Cited, State v. Murphy, 23 Nev. 400 (48 P. 628).

7329. Surety companies may be accepted as bail.

SEC. 479. In all cases where bail may be given under the provisions of this act, the party giving such bail may furnish the same with a surety or bonding company, authorized to do business under the laws of this state and to furnish bonds or recognizances in criminal cases, to be approved by the court or magistrate, in lieu of personal sureties.

See sec. 695.

7330. Cash deposit in lieu of bail.

SEC. 480. The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the magistrate or the clerk of the court in which he is held to answer, the sum mentioned in the order, and upon delivering to the officer in whose custody he is, a certificate of the deposit, he shall be discharged from custody.

Kerr, Pen. C., 1295.

7331. Defendant may make deposit in lieu of undertaking.

SEC. 481. If the defendant has given bail, he may, at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned in the undertaking, and upon the deposit being made, the bail shall be exonerated.

Kerr, Pen. C., 1296.

7332. Money deposited as bail to be applied in satisfaction of judgment.

SEC. 482. When money has been deposited, if it remains on deposit at the time of a judgment for the payment of a fine, the court or the clerk, under the direction of the court, shall apply the money in satisfaction thereof, and after satisfying the fine and costs, shall refund the surplus, if any, to the defendant.

Kerr, Pen. C., 1297.

7333. Bail may surrender defendant—Defendant may surrender—Exoneration of bail.

SEC. 483. At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the officer to whose custody he was committed at the time of giving bail, in the following manner:

1. A certified copy of the undertaking of bail shall be delivered to the officer, who shall detain the defendant in his custody thereon as upon a commitment, and shall, by a certificate in writing, acknowledge the surrender.

2. Upon an undertaking and a certificate of the officer, the court in which the action is pending may, upon notice of five days to the district attorney of the district, with a copy of the undertaking and certificate, order that the bail be exonerated, and on filing the order and the papers used on the application, they shall be exonerated accordingly.

Kerr, Pen. C., 1300.

7334. Sureties may arrest and surrender defendant.

SEC. 484. For the purpose of surrendering the defendant, the sureties, at any time before they are finally discharged, and at any place within the state, may themselves arrest him, or by a written authority, indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

Kerr, Pen. C., 1301.

7335. When defendant surrenders, deposit to be returned.

SEC. 485. If money has been deposited instead of bail, and the defend-

ant, at any time before the forfeiture thereof, shall surrender himself to the officer to whom the commitment was directed, in the manner provided in the last two sections, the court shall order a return of the deposit to the defendant, upon producing the certificate to the officer, showing the surrender, and upon a notice of five days to the district attorney, with a copy of the certificate.

Kerr, Pen. C., 1302.

7336. Undertaking or deposit to be forfeited, when.

SEC. 486. If without sufficient excuse the defendant neglects to appear for arraignment, or for trial or judgment, or upon any other occasion, when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court shall direct the fact to be entered upon its minutes, and the undertaking, or the money deposited instead of bail, as the case may be, shall thereupon be declared forfeited.

Kerr, Pen. C., 1305.

This provision is mandatory. It does not require that the record must show that the defendant was called, neither is it necessary thereunder that the defendant should be called. State v. Murphy, 23 Nev. 391 (48 P. 628).

A record reading as follows: "Now, on motion of the district attorney, it is ordered that the bonds of M. be and they are hereby declared forfeited," is fatally defective in not showing that the defendant neglected to appear on one of the occasions designated in section 523 of the former criminal practice act. Idem.

7337. Idem—If defendant appears court may order forfeiture discharged.

SEC. 487. If at any time before the final adjournment of the court, the defendant shall appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just.

Kerr, Pen. C., 1305.

7338. Idem—When action on undertaking may be had.

SEC. 488. If the forfeiture is not discharged as provided in the last section, the district attorney may, at any time after the adjournment of the court proceed by action only against the bail upon their undertaking.

Kerr, Pen. C., 1306.

7339. Clerk to pay forfeited bail to county treasurer.

SEC. 489. If by reason of the neglect of the defendant to appear, as provided in section 486, money deposited instead of bail is forfeited, and the forfeiture be not discharged or remitted as provided in section 487, the clerk with whom it is deposited must immediately after the final adjournment of the court pay over the money deposited to the county treasurer.

Kerr, Pen. C., 1307.

7340. Recommitted after bail.

SEC. 490. The court to which the committing magistrate shall return the depositions and statement, or in which an indictment or an appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order to be entered on its minutes, direct the arrest of the defendant and his commitment to the officer to whose custody he was committed at the time of giving bail, and his detention until legally discharged, in the following cases:

1. When, by reason of his failure to appear, he has incurred a forfeiture of his bail, or of money deposited instead thereof, as provided in section 486;

2. When it satisfactorily appears to the court that his bail, or either of them, are dead, or insufficient, or have removed from the state;

3. Upon an indictment being found in the cases provided in section 233.

Kerr, Pen. C., 1310.

7341. Order of recommitment, what to contain.

SEC. 491. The order for the recommitment of the defendant shall recite generally the facts upon which it is founded, and shall direct that the defendant be arrested by any sheriff, constable, marshal, policeman, or other peace officer within the state, and committed to the custody of the sheriff of the county where the depositions and statement were returned, or the indictment was found, or the conviction was had, as the case may be, to be detained until legally discharged.

Kerr, Pen. C., 1311.

7342. Arrest on order of recommitment.

SEC. 492. The defendant may be arrested pursuant to the order, upon a certified copy thereof, in any county, in the same manner as upon a warrant of arrest, except that when arrested in another county the order need not be indorsed by a magistrate of that county.

Kerr, Pen. C., 1312.

7343. Commitment of defendant on order when he fails to appear for judgment.

SEC. 493. If the order recites, as the grounds upon which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirement of the order.

Kerr, Pen. C., 1313.

7344. Idem—If for other cause he may be admitted to bail.

SEC. 494. If the order be made for any other cause, and the offense is bailable, the court may fix the amount of bail, and may cause a direction to be inserted in the order that the defendant be admitted to bail in the sum fixed, which shall be specified in the order.

Kerr, Pen. C., 1314.

7345. Idem—Who may take bail.

SEC. 495. When the defendant is admitted to bail, the bail may be taken in the amount specified in the order, by any magistrate in the county having authority in a similar case to admit to bail upon the holding of the defendant to answer before indictment, or by any other magistrate to be designated by the court.

Kerr, Pen. C., 1315.

7346. Form of undertaking on recommitment.

SEC. 496. When bail is taken upon the recommitment of the defendant, the undertaking shall be in substantially the following form: "An order having been made on the.....day of....., A. D. 19...., by the court (naming it), that A. B. be admitted to bail in the sum of.....dollars, in an action pending in that court against him, in behalf of the State of Nevada, upon a (presentment, indictment or appeal, as the case may be), we, C. D. and E. F., of (stating their place of residence), hereby undertake that the above-named A. B. shall appear in that or any other court in which his appearance may be lawfully required upon that (presentment, indictment, or appeal, as the case may be), and shall at all times render himself amenable to its orders and processes, and appear for judgment, and surrender himself in execution thereof; or if he fail to perform any of these conditions, that we will pay to the State of Nevada the sum of..... dollars (inserting the sum in which the defendant is admitted to bail.)"

Kerr, Pen. C., 1316.

A motion by the accused for an order directing the sheriff to pay over to him money unlawfully detained, as shown by an affidavit in support of such motion, was properly denied, as such money could be recovered by civil action, and, if the money was taken from him at the time of his arrest, this section provides for its disposition. State v. Burns, 27 Nev. 289 (74 P. 983).

Recital of offense in recognizance. State v. O'Keefe, 32 Nev. 331 (108 P. 2).

7347. Qualifications of bail.

SEC. 497. The sureties must possess the qualifications and the bail must be furnished in all respects in the manner heretofore prescribed.

Kerr, Pen. C., 1317.

CHAPTER 40

COMPELLING ATTENDANCE OF WITNESSES

7348. Subpena defined.
7349. Who may issue subpenas—Order for witness in prison.
7350. District attorney may issue subpenas in support of prosecution.
7351. Idem—In support of indictment.
7352. Clerk to issue subpenas to defendant.
7353. Form of subpena.
7354. Books and papers ordered produced designated in subpena.
7355. By whom served—Return.
7356. Subpena, how served.
7357. Payment of witnesses for state who reside out of county, or are poor.
7358. Idem—Payment of witnesses, from what fund.
7359. Witness not obliged to attend out of county unless ordered.
7360. Subpena for interpreter—Oath of.
7361. Disobedience of subpena—Refusal to be sworn or to answer.
7362. Forfeiture of bond of witness.
7363. When witness is a prisoner—Order.
7364. Disobedience of subpena, penalty.

7348. Subpena defined.

SEC. 498. The process by which the attendance of a witness before a court or magistrate is required, is a subpena.

Kerr, Pen. C., 1326.

7349. Who may issue subpenas—Order for witness in prison.

SEC. 499. A magistrate before whom a complaint is laid, or a clerk of the district court before which a proceeding by indictment is being tried, may issue subpenas subscribed by them for witnesses within the State of Nevada, either on behalf of the state or of the defendant; and when it is necessary to have a person imprisoned in the state prison brought before any district court, or a person imprisoned in the county jail brought before a district court sitting in another county, an order for that purpose may be made by the district court, or district judge, at chambers, and executed by the sheriff of the county when it is made; such order can only be made upon motion of a party upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

Kerr, Pen. C., 1326.
See sec. 7363.

7350. District attorney may issue subpenas in support of prosecution.

SEC. 500. The district attorney may issue subpenas subscribed by him, for witnesses within the state, in support of the prosecution, or for such other witnesses as the grand jury may direct to appear before the grand jury, upon any investigation pending before them.

Kerr, Pen. C., 1326.

7351. Idem—In support of indictment.

SEC. 501. The district attorney may, in like manner, issue subpenas subscribed by him, for witnesses within the state, in support of an indictment, to appear before the court at which it is to be tried.

Kerr, Pen. C., 1326.

7352. Clerk to issue subpenas to defendant.

SEC. 502. The clerk of the court at which an indictment is to be tried, shall at all times, upon the application of the defendant, and without charge, issue as many blank subpenas, subscribed by him as clerk, for witnesses within the state, as may be required by the defendant.

Kerr, Pen. C., 1326.

7353. Form of subpena.

SEC. 503. A subpena authorized by the last four sections shall be sub-

stantially in the following form: The State of Nevada to A. B.: You are commanded to appear before C. D., a justice of the peace of ..... township, in.....county (or, the court of....., as the case may be), at (naming the place), on (stating the day and hour), as a witness in a criminal action, prosecuted by the State of Nevada against E. F. Given under my hand this.....day of....., A. D. 19..... G. H., justice of the peace (or J. B., district attorney, or "By order of the court, L. M., Clerk," as the case may be).

Kerr, Pen. C., 1327.

7354. Books and papers ordered produced designated in subpena.

SEC. 504. If books, papers, or documents be required, a direction to the following effect shall be contained in the subpena: And you are required also to bring with you the following (describing intelligibly the books, papers, or documents required).

Kerr, Pen. C., 1327.

7355. By whom served—Return.

SEC. 505. A subpena may be served by any male citizen over the age of twenty-one years. A peace officer must serve within his county or district any subpena delivered to him for service, either on the part of the people or of the defendant, and must make a written return of the service, subscribed by him, stating the time and place of service, without delay.

Kerr, Pen. C., 1328.

7356. Subpena, how served.

SEC. 506. The service of the subpena shall be by showing the original to the witness personally, and informing him of the contents.

Kerr, Pen. C., 1328.

7357. Payment of witnesses for state who reside out of county, or are poor.

SEC. 507. When a person shall attend before a magistrate, grand jury, or court, as a witness on behalf of the state, or defendant, upon a subpena, or by virtue of a recognizance, and it shall appear that he has come from any place out of the county, or that he is poor, the court, if the attendance of the witness be upon a trial, by an order upon its minutes, or in any other case, the district judge, by an order subscribed by him, may direct the treasurer of the county to pay the witness a reasonable sum, to be specified in the order, for his expenses.

Kerr, Pen. C., 1329.

See sec. 2000.

Regarding fees for witnesses in criminal cases: Clark County, Stats. 1909, p. 128, and Stats. 1907, p. 150; Elko, Esmeralda, Eureka, Humboldt, and Mineral Counties, Stats. 1911, p. 361; Lander County, Stats. 1909, p. 78; Lincoln County, Stats. 1907, p. 150; Nye County, Stats. 1909, p. 158; White Pine County, Stats. 1909, p. 168.

Cited, Washoe Co. v. Humboldt Co., 14 Nev. 127, 135.

7358. Idem—Payment of witnesses, from what fund.

SEC. 508. Upon the production of the order, or a certified copy thereof, the county treasurer shall pay the witness the sum specified therein, out of any fund in the county treasury not otherwise specially appropriated or set apart. It shall not be necessary for such order to be presented to the board of county commissioners or auditor.

Kerr, Pen. C., 1329.

7359. Witness not obliged to attend out of county unless ordered.

SEC. 509. No person shall be obliged to attend as a witness before any court or judge out of the district where the witness resides, or is served with the subpena, unless a judge of the court in which the offense is triable, or a justice of the supreme court, upon an affidavit of the district attorney, or prosecutor, or of the defendant, or his counsel, stating that he believes

the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse on the subpena an order for the attendance of the witness.

Kerr, Pen. C., 1330.

The sheriff is not authorized to serve a subpena upon witnesses residing in any other county, except it is within the same judicial district. Washoe Co. v. Humboldt Co., 14 Nev. 124, 132.

7360. Subpena for interpreter—Oath of.

SEC. 510. The court or magistrate may cause to be issued a subpena requiring any competent person to appear before the court at or during a trial or proceeding and act as interpreter. Such interpreter must be sworn to the effect that he will well and truly, to the best of his ability, discharge the duties of interpreter, under the direction of the court. The manner of compelling compliance on the part of the interpreter shall be the same as that provided in the case of witnesses.

7361. Disobedience of subpena, refusing to be sworn or to answer.

SEC. 511. Disobedience to a subpena, or a refusal to be sworn, or to answer as a witness, may be punished by the court or magistrate as a contempt.

Kerr, Pen. C., 1331.

7362. Forfeiture of bond of witness.

SEC. 512. Where a witness has entered into a recognizance to appear, upon his failure so to do, his recognizance shall be forfeited, in the same manner as recognizances of bail.

Kerr, Pen. C., 1332.

7363. When witness is a prisoner—Order.

SEC. 513. When a person required as a witness before a district court is imprisoned, the judge thereof may order the sheriff to bring the prisoner before such court at the expense of the state or, in his discretion, at the expense of the defendant.

See sec. 7349.

7364. Disobedience of subpena, penalty.

SEC. 514. A witness disobeying a subpena issued on the part of a defendant, shall also forfeit to the defendant the sum of $100, which may be recovered in a civil action, unless good cause can be shown for his nonattendance.

Kerr, Pen. C., 1331.

CHAPTER 41

EXAMINATION OF WITNESSES ON COMMISSION

7365. Examination of witnesses for defense—Method prescribed.
7366. Application for examination of witness sick or about to leave state.
7367. Commission defined.
7368. Who qualified to be commissioner.
7369. Application upon affidavit, contents.
7370. Application made at any time—Notice.
7371. If court satisfied must issue order.
7372. If commission granted, stay of trial may be granted.
7373. Idem—Defendant to serve copy of interrogatories on district attorney—Notice.
7374. Cross interrogatories may be served by district attorney.
7375. What questions may be included in interrogatories.
7376. Idem—Court may modify and must indorse questions.
7377. Instructions as to return of commission.
7378. Commission, how executed—Copy must be annexed—Return.
7379. Delivery of commission and return by agent—Affidavit.
7380. Idem—Procedure when agent dead or unable to deliver.
7381. Judge must file commission with clerk.
7382. Idem—When returned by mail, duty of clerk.
7383. Commission shall be open to inspection—Copies.
7384. Depositions may be read in evidence by either party—Objections.

7365. Examination of witnesses for defense—Method prescribed.

SEC. 515. When a defendant has been held to answer a charge for a public offense, he may, either before or after indictment, have witnesses examined conditionally on his behalf, as prescribed in this chapter, and not otherwise.

Kerr, Pen. C., 1335.

7366. Application for examination of witness sick or about to leave state.

SEC. 516. When a material witness for the defendant is about to leave the state, or resides out of the state, or has departed from the state, and his or her place of abode is known, or is so sick or infirm as to afford reasonable grounds for apprehending that he or she will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally on a commission.

Kerr, Pen. C., 1336, 1350.

7367. Commission defined.

SEC. 517. A commission is a process issued under the seal of the court and the signature of the clerk, directed to some person designated as commissioner, authorizing him to examine the witness upon oath, on interrogations annexed thereto, to take and certify the deposition of the witness, and return it according to the directions given in the commission.

Kerr, Pen. C., 1351.

7368. Who qualified to be commissioner.

SEC. 518. The commissioner shall be either a district judge, county clerk, or notary public of the district or state in which the commission is issued.

7369. Application upon affidavit, contents.

SEC. 519. The application must be made upon affidavit showing:

1. The nature of the offense charged;
2. The state of the proceedings in the action;
3. The name of the witness, and that his or her testimony is material to the defense of the action;
4. That the witness is about to leave the state, or resides out of the state, or has departed from the state, naming his or her place of abode, or is so sick or infirm as to afford reasonable grounds for apprehending that he or she will not be able to attend the trial.

Kerr, Pen. C., 1337, 1352.
See district court rule 15, p. 1428.

7370. Application made at any time—Notice.

SEC. 520. The application may be made to the court or to the judge, and must be upon three days' notice to the district attorney.

Kerr, Pen. C., 1338, 1353.

7371. If court satisfied must issue order.

SEC. 521. If the court or judge to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order shall be made that a commission be issued to take his testimony.

Kerr, Pen. C., 1339, 1354.

7372. If commission granted, stay of trial may be granted.

SEC. 522. If the application for a commission is granted, the court or judge may insert in the order therefor a direction that the trial of the

indictment be stayed for a specified time, reasonably sufficient for the execution and return of the commission.

Kerr, Pen. C., 1329, 1354.

7373. Idem—Defendant to serve copy of interrogatories on district attorney—Notice.

SEC. 523. When the commission is ordered, the defendant must serve upon the district attorney, without delay, a copy of the interrogatories to be annexed thereto, with two days' notice of the time at which they will be presented to the court or judge.

Kerr, Pen. C., 1355.

7374. Cross interrogatories may be served by district attorney.

SEC. 524. The district attorney may, in like manner, serve upon the defendant, or his counsel, cross interrogatories, to be annexed to the commission with like notice.

Kerr, Pen. C., 1355.

7375. What questions may be included in interrogatories.

SEC. 525. In the interrogatories, either party may insert any question pertinent to the issue.

Kerr, Pen. C., 1355.

7376. Idem—Court may modify and must indorse questions.

SEC. 526. When the interrogatories and cross interrogatories are presented to the court or judge, according to the notice given, the court or judge shall modify the questions so as to conform them to the rules of evidence, and shall endorse upon them his allowance, and annex them to the commission.

Kerr, Pen. C., 1355.

7377. Instructions as to return of commission.

SEC. 527. Unless the parties otherwise consent by an indorsement on the commission, the court or judge shall indorse thereon a direction as to the manner in which it shall be returned, and may, in his discretion, direct that it be returned by mail, or otherwise, addressed to the clerk of the court in which the action is pending.

Kerr, Pen. C., 1356.

7378. Commission, how executed—Copy must be annexed—Return.

SEC. 528. The commissioner, unless otherwise specially directed, may execute the commission as follows:

1. He shall publicly administer an oath to the witness that his answers given to the interrogatories shall be the truth, the whole truth, and nothing but the truth;

2. He shall cause the examination of the witness to be reduced to writing and subscribed by him;

3. He shall write the answers of the witness as near as possible in the language he gives them, and shall read to him each answer as it is taken down, and correct or add to it until it is made conformable to what he declares is the truth;

4. If the witness decline answering a question, that fact, with the reason for which he declines answering it, as he gives it, must be stated;

5. If any papers or documents are produced before him, and proved by the witness, the same or copies thereof shall be annexed to his deposition and be subscribed by the witness, and certified by the commissioner;

6. The commissioner shall subscribe his name to each sheet of the deposition, and annex the deposition with the papers and documents proved by

the witness, or copies thereof, to the commission, and must close it up under seal, and address the same as directed on the commission;

7. If there be a direction on the commission to return it by mail, the commissioner shall immediately deposit it in the nearest postoffice. If any other direction be made by the written consent of the parties, or by the court or judge on the commission as to its return, he must comply with the direction. A copy of this section must be annexed to the commission.

Kerr, Pen. C., 1343, 1357.

7379. Delivery of commission and return by agent—Affidavit.

SEC. 529. If the commission and return be delivered by the commissioner to an agent, he must deliver the same to the clerk to whom it is directed, or to the judge of the court in which the action is pending, by whom it may be received and opened, upon the agent making affidavit that he received it from the hand of the commissioner, and that it has not been opened or altered since he received it.

Kerr, Pen. C., 1344, 1358.

7380. Idem—Procedure when agent dead or unable to deliver.

SEC. 530. If the agent be dead, or from sickness or other casualty unable personally to deliver the commission and return as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making an affidavit that he received it from the agent; that the agent is dead, or from sickness or other casualty unable to deliver it; that it has not been opened or altered since the person making the affidavit received it; and that he believes it has not been opened or altered since it came from the hand of the commissioner.

Kerr, Pen. C., 1359.

7381. Judge must file commission with clerk.

SEC. 531. The clerk or judge receiving and opening the commission and return must immediately file it with the affidavit mentioned in the last two preceding sections, in the office of the clerk of the court in which the action is pending.

Kerr, Pen. C., 1360.

7382. Idem—When returned by mail, duty of clerk.

SEC. 532. If the commission and return be transmitted by mail, the clerk to whom it is addressed must receive it from the postoffice, and open and file it in his office, where it shall remain, unless the court or judge otherwise direct.

Kerr, Pen. C., 1360.
See district court rule 16, p. 1428.

7383. Commission shall be open to inspection—Copies.

SEC. 533. The commission and return shall be at all times opened to the inspection of the parties, who shall be furnished by the clerk with copies of the same, or of such part thereof as they may require, on the payment of his fees.

Kerr, Pen. C., 1361.

7384. Depositions may be read in evidence by either party—Objections.

SEC. 534. The depositions taken under the commission may be read in evidence by defendant on the trial, upon it being shown that the witness is unable to attend from any cause whatever, and the same objections may be taken to any questions in the interrogatories, or to any answer in the deposition, as if the witness had been examined orally in court.

Kerr, Pen. C., 1345, 1362.

CHAPTER 42

INQUIRY INTO SANITY OF DEFENDANT

7385. No person can be tried or punished while insane.
7386. Inquiry into sanity of accused or convicted person—Procedure.
7387. Trial or judgment to be suspended until sanity determined.
7388. Order of trial for insanity.
7389. Procedure on finding defendant sane.
7390. Procedure on finding of insanity.
7391. Commitment exonerates bail.
7392. Detention until sanity restored—Subsequent proceedings.
7393. Expenses of examination of insane, how paid.
7394. Clerk to certify costs to state or to county.

7385. No person can be tried or punished while insane.

SEC. 535. An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment, or punished, for a public offense, while he is insane.

Kerr, Pen. C., 1367.

7386. Inquiry into sanity of accused or convicted person—Procedure.

SEC. 536. When an indictment is called for trial, or upon conviction the defendant is brought up for judgment, if a doubt shall arise as to the sanity of the defendant, the court shall order the question to be submitted to a jury that must be drawn and selected as in other cases.

Kerr, Pen. C., 1368.
See secs. 7217, 7252.

7387. Trial or judgment to be suspended until sanity determined.

SEC. 537. The trial of the indictment, or the pronouncing of the judgment, as the case may be, shall be suspended until the question of insanity shall be determined by the verdict of the jury.

Kerr, Pen. C., 1368.

7388. Order of trial for insanity.

SEC. 538. The trial of the question of insanity shall proceed in the following order:

1. The counsel for the defendant shall open the case and offer evidence in support of the allegation of insanity;

2. The counsel for the state shall open their case and offer evidence in support thereof;

3. The parties may then respectively offer rebutting testimony only, unless the court, for good reason in furtherance of justice, permit them to offer evidence upon their original cause;

4. When the evidence is concluded, unless the case is submitted to the jury, on either or both sides, without argument, the counsel for the state must commence, and the defendant, or his counsel, may conclude the argument to the jury;

5. If the indictment be for an offense punishable with death, two counsel on each side may argue the cause to the jury, in which case they must do so alternately. In other cases the argument may be restricted to one counsel on each side;

6. The court shall then charge the jury, stating to them all matters of law necessary for their information in rendering a verdict.

Kerr, Pen. C., 1369.

7389. Procedure on finding defendant sane.

SEC. 539. If the jury find that the defendant is sane, the trial of the indictment shall proceed, or judgment may be pronounced, as the case may be.

Kerr, Pen. C., 1370.

7390. Procedure on finding of insanity.

SEC. 540. If the jury find the defendant insane, the judge shall order

the sheriff to forthwith convey him, together with a copy of the complaint, the commitment, and the physicians' certificate, if any, to the hospital for mental diseases; *provided*, the court deems his freedom a menace to public quietude. Proceedings against the defendant must be suspended until he becomes sane.

Kerr, Pen. C., 1370; Utah, 5057.

7391. Commitment exonerates bail.

SEC. 541. The commitment of the defendant, as mentioned in the last section, shall exonerate any bail he may have given, or shall entitle any person authorized to receive the property of the defendant to a return of any money he may have deposited instead of bail.

Kerr, Pen. C., 1371.

7392. Detention until sanity restored—Subsequent proceedings.

SEC. 542. If the defendant be received into the state hospital for mental diseases he must be detained there until he becomes sane. When he becomes sane, notice must be given to the sheriff and district attorney of the county of that fact. The sheriff shall thereupon, without delay, take the defendant and place him in proper custody, until he be brought to trial or judgment, as the case may be, or be otherwise legally discharged.

Kerr, Pen. C., 1372.

7393. Expenses of examination of insane, how paid.

SEC. 543. The expenses of the examination and of the sending of such persons, save convicts in the state prison, to and from the hospital for mental diseases, shall be in the first instance chargeable to the county from which they shall have been sent. But the county may recover them from the estates of any such persons, or from a relative legally bound to care for them, or from the county of which such persons may be resident. Expenses of the examination and of the sending of any insane convict to and from the hospital for mental diseases must be borne by the state, if he is impecunious.

Kerr, Pen. C., 1373; Utah, 5060.
See secs. 2208, 2209, 7589.

7394. Clerk to certify costs to state or to county.

SEC. 544. The clerk of the district court before which an examination shall have been conducted shall certify the costs to the state controller, who is hereby authorized to issue his warrants therefor, or to the board of county commissioners, as the case may be.

Kerr, Pen. C., 5061.

CHAPTER 43

DISMISSAL OF ACTION

7395. Court may order dismissal of prosecution, when.
7396. Defendant must be tried at next session after indictment, or dismissed.
7397. Idem—Action continued from term to term—Discharge.
7398. Dismissal discharges defendant.
7399. Dismissal on motion of court or district attorney.
7400. Attorney-general and district attorney not to abandon prosecution except as provided.
7401. Dismissal a bar except in felony cases.

7395. Court may order dismissal of prosecution, when.

SEC. 545. When a person has been held to answer for a public offense, if an indictment be not found against him at the next session of the court at which he is held to answer, and at which a meeting of the grand jury is held, the court shall order the prosecution to be dismissed, unless good cause to the contrary be shown.

Kerr, Pen. C., 1382.

The object of this section in providing that a person held to answer shall be indicted at the next term of the court, is to protect the citizen from imprisonment upon insufficient cause; but such provision has no bearing upon the validity of an indictment found at a subsequent term. State v. Lambert, 9 Nev. 322, 324.

Where petitioner has been held to answer before the grand jury for the crime of murder, the grand jury had met and ignored the charge, and the court, upon sufficient cause shown, ordered that he be held to appear before the next grand jury; it was held that petitioner was not entitled to his discharge under the provisions of this or section 547 of this act upon a writ of habeas corpus. Ex Parte Isbell, 11 Nev. 295, 297.

Where it appears that the court adjudicated upon the facts, the presumption arises that the facts were of such a character as to warrant the court in the exercise of its sound legal discretion to make the order. Idem.

It being recited in the record that the order resubmitting the case to the next grand jury, was made because "sufficient cause" was shown, the presumption is, in the absence of any showing to the contrary, that the court did not act arbitrarily in the premises. Idem.

The district court sustained a demurrer to an indictment for felony against petitioner, and, being of opinion that the objection could be avoided in a new indictment, ordered the case submitted "to the same or another grand jury." The grand jury then in session and a second and third grand jury failed to indict petitioner. A fourth grand jury found an indictment. It was held that the failure of the respective grand juries to find an indictment was not a bar to further prosecution. Ex Parte Job, 17 Nev. 184, 187 (30 P. 699).

It was held that the order resubmitting the case "to the same or another grand jury," was not void for uncertainty. Idem.

7396. Defendant must be tried at next session after indictment or dismissed.

SEC. 546. If a defendant indicted for a public offense, whose trial has not been postponed upon his application, is not brought to trial at the next session of the court at which the indictment is triable, after the same is found, the court shall order the indictment to be dismissed, unless good cause to the contrary be shown.

Kerr, Pen. C., 1382.

If the prosecution makes all reasonable efforts to impanel a jury at the first term at which the case is triable, but without success, and it does not appear that a jury could not be had at the next term, there is a good cause for a continuance on its motion for the term. Ex Parte Stanley, 4 Nev. 113, 116.

The fact that a disastrous fire had occurred destroying the courthouse and so much of the city of Virginia as to render it impossible for the court to find a suitable room in which to meet, was sufficient to authorize the court to continue the trial of causes for the term. Ex Parte Larkin, 11 Nev. 91, 95.

Courts usually require, and ordinarily should require, a showing to be made by affidavits, in order to continue causes for the term, when such continuance is objected to by either party; but when a condition of affairs exists that is notorious, and about which, from its very nature, there could be no conflict, the court is authorized of its own motion, to continue the causes for the term (Ex Parte Stanley, 4 Nev. 116, affirmed). Idem.

This section is intended to prevent arbitrary, wilful or oppressive delays; and whenever this appears to be the case, the prisoner is entitled to be discharged. Idem.

Cited, Ex Parte Maxwell, 11 Nev. 433.

See Ex Parte Isbell, under sec. 545 of this act.

7397. Idem—Action continued from term to term—Discharge.

SEC. 547. If the defendant is not indicted or tried, as provided in the last two preceding sections, and sufficient reason therefor be shown, the court may order the action to be continued from time to time, and in the meantime may discharge the defendant from custody, on his own recognizance, or on the recognizance of bail, for his appearance to answer the charge at the time to which the action is continued.

Kerr, Pen. C., 1383.

Cited, Ex Parte Maxwell, 11 Nev. 433, 441,

See Ex Parte Isbell, under sec. 545 of this act.

7398. Dismissal discharges defendant.

SEC. 548. If the court directs the action to be dismissed, the defendant shall, if in custody, be discharged therefrom, or if admitted to bail, his bail

shall be exonerated, or money deposited instead of bail shall be refunded to him.

Kerr, Pen. C., 1384.

7399. Dismissal on motion of court or district attorney.

SEC. 549. The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order any action after indictment to be dismissed; but in such case the reasons of the dismissal shall be set forth in the order, which must be entered on the minutes.

Kerr, Pen. C., 1385.

7400. Attorney-general and district attorney not to abandon prosecution except as provided.

SEC. 550. Neither the attorney-general nor the district attorney shall hereafter discontinue or abandon a prosecution for a public offense, except as provided in the last preceding section.

Kerr, Pen. C., 1386.

7401. Dismissal a bar except in felony cases.

SEC. 551. An order for the dismissal of the action, as provided in this chapter, shall be a bar to another prosecution for the same offense, if it be a misdemeanor, but it shall not be a bar if the offense charged be a felony.

Kerr, Pen. C., 1387.
See Ex Parte Job, under sec. 545 of this act.

CHAPTER 44

PROCEEDINGS AGAINST CORPORATIONS

7402. Complaint against corporation — Requisites of summons.
7403. Idem—Form of summons.
7404. Idem—Service of summons.
7405. Proceedings against corporation for misdemeanor.
7406. Preliminary examination of corporation.
7407. Idem—Certificate of discharge, or of probable cause.
7408. Idem—Prosecution by indictment.
7409. Idem—Summons — Same proceedings as against a person.
7410. Execution against corporation for fine.

7402. Complaint against corporation—Requisites of summons.

SEC. 552. Upon a complaint against a corporation, the magistrate must issue a summons, signed by him, with his name of office, requiring the corporation to appear before him at a specified time and place to answer the charge, the time to be not less than ten days after the issuing of the summons.

Kerr, Pen. C., 1390; Utah, 5071.

7403. Idem—Form of summons.

SEC. 553. The summons must be substantially in the following form:

State of Nevada, County of.....,

The State of Nevada to the (naming corporation):

You are hereby summoned to appear before me at (naming the place) on (specifying the day and hour), to answer a charge made against you upon the complaint of A. B. for (designating the offense generally).

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

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

Kerr, Pen. C., 1391; Utah, 5072.

7404. Idem—Service of summons.

SEC. 554. The summons must be served at least five days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the president or other head of the corporation, or to the

secretary, cashier, managing agent thereof, or agent designated by such corporation upon whom process may be served, if there be any such officer or agent in the state, otherwise, service may be made upon the secretary of state.

Kerr, Pen. C., 1392.

7405. Proceedings against corporation for misdemeanor.

SEC. 555. If the offense charged against a corporation be one within the jurisdiction of a justice of the peace, the complaint must be laid before and the summons issued by such justice of the peace, and the trial shall proceed against the defendant corporation to judgment, as in cases against an individual.

7406. Preliminary examination of corporation.

SEC. 556. If the offense charged against the corporation is not within the jurisdiction of a justice of the peace to try, the magistrate at the time appointed in the summons, must proceed to investigate the charge in the same manner as in the case of a natural person, so far as those proceedings are applicable.

Kerr, Pen. C., 1393.

7407. Idem—Certificate of discharge, or of probable cause.

SEC. 557. After hearing the evidence, the magistrate must indorse upon the complaint either that there is or is not sufficient cause to believe the corporation guilty of the offense charged, and must forward the complaint and other documents, if any, to the clerk of the court to which the defendant is required to appear.

Kerr, Pen. C., 1394; Utah, 5075.

7408. Idem—Prosecution by indictment.

SEC. 558. If the magistrate's return shows that there is sufficient cause to believe the corporation guilty of the offense charged, the district attorney and grand jury must proceed thereon as in the case of a natural person held to answer.

Utah, 5076.

7409. Idem—Summons—Same proceedings as against a person.

SEC. 559. Whenever an indictment is found against a corporation, it must be summoned to appear as provided in the civil practice act, or as provided in this chapter for the service of a summons. The corporation may appear by counsel If it does not appear, a plea of not guilty must be entered. In either case, proceedings thereupon must be had as if the defendant were a natural person.

Kerr, Pen. C., 1396; Utah, 5077.

7410. Execution against corporation for fine.

SEC. 560. Whenever a fine and costs, or either, shall be imposed upon a corporation on conviction, judgment therefor may be executed by the sheriff or constable out of the real and personal property of such corporation in the same manner as a judgment in a civil action.

Kerr, Pen. C., 1397; Utah, 5078.

CHAPTER 45

COMPROMISING PUBLIC OFFENSES

7411. What misdemeanors may be compromised.

SEC. 561. When a defendant is held to answer on a charge of a misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it was committed:

1. By or upon an officer of justice, while in the execution of the duties of his office;
2. Riotously;
3. With intent to commit a felony.

Kerr, Pen. C., 1377.

7412. Idem—By permission of the court—Bar.

SEC. 562. If the party injured appears before the court to which the depositions are required to be returned, at any time before trial, and acknowledges in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom; but, in such case, the reasons for the order must be set forth therein, and entered on the minutes. The order shall be a bar to another prosecution for the same offense.

Kerr, Pen. C., 1378.

7413. No offense to be compromised except as herein provided.

SEC. 563. No public offense shall be compromised, nor shall any proceeding for the prosecution or punishment thereof, upon a compromise, be stayed, except as provided in this act.

Kerr, Pen. C., 1379.

CHAPTER 46

ENTITLING AFFIDAVITS

7414. Affidavit defectively entitled—Valid, when.

SEC. 564. It shall not be necessary to entitle an affidavit or deposition in the action, whether taken before or after indictment, or upon an appeal; but if made without a title, or with an erroneous title, it shall be as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the proceeding, indictment, or appeal in which it is made.

Kerr, Pen. C., 1401.
See sec. 7469.

CHAPTER 47

SEARCH WARRANTS—SEARCH OF PERSONS CHARGED WITH FELONY

7415. Search warrant defined.
7416. Idem—Grounds for issuance.
7417. Idem—Issue only on probable cause—Affidavit.
7418. Examination of complainant and witnesses—Depositions.
7419. Idem—What depositions to contain.
7420. Warrant to issue if magistrate satisfied—Contents.
7421. Form of search warrant.
7422. Warrant may be served by officer mentioned therein.
7423. Officer may break door to serve warrant.
7424. May break door or window to liberate self or assistant.
7425. Search warrant to be served in daytime—Proviso.
7426. Time within which execution and return must be made.
7427. Officer to receipt for property taken.
7428. Disposal of property taken.
7429. Officer's return of warrant and inventory.
7430. Who may obtain copy of inventory.
7431. If grounds disputed, testimony must be taken and reduced to writing.
7432. When property taken shall be restored.
7433. Return of paper to court, or trial by magistrate.
7434. Person charged with felony may be searched.

7415. Search warrant defined.

SEC. 565. A search warrant is an order in writing in the name of the State of Nevada, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, or implements used, or evidences of crime, and bring it before the magistrate.

Kerr, Pen. C., 1523.

7416. Idem—Grounds for issuance.

SEC. 566. It may be issued upon any of the following grounds:

1. When the property was stolen or embezzled; in which case it may

be taken on the warrant from any place in which it is concealed, or from any person in whose possession it may be;

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

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

Search and seizure are not to take place without oath and probable cause, U. S. Const., sec. 174; State Const., sec. 247.

7417. Idem—Issue only on probable cause—Affidavit.

SEC. 567. No search warrant shall be issued but upon probable cause, supported by affidavit naming or describing the person, and particularly describing the property and place to be searched.

Kerr, Pen. C., 1525.

7418. Examination of complainant and witnesses—Depositions.

SEC. 568. The magistrate must before issuing the warrant examine on oath the complainant, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

Kerr, Pen. C., 1526.

7419. Idem—What depositions to contain.

SEC. 569. The depositions must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

Kerr, Pen. C., 1527.

7420. Warrant to issue if magistrate satisfied—Contents.

SEC. 570. If the magistrate be satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he shall issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named for the property specified, and to bring it before the magistrate.

Kerr, Pen. C., 1528.

7421. Form of search warrant.

SEC. 571. The warrant shall be in substantially the following form:

State of Nevada, County of..... The State of Nevada, to any sheriff, constable, marshal, policeman, or other peace officer in the county of ..... Proof by affidavit having been this day made before me by (naming every person whose affidavit has been taken) that (stating the grounds of the application, or if the affidavit be not positive that there is probable cause for believing that, stating the ground of the application in the same manner); you are thereupon commanded in the daytime (or at any time of the day or night, as the case may be), to make immediate search on the person of C. D. (or in the house situated ....., describing it, or any other place to be searched, with reasonable particularity, as the case may be), for the following property (describing it with reasonable particularity), and if you find the same, or any part thereof, to bring it forthwith before me at (stating the place). Given under my hand, and

dated this.....day of....., A. D. 19..... E. F., Justice of the Peace (or as the case may be).

Kerr, Pen. C., 1529.

7422. Warrant may be served by officer mentioned therein.

SEC. 572. A search warrant may, in all cases, be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer, on his requiring it, he being present and acting in its execution.

Kerr, Pen. C., 1530.

7423. Officer may break door to serve warrant.

SEC. 573. The officer may break open any outer or inner door or window of a house, or any part of the house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

Kerr, Pen. C., 1531.

7424. May break door or window to liberate self or assistant.

SEC. 574. He may break open any outer or inner door or window of a house for the purpose of liberating a person who, having entered to aid him in the execution of his warrant, is detained therein, or when necessary for his own liberation.

Kerr, Pen. C., 1532.

7425. Search warrant to be served in daytime—Proviso.

SEC. 575. The magistrate must insert a direction in the warrant that it be served in the daytime, unless the affidavits be positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night.

Kerr, Pen. C., 1533.

7426. Time within which execution and return must be made.

SEC. 576. A search warrant must be executed and returned to the magistrate who issued it within five days after its date, and if in any other county, within thirty days; after the expiration of these times, respectively, the warrant shall, unless executed, be void.

Kerr, Pen. C., 1534.

7427. Officer to receipt for property taken.

SEC. 577. When the officer shall have taken any property under the warrant, he must give a receipt for the property taken, specifying it in detail, to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he shall leave it in the place where he found the property.

Kerr, Pen. C., 1535.

7428. Disposal of property taken.

SEC. 578. When the property is delivered to the magistrate, he shall, if it was stolen or embezzled, dispose of it as provided in sections 595 to 600, both inclusive.

Kerr, Pen. C., 1536.

7429. Officer's return of warrant and inventory.

SEC. 579. The officer shall forthwith return the warrant to the magistrate, and at the same time deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory,

and taken before the magistrate at the time to the following effect: "I, R. S., the officer by whom the annexed warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

Kerr, Pen. C., 1537.

7430. Who may obtain copy of inventory.

SEC. 580. The magistrate shall thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

Kerr, Pen. C., 1538.

7431. If grounds disputed, testimony must be taken and reduced to writing.

SEC. 581. If the grounds on which the warrant was issued are controverted, he must proceed to take testimony in relation thereto, and the testimony given by each witness must be reduced to writing, and certified by the magistrate.

Kerr, Pen. C., 1539.

7432. When property taken shall be restored.

SEC. 582. If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate shall cause it to be restored to the person from whom it was taken.

Kerr, Pen. C., 1542.

7433. Return of paper to court, or trial by magistrate.

SEC. 583. The magistrate shall annex together the depositions, the search warrant and return, and the inventory, and return them to the court having power to inquire into the offenses in respect to which the search warrant was issued, unless he has jurisdiction of the offense, in which case he must retain them and proceed to try the accused.

Kerr, Pen. C., 1541.

7434. Person charged with felony may be searched.

SEC. 584. When a person charged with a felony is supposed to have on his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the officer making the arrest shall cause him to be searched, and the weapon or other thing to be retained, subject to the order of the court in which the defendant may be tried.

Kerr, Pen. C., 1542.

CHAPTER 48

FUGITIVES FROM JUSTICE

7435. Governor to deliver fugitive — Secretary of state to annex seal without charge.
7436. Magistrate may issue warrant.
7437. Proceedings for arrest and commitment of fugitive.
7438. Commitment of accused to await requisition—Bail.
7439. Admitted to bail, when.
7440. Notice to district attorney.
7441. Duty of district attorney.
7442. Discharge of accused for lack of prosecution.
7443. Return of magistrate—Procedure in district court.
7444. Board of commissioners to provide expense of returning prisoner—Proviso.

7435. Governor to deliver fugitive—Secretary of state to annex seal without charge.

SEC. 585. A person charged, in any state or territory of the United States, with treason, felony, or other crime, who shall flee from justice and be found in this state, shall, on demand of the executive authority of the state or territory from which he fled, be delivered up by the governor of this state to be removed to the state or territory having jurisdiction of the

crime. The secretary of state shall, without charge, annex the seal of this state to all papers, on which it is required, necessary for the extradition of such fugitive.

Kerr, Pen. C., 1548.

Fees of secretary of state, sec. 4260.

To hold a fugitive from justice to await the requisition of a governor of another state, it must affirmatively appear from the complaint filed before the committing magistrate in this state:

1. That a crime has been committed in the other state.

2. That the accused has been charged in that state with the commission of such crime.

3. That he has fled from justice, and is within this state. Ex Parte Lorraine, 16 Nev. 63, 64.

To hold a fugitive from justice upon the ground that the money taken by him in committing a robbery was brought into this state, there must be a complaint charging him with this offense substantially in the language of the statute. Idem.

7436. Magistrate may issue warrant.

SEC. 586. A magistrate may issue a warrant for the apprehension of a person so charged, who shall flee from justice and be found in this state.

Kerr, Pen. C., 1549.

7437. Proceedings for arrest and commitment of fugitive.

SEC. 587. The proceedings for the arrest and commitment of the person charged shall be in all respects similar to those provided in this act for the arrest and commitment of a person charged with a public offense committed within this state, except that an exemplified copy of an indictment found or other judicial proceeding had against him in the state or territory in which he is charged to have committed the offense, may be received as evidence before the magistrate.

Kerr, Pen. C., 1550.

7438. Commitment of accused to await requisition—Bail.

SEC. 588. If, from the examination, it appears that the person charged has committed treason, felony, or other crime charged, the magistrate, by warrant reciting the accusation, shall commit him to the proper custody within his county, for a time to be specified in the warrant, which the magistrate may deem reasonable, to enable the arrest of the fugitive under the warrant of the executive of this state, on the requisition of the executive authority of the state or territory in which he committed the offense, unless he give bail as provided in the next section or until he be legally discharged.

7439. Admitted to bail, when.

SEC. 589. The magistrate may admit the person arrested to bail by undertaking with sufficient sureties, and in such sums as he may deem proper, for his appearance before him at a time specified in the undertaking, and for his surrender to be arrested upon the warrant of the governor of this state.

Kerr, Pen. C., 1552.

7440. Notice to district attorney.

SEC. 590. Immediately upon the arrest of the person charged, the magistrate shall give notice to the district attorney of the district of the name of the person and the cause of the arrest.

Kerr, Pen. C., 1553.

7441. Duty of district attorney.

SEC. 591. The district attorney shall immediately thereafter give notice to the executive authority of the state or territory, or to the prosecuting attorney, or presiding judge of the criminal court of the city or county, within the state or territory having jurisdiction of the offense, to the end

that a demand may be made for the arrest and surrender of the person charged.

Kerr, Pen. C., 1554.

7442. Discharge of accused for lack of prosecution.

SEC. 592. The person arrested shall be discharged from custody or bail, unless before the expiration of the time designated in the warrant or undertaking, he is arrested under the warrant of the governor of this state.

Kerr, Pen. C., 1555.

7443. Return of magistrate—Procedure in district court.

SEC. 593. The magistrate must make return of his proceedings to the district court of the county, which must thereupon inquire into the cause of the arrest and detention of the person charged, and if he is in custody, or the time of his arrest has not elapsed, the court may discharge him from detention, or may order his undertaking of bail to be canceled, or may continue his detention for a longer time, or may readmit him to bail, to appear and surrender himself within a time to be specified in the recognizance.

Kerr, Pen. C., 1556.

7444. Board of commissioners to provide expense of returning prisoner—Proviso.

SEC. 594. Whenever any fugitive from justice shall be returned to this state under interstate or international extradition, and shall be delivered to the sheriff of the county in which the fugitive is charged with having committed a crime against the laws of this state, of the grade of felony, the board of county commissioners of every such county is authorized to provide for the payment by the county of such reasonable sum of money to defray the necessary expenses of the extradition and delivery aforesaid as the board may deem just and reasonable; *provided*, that a majority of the members of the board of county commissioners shall have consented, by order of the board entered on its minutes, to the extradition of the fugitive before extradition proceedings are instituted, and not otherwise.

CHAPTER 49

DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED

7445. Held subject to disposal of magistrate.
7446. Property delivered to owner—Order—Costs.
7447. Idem—Stolen property returned.
7448. Court may order return of property to owner.
7449. Sale of unclaimed property.
7450. Property taken from person arrested—Duplicate receipts.

7445. Held subject to order of magistrate.

SEC. 595. When property, alleged to have been stolen or embezzled, shall come into the custody of a peace officer, he shall hold the same subject to the order of the magistrate authorized by the next section to direct the disposal thereof.

Kerr, Pen. C., 1407.

A motion by the accused for order directing the sheriff to pay over to him money unlawfully detained, as shown by an affidavit in support of such motion, was properly denied, as such money could be recovered by civil action, and if the money was taken from him at the time of his arrest, this section provides for its disposition. State v. Burns, 27 Nev. 289, 292 (74 P. 983).

7446. Property delivered to owner—Order—Costs.

SEC. 596. On satisfactory proof of the title of the owner of the property, the magistrate to whom the information is laid, or who shall examine the charge against the person accused of stealing or embezzling the prop-

erty, may order it to be delivered to the owner, on his paying the reasonable and necessary expenses incurred in its preservation, to be certified by the magistrate. The order shall entitle the owner to demand and receive the property.

Kerr, Pen. C., 1408.

7447. Idem—Stolen property returned.

SEC. 597. If the property stolen or embezzled come into the custody of the magistrate, it shall be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate.

Kerr, Pen. C., 1409.
See secs. 6650, 6651.

7448. Court may order return of property to owner.

SEC. 598. If the property stolen or embezzled has not been delivered to the owner, the court before which a conviction is had for stealing or embezzling it may, on proof of his title, order it to be restored to the owner.

Kerr, Pen. C., 1410.

7449. Sale of unclaimed property.

SEC. 599. If property stolen or embezzled be not claimed by the owner before the expiration of six months from the conviction of a person for stealing or embezzling it, the magistrate or other officer having it in custody shall, on payment of the necessary expenses incurred for its preservation, deliver it to the county treasurer, by whom it must be sold and the proceeds paid into the county treasury.

Kerr, Pen. C., 1411.

7450. Property taken from person arrested—Duplicate receipts.

SEC. 600. When money or other property is taken from a defendant arrested upon a charge of a public offense, the officer taking it shall at the time give duplicate receipts therefor, specifying particularly the amount of money and the kind of property taken; one of which receipts he shall deliver to the defendant, and the other of which he shall forthwith file with the clerk of the court to which the deposition and statements must be sent.

Kerr, Pen. C., 1412.
See State v. Burns, under sec. 595 of this act.

CHAPTER 50

WITNESSES

7451. Witnesses, competency of—Privilege of codefendant.
7452. Witnesses, husband and wife.
7453. Witnesses, affirmation sufficient.
7454. Rules of evidence same as in civil cases, exception.
7455. Reported testimony used on subsequent trial, when.
7456. Defendant's failure to testify not to prejudice him — Cross-examination of defendant.

7451. Witnesses, competency of—Privilege of codefendant.

SEC. 601. The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided for in this act. The party or parties injured shall in all cases be competent witnesses; the credibility of all such witnesses shall be left to the jury, as in other cases. In all cases when two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness against another, in relation to such crime or misdemeanor, but the testimony given by such witness shall in no instance be used against himself in any criminal prosecution except upon a charge of perjury committed in the giving of

such testimony; and any person may be compelled to testify, as provided in this section.

Regarding testimony of accomplice, see sec. 7180.

Cited, State v. Depoister, 21 Nev. 123 (25 P. 1000).

An accomplice is not incompetent to give testimony, but the weight thereof is for the jury under proper instructions subject to the restriction of sec. 330 of this act, provided the conviction cannot be had on the uncorroborated testimony of such accomplice. State v. Douglas, 26 Nev. 196, 204 (99 A. S. 688, 65 P. 802).

Permitting the defendant, who was a witness in his own behalf, to be asked in regard to his conviction for felony, was held not prejudicial error. State v. Roberts, 28 Nev. 351, 379 (82 P. 100).

7452. Witnesses, husband and wife.

SEC. 602. Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties.

Where, in a prosecution for crime, it appeared that a woman who was called as a witness against defendant had lived with him for a number of years, but had never been married to him, and was during all the time the wife of another, she was not incompetent to testify on the grounds that she was defendant's common-law wife. State v. Hancock, 28 Nev. 300 (82 P. 95).

7453. Witnesses, affirmation sufficient.

SEC. 603. The solemn affirmation of witnesses shall be deemed sufficient. A false or corrupt affirmation shall subject the witness to all the penalties and punishments provided for those who commit wilful and corrupt perjury. The term oath, when used in this act, shall be deemed to include an affirmation.

Comprehension of nature of an oath. State v. Burns, 27 Nev. 289 (74 P. 983).

7454. Rules of evidence same as in civil cases, exception.

SEC. 604. The rules of evidence in civil actions shall be applicable also to criminal actions, except as otherwise provided in this act.

Instruction on circumstantial evidence. State v. Mandich, 24 Nev. 336 (54 P. 510).

If the circumstances, all taken together, exclude to a moral certainty every hypothesis but the single one of guilt, and established that one beyond a reasonable doubt, they are sufficient. Idem.

The fact that portions of the voluntary confession made by an accused out of court were not understood by the person to whom they were made, because made in a language with which he was unacquainted, renders the entire confession inadmissible. State v. Buster, 23 Nev. 346 (47 P. 194); State v. Simas, 25 Nev. 434 (62 P. 242).

Confession, when admissible. Idem.

That one is imbued with fear, occasioned by his arrest for crime, and a knowledge of his guilt thereof, does not alone make his confession inadmissible. State v. Johnny, 29 Nev. 204 (87 P. 3).

A defendant cannot be prejudiced by the admission of his confession which he voluntarily acknowledges under oath is true. Idem.

If it cannot be easily shown that a conversation sought to be proved was voluntary, without leading the jury to surmise that a confession has been made, they ought to be excused until the court can hear the evidence and determine whether the confession ought to be submitted to them. Idem.

It is discretionary to allow leading questions on the direct examination when the witness is unable to understand otherwise. State v. Williams, 31 Nev. 360 (102 P. 974).

Time is provable by the opinion of a witness testifying from his recollection. Idem.

Knowledge of custom may be shown by one who has gained his knowledge in the course of trade and through the statements of others engaged in the same business. State v. Hughes, 31 Nev. 270 (102 P. 562).

7455. Reported testimony used on subsequent trial, when.

SEC. 605. Whenever, in any court of record, the testimony of any witness in any criminal case shall be stenographically reported by an official court stenographer, and thereafter such witness shall die, or be beyond the jurisdiction of the court in which the cause is pending, either party to the record may read in evidence the testimony of said witness, when duly certified by the stenographer to be correct, or otherwise so proved, in any subsequent trial of or proceeding had in the same cause, subject

only to the same objection that might be made if said witness were upon the stand and testifying in open court.

7456. Defendant's failure or refusal to testify not to prejudice him—Cross-examination of defendant.

SEC. 606. If a defendant offers himself as a witness, he may be cross-examined by the counsel for the state the same as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice him, nor be used against him on the trial or proceeding.

An accused person cannot be compelled to be a witness against himself, U. S. Const., sec. 175; State Const., sec. 237.

See State v. Ah Chuey, 14 Nev. 79 (33 A. R. 530).

CHAPTER 51

GENERAL PROVISIONS

7457. Words and terms defined.
7458. When mark sufficient as signature.
7459. Transfer of prisoners.
7460. Process to be executed according to its terms.
7461. Magistrate defined.
7462. Peace officers defined.
7463. Fines to be paid into state treasury—Costs to be separate.
7464. Costs collected as in civil cases.
7465. Fees allowed recovered as costs.
7466. Removal of criminal action before trial—Costs.
7467. Idem—Clerk to certify account to the auditor.
7468. Superseding of criminal statute no bar to crime committed unless provided in act.
7469. No judgment to be set aside except for material error.

7457. Words and terms defined.

SEC. 607. Words used in this act in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word "person" includes a company, partnership, association or corporation as well as a natural person; writing includes printing and typewriting; and every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose"; signature or subscription includes mark, when the person cannot write, his name being written near it by a person who writes his own name as a witness. The word "property" includes both real and personal property. The words "real property" are coextensive with lands, tenements and hereditaments. The words "personal property" include money, goods, chattels, things in action, and evidences of debt. The word "month" means a calendar month unless otherwise expressed. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories; and the words "United States" may include the District of Columbia and territories or insular possessions. The word "section" whenever hereinafter employed, refers to a section of this act, unless some other act or statute is expressly mentioned.

7458. When mark sufficient as signature.

SEC. 608. When a signature of a person is required by this act, the mark of a person, if he cannot write, shall be deemed sufficient, the name of the person making the mark being written near it, and the mark being witnessed by a person who writes his own name as a witness.

Kerr, Pen. C., 7.

See sec. 3913.

Concerning signature to complaint by mark. State v. Depoister, 21 Nev. 107.

It is not necessary that a signature to a criminal complaint, executed by the complainant's mark, should be attested by a subscribing witness, when the magistrate certifies upon the complaint that it was subscribed and sworn to in his presence. State v. Depoister, 21 Nev. 107 (25 P. 1000).

The use of the word "signature" instead of "mark" by the magistrate, and the misplacing of the words "witness to the above signature" by the magistrate below his jurat are mere informalities. Idem.

7459. Transfer of prisoners.

SEC. 609. When it is necessary for any purpose to have a person who is in prison in any part of the state, brought before a court of criminal jurisdiction, an order for that purpose may be made by the court, and the order shall be executed by the sheriff of the county where it is made.

Kerr, Pen. C., 1333.

7460. Process to be executed according to its terms.

SEC. 610. Process issued by a court or magistrate shall be executed according to its terms.

Kerr, Pen. C., 7.
Process must issue under the style "The State of Nevada," Const., sec. 328.

7461. Magistrate defined.

SEC. 611. The term "magistrate," when used in this act, signifies any one of the officers mentioned in section 79.

Kerr, Pen. C., 7.
See sec. 6929.

7462. Peace officers defined.

SEC. 612. The term "peace officer," when used in this act, signifies any one of the officers mentioned in section 87.

Kerr, Pen. C., 7.
See sec. 6937.

7463. Fines to be paid into state treasury—Costs to be separate.

SEC. 613. The full amount of all fines imposed and collected under and for violation of any penal law of this state shall be paid into the state treasury, and costs shall in no case be deducted from the fine fixed by law or imposed by the court, but shall be taxed against the defendant in addition to the fine and separately stated on the docket of the court.

All fines are pledged to educational purposes by Const., sec. 355.

Accused was convicted and fined, with the proviso that in default of payment he should be imprisoned at the rate of one day for each two dollars thereof. An appeal was taken, and the stipulation between counsel for accused and the district attorney showed that the accused paid the fine under protest; that it was held by the clerk pending the outcome of the appeal, and that the district attorney was willing to permit accused to have his full rights on appeal, and the money returned if the appeal resulted in his favor. It was held that neither the clerk nor anyone else had any power to make any disposition of the fine other than that provided by statute, and the arrangement made was void, and, since accused was at liberty without bail, the judgment for the fine could only be treated as paid. State v. Pray, 30 Nev. 206, 219 (94 P. 218).

7464. Costs collected as in civil cases.

SEC. 614. Judgment for costs shall be entered against the defendant, to be collected as judgments in civil cases.

Concerning executions in district courts, see sec. 5280, et seq., and in justice courts, sec. 5783, et seq.

7465. Fees allowed recovered as costs.

SEC. 615. The fees allowed to justices of the peace, and other officers having the jurisdiction and authority of justices of the peace, clerks, peace officers, and district attorneys, shall, when the defendant is convicted, be considered and recovered against him as costs in the suit, and be collected in like manner as costs in civil cases.

Under former act it was held, relator could be imprisoned for the fine, the judgment for costs could only be enforced by execution. State ex rel. Quinn v. District Court, 16 Nev. 76, 77.

7466. Removal of criminal action before trial—Costs.

SEC. 616. In every case where a criminal action may have been or shall be removed before trial, the cost accruing upon such removal and trial

shall be a charge against the county in which the cause of indictment occurred.

Where a criminal case is transferred from one county to another, the former is liable for all costs and expenses incurred in the trial of said cause, and it cannot complain of any mere irregularity in the mode of paying the expenses in the first instance, by the latter county (Beatty, J., dissenting, in part). Washoe Co. v. Humboldt Co., 14 Nev. 123, 126, 135, 138.

A county from which the cause was transferred has the right to show that the services charged for were never rendered or that the fees charged are unauthorized by the statute. Idem.

7467. Idem—Clerk to certify account to auditor.

SEC. 617. The clerk of the county to which such action is or may be removed, shall certify the amount of said costs to the auditor of the county in which the indictment was found, which shall be examined, allowed and paid as other county charges.

Where the expenses of a criminal trial have been properly audited in the county where the trial was had, it is unnecessary to have the same claims verified and presented as unaudited accounts to the commissioners of the county from which the cause was transferred (Beatty, J., dissenting). Washoe Co. v. Humboldt Co., 14 Nev. 124, 138.

7468. Superseding of criminal statute no bar to crime committed unless provided in act.

SEC. 618. The superseding of any law creating a criminal offense, shall not be held to constitute a bar to the indictment and punishment of a crime already committed, or to bar the trial and punishment of a crime where an indictment has been already found, in violation of the law so superseded, unless the intention to bar such indictment and punishment, or trial and punishment where an indictment has been already found, is expressly declared in the superseding act.

7469. No judgment to be set aside except for material error.

SEC. 619. No judgment shall be set aside, or new trial granted, in any case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter or pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice, or has actually prejudiced the defendant, in respect to a substantial right.

See sec. 7302.

HISTORY: This section contains substantially the provisions of section 589 of the act to regulate proceedings in criminal cases, approved November 26, 1861, which is superseded by the present act, and the more recent recommendation of the American Bar Association.

See secs. 7060, 7296, 7302, 7414.

The filing of a verdict by the clerk instead of recording it before he reads it to the jury will not invalidate it when it is not claimed that the defendant was injured thereby or that the verdict was not the one upon which judgment was pronounced. State v. Depoister, 21 Nev. 108, 118 (25 P. 1000).

Cited and explained, State v. Smith, 34 Nev. — (117 P. 19).

Error in admitting evidence of a fact which was apparently conceded, and to which other witnesses testified, was harmless to accused. Idem.

No error in criminal proceedings should render them invalid, unless it actually prejudices accused in a substantial right. Idem.

Errors which do not prejudice the accused are not ground for setting aside conviction. State v. Williams, 28 Nev. 421; State v. Smith, 34 Nev. — (117 P. 19).

CHAPTER 52

JUSTICES' COURTS

7470. Jurisdiction extends to county limits.
7471. Requisites of complaint.
7472. Idem—Further requisites.
7473. Warrant of arrest—Form.
7474. Justice to keep docket, entries.
7475. Trial—Complaint to be read—Plea.
7476. Name of defendant—Four kinds of pleas.
7477. Plea must be oral—Plea of guilty—Higher offense.
7478. When trial to begin.
7479. Postponement of trial for cause.
7480. Grounds of demurrer to complaint.
7481. Demurrer sustained—New complaint or discharge.

7482. Defendant must be present unless bail given or district attorney consents.

The Trial

7483. Jury, how summoned.
7484. Challenge to jurors same as misdemeanor—Trial by court.
7485. Oath of jurors.
7486. Proofs delivered in public.
7487. Questions of law to be decided by court, fact by jury.
7488. Deliberation of jury—Oath of officer.
7489. Delivery of verdict—Entry in minutes.
7490. Form of verdict.
7491. Several defendants, verdict as to less than all—Judgment.
7492. Jury not to be discharged until verdict reached or court orders.
7493. Idem—Case retried.

New Trial and Arrest of Judgment

7494. Motion must be made before judgment.
7495. Grounds for new trial.
7496. Grounds for motion in arrest of judgment.
7497. Judgment pronounced, when.

Judgment and Execution

7498. Time for pronouncing judgment — Postponement.
7499. Judgment rendered for fine or imprisonment or costs.
7500. Imprisonment in lieu of fine may be directed in judgment.
7501. Acquittal — Malicious prosecution — Prosecutor to pay costs—Undertaking.
7502. Judgment of costs against prosecutor may be entered.
7503. Fine without imprisonment—Execution.
7504. Verdict to be entered on minutes.
7505. Judgment of acquittal or fine given—Defendant to be discharged, when.
7506. Imprisonment until fine paid—Defendant to be held.
7507. Judgment of imprisonment, how executed.
7508. Fines, to be paid into county treasury.
7509. Fines before commitment to be applied, how.
7510. Forfeiture of deposit.
7511. Failure to appear, procedure.

Appeal

7512. Appeal must be taken within ten days.
7513. Appeal to district court—Bail—Trial in appellate court.
7514. Justice to transmit papers on appeal and copy of docket.
7515. Witness may be required to give bonds, or be conditionally examined.
7516. Trial anew in district court—Dismissal of appeal.
7517. Dismissal of complaint on appeal, grounds.
7518. Defendant to plead anew, procedure.

Miscellaneous Provisions

7519. Subpenas, proceedings governing.
7520. Bail, provisions governing.
7521. Contempt, provisions governing.
7522. Entitling affidavits, provisions governing.
7523. Competency of witnesses, provisions governing.
7524. When justice may depute a person to act as constable.

7470. Jurisdiction extends to county limits.

SEC. 620. In criminal cases the jurisdiction of justices of the peace extends to the limits of their respective counties.

Utah, 5124.

Regarding jurisdiction of justices of the peace, see sec. 4851, Const., sec. 323; jurisdiction in civil cases, sec. 5714; extends to limits of the county, sec. 7470.

Trials before justice of the peace for misdemeanors, sec. 7470, et seq.

Duties of as committing magistrate, sec. 6929, et seq.

In case of illness or absence may call another, sec. 4926.

Ex officio registry agent, and as such may appoint deputy, sec. 1705.

Violation of town ordinances, see sec. 886.

Proceedings for sale of personal property for taxes, sec. 3679.

See "Children," secs. 741, 742.

Official bond and oath, sec. 4927.

Regarding prosecution of actions, see sec. 6854.

The act of 1867, 124, sec. 13, was cited as follows: An action for malicious mischief does not involve any question of title or right of possession to real estate. State v. Rising, 10 Nev. 97, 103, 104.

In an action for trespass the plaintiff's right to compensation depends wholly upon his right to the property and not at all upon the motives of the defendant; and in an action for malicious mischief the guilt of the defendant depends not at all upon his right to the property, as against one in adverse possession, but wholly upon his motive. Idem.

Justices of the peace have jurisdiction to try an action for malicious injury to real estate in cases where the defendant claims an adverse title to the property. Idem.

7471. Requisites of complaint.

SEC. 621. All proceedings and actions before a justice's court, for a public offense, of which said courts have jurisdiction, shall be commenced by complaint setting forth the offense charged, with such particulars of

time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of and to answer the complaint.

Kerr, Pen. C., 1426.

7472. Idem—Further requisites.

SEC. 622. When a complaint is laid before a justice of the peace, or a judge of any inferior tribunal having jurisdiction of criminal offenses, that an offense has been committed, of which a justice's court or other inferior tribunal has jurisdiction, the justice or judge to whom the complaint is made shall cause the person making the complaint, or some one else, to file with him a statement in writing, sworn to before him, or some other officer authorized by law to administer oaths, setting forth the offense charged, with such particulars as to time, place, person, and property as to enable the person charged to understand the character of the offense complained of, and to answer the complaint or charge. The statement may be similar in form to the provisions in respect to an indictment.

Sufficiency of complaint on information and belief. Ex Parte Buncel, 25 Nev. 426 (62 P. 207).

7473. Warrant of arrest—Form.

SEC. 623. If the justice of the peace be satisfied therefrom that the offense complained of has been committed, he must issue a warrant of arrest, which shall be substantially in the following form:

State of Nevada, county of ..... The State of Nevada to any sheriff, constable, marshal, policeman, or other peace officer in this state: Complaint upon oath having been this day made before me (justice of the peace, police judge, or recorder, as the case may be), by C. D., that the offense of (designating it generally) has been committed, and accusing E. F. thereof, you are therefore commanded forthwith to arrest the above-named E. F., and bring him before me forthwith, at (naming the place). Witness my hand and seal, at ....., this ..... day of ....., A. D. 19..... A. B.

Kerr, Pen. C., 1427.

7474. Justice to keep docket, entries.

SEC. 624. A docket shall be kept by the justice, or by the clerk of the court, if there be one, in which he shall enter each action, and the minutes of the proceedings of the court therein.

Kerr, Pen. C., 1428.

7475. Trial—Complaint to be read—Plea.

SEC. 625. Before the trial commences, the complaint must be distinctly read to the defendant, and he must be asked if he is designated therein by his right name, and be required to plead.

N. D., 6752; Utah, 5128.

7476. Name of defendant—Four kinds of pleas.

SEC. 626. If the defendant objects that he is wrongly named in the complaint and gives his right name, the proceeding shall be amended accordingly. If he does not give his right name, he is thereafter precluded from making any objections on the ground that he is not designated by his right name. There are four kinds of pleas to a complaint: A plea of:

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

4. Once in jeopardy, which may be pleaded with or without the plea of not guilty.

Kerr, Pen. C., 1429; N. D., 6753; Utah, 5129.

7477. Pleas must be oral—Plea of guilty—Higher offense.

SEC. 627. Every plea must be oral and entered in the minutes. If the defendant pleads guilty, the court may, before entering such plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed; and if it appears to the court that a higher offense has been committed than the offense charged in the complaint, the court may order the defendant to be committed or admitted to bail, to answer any indictment that may be found against him.

Kerr, Pen. C., 1429; Utah, 5130.

7478. When trial to begin.

SEC. 628. Upon a plea other than a plea of guilty, unless a jury is demanded or an adjournment or change of venue is not granted, the court may proceed to try the case.

Kerr, Pen. C., 1430; Utah, 5131.

7479. Postponement of trial for cause.

SEC. 629. Before the commencement of a trial in a justice's court, either party may, upon good cause shown, have a reasonable postponement thereof.

Kerr, Pen. C., 1433; Utah, 5135.

7480. Grounds of demurrer to complaint.

SEC. 630. The defendant may demur to the complaint when it appears upon the face thereof:

1. That it does not conform to the requirements of section 621.
2. That the facts stated do not constitute a public offense.

Kerr, Pen. C., 5136.

7481. Demurrer sustained—New complaint or discharge.

SEC. 631. If the demurrer is sustained, a new complaint must be filed within such time, not exceeding one day, as the justice may name; if such new complaint be not filed, the defendant must be discharged.

Kerr, Pen. C., 5137.

7482. Defendant must be present unless bail given or district attorney consents.

SEC. 632. The defendant must be personally present in all cases before the trial shall proceed, unless he shall have given sufficient bail, as provided in this act, or the district attorney consent to proceed with the trial after the defendant shall have appeared in person, and shall also be represented by counsel.

Kerr, Pen. C., 1434.

THE TRIAL

7483. Jury, how summoned.

SEC. 633. The defendant may waive a jury trial in person or by attorney, after having appeared in the action, but shall be entitled to a jury trial if demanded by him. The jury may be composed of any number of persons eligible to serve as jurors, not exceeding twelve, nor less than three; but only by consent of parties shall the number be less than twelve. The jury shall be summoned upon an order of the justice, from the citizens of the city, precinct or township, and not from the bystanders. If a sufficient number of competent and qualified jurors do not attend, the jus-

tice shall direct others to be summoned from the vicinity, and not from the bystanders, sufficient to complete the jury.

Kerr, Pen. C., 1435.

A defendant indicted for a misdemeanor may be tried by a jury of eleven men, if he consents to such a jury, and his consent is not a waiver of a jury trial. State v. Borowsky, 11 Nev. 119, 127.

7484. Challenge to jurors same as misdemeanor—Tried by court.

SEC. 634. The same challenges may be taken by either party to the panel of jurors, or to any individual juror, as may be taken on the trial of an indictment for a misdemeanor; but the challenge shall in all cases be tried by the court.

Kerr, Pen. C., 1436.

See sec. 7129, et seq.

7485. Oath of jurors.

SEC. 635. The court shall administer to the jury the following oath or affirmation: "You do swear (or affirm, as the case may be), that you will well and truly try this issue between the State of Nevada and A. B., the defendant, and a true verdict give according to the evidence."

Kerr, Pen. C., 1437.

The form of oath as prescribed should always be followed; its substance cannot be dispensed with. State v. Angelo, 18 Nev. 425, 428, 429 (4 P. 1080).

7486. Proofs delivered in public.

SEC. 636. After the jury are sworn, they must sit together and hear the proofs and allegations of the parties, which must be delivered in public, and in the presence of the defendant.

Kerr, Pen. C., 1438.

7487. Questions of law to be decided by court, fact by jury.

SEC. 637. The court shall decide all questions of law which may arise in the course of the trial, but shall give no charge with respect to matters of fact.

Kerr, Pen. C., 1439.

But regarding trials for libel, see sec. 7196.

7488. Deliberation of jury—Oath of officer.

SEC. 638. After hearing the proofs and allegations, the jury may decide in court, or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect: "You do swear that you will keep this jury together, in some private and convenient place; that you will not permit any person to speak to them, nor speak to them yourself, unless it be to ask them whether they have agreed upon a verdict; and that you will return them into court when they have so agreed."

Kerr, Pen. C., 1440.

7489. Delivery of verdict—Entry in minutes.

SEC. 639. When the jury have agreed upon their verdict, they shall deliver it publicly to the court, who shall cause the same to be entered on the minutes.

Kerr, Pen. C., 1441.

7490. Form of verdict.

SEC. 640. The verdict of a jury on a plea of not guilty must be to the effect that the jury find the defendant "guilty," or "not guilty," as the case may be. On any other plea, the verdict must be "for the state" or "for the defendant."

7491. Several defendants, verdict as to less than all—Judgment.

SEC. 641. When several defendants are tried together, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly, and the case as to the rest may be tried by another jury.

Kerr, Pen. C., 1442.

7492. Jury not to be discharged until verdict reached or court orders.

SEC. 642. The jury shall not be discharged after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for good cause the court sooner discharge them.

Kerr, Pen. C., 1443.

7493. Idem—Case retried.

SEC. 643. If the jury be discharged, as provided in the last section, the court may proceed again to the trial, in the same manner as upon the first trial; and so on, until a verdict be rendered.

Kerr, Pen. C., 1444.

NEW TRIAL AND ARREST OF JUDGMENT

7494. Motion must be made before judgment.

SEC. 644. At any time before the judgment is entered, the defendant may move for a new trial, or in arrest of judgment.

Kerr, Pen. C., 1450.

7495. Grounds for new trial.

SEC. 645. A new trial can be granted only in the following cases:

1. If the trial has been had in the absence of the defendant, unless he voluntarily absent himself, with full knowledge that a trial is being had;
2. When the jury has received any evidence out of court;
3. When the jury has separated without leave of the court, after retiring to deliberate upon their verdict, or been guilty of any misconduct tending to prevent a fair and due consideration of the case;
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 there has been error in the decision of the court, given on any question of law arising during the course of the trial;
6. When the verdict is contrary to law or evidence; but not more than one new trial shall be granted for this cause alone.

Kerr, Pen. C., 1451.

7496. Grounds for motion in arrest of judgment.

SEC. 646. The motion in arrest of judgment may be founded on any substantial defect in the complaint, and the effect of an arrest of judgment is to place the defendant in the same situation in which he was before the trial was had.

Kerr, Pen. C., 1452.

7497. Judgment pronounced, when.

SEC. 647. If the judgment be not arrested, or a new trial granted, judgment shall be pronounced at the time appointed, and entered in the minutes of the court.

Kerr, Pen. C., 1453.

JUDGMENT AND EXECUTION

7498. Time for pronouncing judgment—Postponement.

SEC. 648. After a plea or verdict of "guilty," or after a verdict against the defendant, the court must appoint a time for rendering judgment, which must not be more than two days nor less than six hours after the

verdict is rendered, unless the defendant waives the postponement, or the judgment is arrested, or a new trial granted. If postponed, the court may hold the defendant to bail to appear for judgment. Unless such postponement is demanded, it shall be deemed to be waived.

Where a defendant after conviction escaped and could not be produced on the day fixed for sentence, and sentence was thereupon postponed until such time as he could be produced; and being produced at a subsequent term he objected that at the expiration of the former term the court lost all jurisdiction of the cause and could not afterwards render any judgment, it was held that the objection was frivolous. State v. Pierce, 8 Nev. 291, 297.

The statutory requirement that a day be fixed for sentence is for the benefit of the convicted person; and if he by escape deprives himself thereof, he cannot complain of being sentenced at any day of any term of court thereafter. Idem.

7499. Judgment rendered for fine and imprisonment or costs.

SEC. 649. When the defendant pleads guilty, or is convicted, either by the court or by a jury, the court shall render judgment thereon of fine and imprisonment, or both, with or without costs.

Kerr, Pen. C., 1445.

Relators were found guilty of assault and battery, fined in the sum of $100 each and "the costs of this action." It was held that this was only judgment for the amount of the fine; that the judgment relating to costs, the amount not being stated, was surplusage and nugatory. State ex rel. Burbank v. Jameson, 13 Nev. 429, 430.

7500. Imprisonment in lieu of fine may be directed in judgment.

SEC. 650. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be paid or satisfied, at the rate of one day for each two dollars of such fine.

Kerr, Pen. C., 1446.

7501. Acquittal—Malicious prosecution—Prosecutor to pay costs—Undertaking.

SEC. 651. When the defendant is acquitted, either by the court or by the jury, he shall be immediately discharged, and if the court certify in the minutes that the prosecution was malicious, or without probable cause, it may order the prosecutor to pay the costs of the action, or to give satisfactory security by a written undertaking, with one or more sureties, to pay the same to the county within thirty days after the trial.

Kerr, Pen. C., 1447.

7502. Judgment of costs against prosecutor may be entered.

SEC. 652. If the prosecutor does not pay the costs, or give security therefor, as provided in the last section, the court may enter judgment against him for the amount thereof, which may be enforced in all respects in the same manner as a judgment rendered in a civil action.

Kerr, Pen. C., 1448.

7503. Fine without imprisonment—Execution.

SEC. 653. A judgment which imposes a fine without directing that the defendant be imprisoned until the same is satisfied may be enforced in the same manner as a judgment in a civil action, and execution shall issue accordingly.

Regarding executions in civil actions in justice's court, see sec. 5783, et seq.

7504. Verdict to be entered on minutes.

SEC. 654. When a verdict is rendered it shall be immediately entered upon the minutes.

Kerr, Pen. C., 1441.

7505. Judgment of acquittal or fine given—Defendant to be discharged, when.

SEC. 655. If judgment of acquittal is given, or judgment imposing a

fine only, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given.

Kerr, Pen. C., 1454.

7506. Imprisonment until fine paid—Defendant to be held.

SEC. 656. When a judgment is entered imposing a fine and ordering the defendant to be imprisoned until the fine is paid, he shall be held in custody during the time specified in the judgment, unless the fine be sooner paid, and execution may issue for the collection of said judgment, the same as in civil cases.

Kerr, Pen. C., 1456.
See secs. 5783, 7503.

7507. Judgment of imprisonment, how executed.

SEC. 657. A judgment of imprisonment must be executed by delivering the defendant into the custody of the sheriff or other officer in charge of the county jail. A copy of the judgment, duly certified by the justice, is a sufficient warrant for the doing of every act necessary or proper in the due execution thereof. The officer shall, upon discharging the defendant, return such copy to the justice, with an account of his doings indorsed thereon, and must at the same time pay over to the justice all money which he may have received from the defendant in payment of the fine.

7508. Fines to be paid into county treasury.

SEC. 658. When a fine is paid or bail is forfeited, the justice must pay the same to the county treasurer within thirty days thereafter.

Under constitution all fines are pledged by the state to educational purposes, sec. 355.

7509. Fine before commitment to be applied, how.

SEC. 659. If a fine be imposed and paid before commitment, it shall be applied as prescribed in the preceding section.

Cited, State ex rel. Quinn v. District Court, 16 Nev. 77.

7510. Forfeiture of deposit.

SEC. 660. If a defendant is discharged on bail, or has deposited money instead thereof, and fails to appear according to his undertaking, the same shall be forfeited, or the money appropriated in like manner as in the district court.

Kerr, Pen. C., 1458.

7511. Failure to appear, procedure.

SEC. 661. In case of failure to appear for judgment, the court must issue a warrant for the arrest of the defendant, and shall enter judgment whenever the defendant appears, or is brought before it.

APPEAL

7512. Appeal must be taken within ten days.

SEC. 662. Any defendant in a criminal action tried before a justice of the peace may appeal from the final judgment therein to the district court of the county where the court of such justice is held, at any time within ten days from the time of the rendition of the judgment.

7513. Appeal to district court—Bail—Trial in appellate court.

SEC. 663. The party intending to appeal must file with the justice, and serve upon the district attorney a notice entitled in the action, setting forth the character of the judgment, and the intention of the party to appeal therefrom to the district court. He may also, at any time thereafter, if he desire to be released from custody during the pendency of the appeal, or desire a stay of proceedings under the judgment until the appeal be disposed of, enter bail for the due prosecution of the appeal, the

payment of any judgment, fine, and costs that may be awarded against him on the appeal, and for failure to prosecute the same, and for the rendering of himself in execution of the judgment appealed from, or of any judgment rendered against him in the action appealed from in the court to which the same is appealed.

Kerr, Pen. C., 1466-1470.

7514. Justice to transmit papers on appeal and copy of docket.

SEC. 664. The justice must, within ten days after the notice of appeal is filed, transmit to the clerk of the district court all papers relating to the case and a certified copy of his docket.

N. D., 6786; Utah, 5163.

7515. Witness may be required to give bonds, or be conditionally examined.

SEC. 665. When an appeal is taken, the justice must, if application is made by the district attorney, cause all material witnesses on behalf of the prosecution to enter into an undertaking in like manner as in a case where a defendant is held to answer on a preliminary examination. And when it shall satisfactorily appear by examination on oath of the witness or any other person that the witness is unable to procure sureties, such witness may be forthwith conditionally examined on behalf of the state. Such examination must be by question and answer in the presence of the defendant or after notice to him, if on bail, and reduced to writing, and the witness must thereupon be discharged. The testimony as given, subscribed by the witness and duly certified to by the justice, may be read in evidence by the state, or by the defendant, upon any subsequent trial of the same case in the district court on appeal, upon it being satisfactorily shown that such witness is either dead, unable to attend, or out of the state.

N. D., 6785; Utah, 5164.

7516. Trial anew in district court—Dismissal of appeal.

SEC. 666. An appeal duly perfected transfers the action to the district court for trial anew. The appeal may be dismissed on either of the following grounds:

1. For failure to take the same in time;
2. For failure to appear in the district court when required.

If the appeal is dismissed, a copy of the order of dismissal must be remitted to the justice, who may proceed to enforce the judgment.

Utah, 5165.

7517. Dismissal of complaint on appeal, grounds.

SEC. 667. The complaint, on motion of defendant, may be dismissed upon the following grounds:

1. That the justice did not have jurisdiction of the offense;
2. That more than one offense is charged therein;
3. That the facts stated do not constitute a public offense.

N. D., 6787; Utah, 5166.

7518. Defendant to plead anew, procedure.

SEC. 668. If the defendant does not object to the complaint for any of the causes above specified, or if his objections are overruled, he must be required to plead as to an indictment without regard to any plea entered before the justice. In other respects, the proceedings shall be the same as in criminal actions originally commenced in the district court, and judgment shall be rendered and carried into effect accordingly.

N. D., 6787; Utah, 5167.

MISCELLANEOUS PROVISIONS

7519. Subpenas, proceedings governing.

SEC. 669. A justice of the peace may issue subpenas for witnesses or for interpreters, and punish disobedience thereof, as provided in this act. The names of all the witnesses desired by both parties may be included in the same subpena.

Kerr, Pen. C., 1459; Utah, 5168.

7520. Bail, provisions governing.

SEC. 670. The defendant, at any time after his arrest and before conviction, may be admitted to bail. The provisions of this act relative to bail, shall apply, so far as applicable, to bail in justices' courts.

Utah, 5169.
See sec. 7308, et seq.

7521. Contempt, provisions governing.

SEC. 671. The provisions of the civil procedure act relative to contempts, in justices' courts, shall be applicable to the criminal procedure in justices' courts.

Utah, 5170.

7522. Entitling affidavits, provisions governing.

SEC. 672. The provisions of section 564, in respect to entitling affidavits, are applicable to justices' courts.

Utah, 5171.

7523. Competency of witnesses, provisions governing.

SEC. 673. The provisions of this act, relative to the competency of witnesses, shall be applicable to the criminal procedure in justices' courts.

Utah, 5172.

7524. When justice may depute a person to act as constable.

SEC. 674. A justice of the peace may depute in writing any suitable and discreet person to act as constable when no constable is at hand, and the nature of the business requires immediate action.

Utah, 5173.

CHAPTER 53

REPEAL AND CONTINUANCE OF CERTAIN ACTS RELATING TO CRIMINAL PRACTICE

7525. Same provisions in this act as in existing acts deemed continuation thereof.
7526. Repeal does not affect act happening before this act takes effect.
7527. Acts repealed.
7528. Acts and parts of acts in conflict repealed.
7529. Act to take effect, when.

7525. Same provisions in this act as in existing acts deemed continuation thereof.

SEC. 675. The provisions of this act, so far as they are substantially the same as those of existing statutes, shall be construed as a continuation thereof and not as new enactments, and a reference in a statute which has not been repealed to provisions of law which are revised and reenacted herein shall be construed as applying to such provisions as so incorporated in this act.

7526. Repeal does not affect act happening before this act takes effect.

SEC. 676. The repeal of a law by this act shall not affect any act done, or any right established, or the prosecution of a criminal action or proceeding commenced or an offense committed, before the repeal takes effect, but any proceedings in such case, after this act takes effect, shall, as far as practicable, conform to the provisions of this act.

7527. Acts repealed.

SEC. 677. The acts designated in the following schedule shall stand repealed from and after the time this act goes into effect:

SCHEDULE

1. An act to regulate proceedings in criminal cases in the courts of justice in the Territory of Nevada, approved November 26, 1861;
2. An act to define the term "reasonable doubt," approved February 1, 1889;
3. An act to regulate proceedings in certain criminal cases, approved February 27, 1885;
4. An act supplementary to an act entitled "An act to regulate proceedings in criminal cases in the courts of justice in the Territory of Nevada," approved November 26, 1861, approved February 17, 1893;
5. An act to enable a defendant to testify as a witness in criminal prosecutions, which became a law February 18, 1867;
6. An act approved March 13, 1867, entitled "An act to amend an act entitled 'An act to regulate proceedings in criminal cases in the courts of justice in the State of Nevada and making further provisions relating thereto' ";
7. An act in relation to fines and to repeal an act relating thereto, approved March 5, 1887;
8. An act to provide payment of expenses necessary for the extradition of fugitives from justice, approved March 17, 1903;
9. An act to provide for the appointment of stenographers upon the hearing of criminal cases in courts of justice of this state, and to regulate the compensation therefor, approved March 5, 1903.

7528. Acts and parts of acts in conflict repealed.

SEC. 678. All acts or parts of acts in conflict herewith are repealed as of the date this act takes effect.

7529. Act to take effect, when.

SEC. 679. This act shall take effect on the first day of January, 1912.

An Act to prohibit the sale of ardent spirits to the Indians.

Approved March 14, 1901. 68

[Sections 1 and 2 are omitted as being fully covered by crimes and punishments act, secs. 6507-6509.]

7530. When Indians competent witnesses.

SEC. 3. In all cases prosecuted under the provisions of this act, Indians shall be competent witnesses; *provided*, such Indian answers all questions asked on cross-examination on matters to which he has testified on direct examination, as fully and fairly as he did on direct examination.

7531. When testimony to be disregarded.

SEC. 4. If any witness testifying under the provisions of this act fails or refuses to answer questions, as fully and fairly, one way or the other, for or against the defendant, the judge or jury are at liberty to entirely disregard the testimony of such witness.

An Act to detect and punish incendiarism.

Approved March 3, 1879. 58

7532. Complaint and summons to citizens to ascertain causes of fires.
7533. Oath.
7534. Subpenas to issue.
7535. Verdict after hearing testimony—Certified to district court.
7536. Free access to building.
7537. Warrant to issue for arrest, when—Witnesses may be bound.
7538. Compulsory attendance of jurors and witnesses.
7539. Fees, how paid.

7532. Complaint and summons to citizens to ascertain causes of fires.

SECTION 1. Whenever it is made to appear by the complaint of any citizen that any building or other property has been set on fire, or attempted to be, or burned from an unknown cause, or any cause not clearly accidental, it shall be the duty of any justice of the peace of the county where such fire occurred, or was attempted, and to whom such complaint shall be made, to immediately summon three good and lawful citizens, who shall be householders in the county, to appear at the place of the fire at a time fixed as soon as possible, to inquire when, how, and by what means the fire originated. If any person so summoned does not appear, the justice shall complete the panel by appointment from the bystanders, or from citizens residing in the vicinity of said fire.

7533. Oath.

SEC. 2. When the panel is complete, the justice shall administer the following oath: "You, and each of you, solemnly swear that you will diligently examine and inquire when, how, and by what means the fire which has here occurred was caused, and that you will return a true verdict, according to your knowledge and such evidence as shall be laid before you. So help you God."

7534. Subpenas to issue.

SEC. 3. The justice of the peace shall issue subpenas for witnesses, returnable at such time and place as he therein directs. The witnesses shall be sworn, their testimony reduced to writing, and subscribed to by them.

7535. Verdict after hearing testimony—Certified to district court.

SEC. 4. The jury, after hearing the testimony, and making all needful examinations and inquiries, shall draw up and deliver to the justice holding such inquest their verdict, signed by them, or in case of disagreement, by two of them, in which they shall find and certify when, how, and by what means such fire was caused. Said finding, together with the testimony of the witnesses, shall be certified by the justice and filed with the clerk of the district court of the county in which such fire originated within one week thereafter.

7536. Free access to building.

SEC. 5. For the purpose of investigation, the justice and jury shall have free access to any building or property whatsoever.

7537. Warrants to issue for arrest, when—Witnesses may be bound.

SEC. 6. If the jury shall find that any person or persons wilfully set fire to the property in question, or attempted to, or that reasonable cause exists for believing them to have been accessory thereto, unless such person or persons be already in custody, the justice shall issue a warrant for the arrest of the person or persons so charged, and shall deliver the same to any constable in the county or the sheriff thereof. In such cases, the justice may bind over the witnesses or any of them, to appear at an examination of the person or persons so charged at such time and place as he may direct; but nothing in this act shall be construed to interfere with arrests and examinations of any person charged with the crime of arson, as now provided by law.

7538. Compulsory attendance of jurors and witnesses.

SEC. 7. For the purposes of this act, the justice of the peace shall have the same power to enforce the attendance of jurors and witnesses as when sitting as a committing magistrate.

7539. Fees, how paid.

SEC. 8. The compensation for holding such inquest shall be the same as

now provided by law for coroner's inquests, and shall be audited and paid in like manner.

An Act to provide for the payment of attorneys in certain cases.

Approved March 5, 1875, 142

7540. Attorneys appointed by court paid by county.

SECTION 1. An attorney appointed by a court to defend a person indicted for any offense is entitled to receive from the county treasury the following fees: For a case of murder, one hundred dollars; for a felony or misdemeanor, such fee as the court may fix, not to exceed fifty dollars. Such compensation shall be paid by the county treasurer out of any moneys in the treasury, not otherwise appropriated, upon the certificate of the judge of the court that such attorney has performed the services required. *As amended, Stats. 1911, 318.*

Cited, In re Wixom, 12 Nev. 224.

7541. When attorney need not follow case—Enlarged fee.

SEC. 2. An attorney cannot, in such case, be compelled to follow a case to another county or into the supreme court, and if he does so, may recover an enlarged compensation, to be graduated on a scale corresponding to the prices allowed.

An attorney who defends a prisoner under appointment by the court, is entitled to a fee not exceeding fifty dollars for each trial of the cause, in whatever county the case may be tried, and an additional fee, not exceeding fifty dollars, if the case is followed into the supreme court. Washoe Co. v. Humboldt Co., 14 Nev. 123.

CORONERS

An Act creating coroner districts, making the justices of the peace ex officio coroners, prescribing their duties and compensation, and repealing all acts and parts of acts in conflict with the provisions of this act.

Approved March 16, 1909, 119

7542. Coroner districts.
7543. Justices of peace ex officio coroners—Bond—Deputies—Appointment—Oath—Powers—Compensation.
7544. Summoning jurors.
7545. Failure to attend as juror, penalty.
7546. Oath of juror.
7547. Coroner to subpena and examine witnesses—May summon surgeon.
7548. Witness failing to attend punishable for contempt.
7549. After inspecting body and hearing, verdict to specify.
7550. Testimony reduced to writing—Filing in district court.
7551. Warrant to issue for accused.
7552. Service and return of warrant.
7553. Money or property of deceased—Delivery to county treasurer.
7554. Treasurer to sell property—Placement of proceeds.
7555. Payment to representatives of deceased.
7556. Coroner to file affidavit regarding property before allowance of fees.
7557. Burial and payment for same.
7558. Fees—Payment by county.
7559. Townships in which coroner may act.
7560. Coroner's jurors to receive $2.50 per day.

7542. Coroner districts.

SECTION 1. Every township in this state is hereby made a coroner's district.

7543. Justices of peace ex officio coroners—Bond—Deputies—Appointment—Oath—Powers—Compensation.

SEC. 2. All justices of the peace in this state are hereby made ex officio coroners; *provided*, said ex officio coroners may appoint a deputy or deputies, who shall have power to transact all official business appertaining to said officers to the same extent as their principal; *provided, further*, said ex officio coroners shall be responsible for the compensation of said deputy or deputies, and shall be responsible on their official bonds for all official malfeasance or nonfeasance of the same. All appointments of deputies shall be made in

writing, and shall, with the oath of office, be filed in the office of the recorder of the county within which the principal holds and exercises his office. *As amended, Stats. 1911, 58.*

7544. Summoning jurors.

SEC. 3. When a justice of the peace, acting as coroner, or his deputy, has been informed that a person has been killed, or committed suicide, or has suddenly died under such circumstances as to afford reasonable ground to suspect that the death has been occasioned by unnatural means, he shall go to the place where the body is and summon no less than six, nor more than twelve, persons qualified by law to serve as jurors, to appear before him forthwith at the place where the body is, to inquire into the cause of the death.

7545. Failure to attend as juror, penalty.

SEC. 4. Every person summoned as a juror who shall fail to appear without having a reasonable excuse, shall forfeit any sum, not exceeding one hundred dollars, to be recovered by the justice of the peace, acting as coroner, in his official capacity, in any court of competent jurisdiction, and paid by him into the county treasury.

7546. Oath of juror.

SEC. 5. When six, or more, of the jurors attend, they shall be sworn by the justice of the peace, acting as coroner or deputy, to inquire who the person was, and when, where and by what means he came to his death, and into the circumstances attending his death, and to render a true verdict thereon according to the evidence.

7547. Coroner to subpena and examine witnesses—May summon surgeon.

SEC. 6. The justice of the peace, acting as coroner, may issue subpenas for witnesses, returnable as he may direct, and served by himself or such person as he may direct. He must summon and examine as witnesses every person who, in his opinion or that of any of the jurors, has any knowledge of the facts, and he may summon a surgeon or physician to inspect the body.

7548. Witness failing to attend punishable for contempt.

SEC. 7. Any witness failing to obey the subpena of the justice of the peace, acting as coroner, may be attached and fined for contempt of such jury, in like manner as in a justice's court.

See secs. 5795, et seq.

7549. After inspecting body and hearing, verdict to specify.

SEC. 8. After inspecting the body and hearing the testimony, the jury shall render their verdict and certify the same by an inquisition in writing, signed by them, and setting forth the name of the deceased, when, where and by what means he came to his death; if by criminal means, the name of the person causing the death.

7550. Testimony reduced to writing—Filing in district court.

SEC. 9. The testimony at such inquest shall be reduced to writing by the justice of the peace, acting as coroner, or as he may direct, and by him, without delay, filed in the office of the clerk of the district court of the county.

7551. Warrant to issue for accused.

SEC. 10. If the jury find that the person was killed by another under circumstances not excusable or justifiable in law, and the party committing the act be not in custody, the justice of the peace, acting as coroner, shall issue a warrant signed by him, with his name of office, for the arrest of the accused.

7552. Service and return of warrant.

SEC. 11. The warrant of the justice of the peace, acting as coroner, may

be served in any county of the state and returned by the officer serving before a magistrate of the county in which it is issued; the officer receiving such warrant shall have the same power under the warrant as by virtue of a warrant from any court or magistrate of this state.

See secs. 6951, et seq.

7553. Money or property of deceased—Delivery to county treasurer.

SEC. 12. It is hereby made a duty of the justice of the peace, acting as coroner, to deliver without delay to the treasurer of the county any money or property which may have been found with the deceased, unless taken from his possession by legal authority; and if the justice of the peace, acting as coroner, fail to pay or deliver such money or property to the treasurer, the treasurer may recover same by action at law.

7554. Treasurer to sell property—Placement of proceeds.

SEC. 13. Upon payment of money into the treasurer's office in such case, he shall place it to the credit of the county. If it be property, he shall proceed upon reasonable notice to sell the same at public sale, and place the proceeds to the credit of the county.

7555. Payment to representatives of deceased.

SEC. 14. If the money be demanded within six years, the treasurer shall pay the same to the person legally authorized to receive it, but the same may be paid at any subsequent time to the representatives of the deceased upon an order from the tribunal invested with the power to allow claims against the county. *As amended, Stats. 1911, 59.*

7556. Coroner to file affidavit regarding property before allowance of fees.

SEC. 15. The justice of the peace, acting as coroner, shall, before his claim is allowed for such inquest, file with such claim an affidavit setting out the amount of money or property found with the deceased, and the disposition of the same by him.

7557. Burial and payment for same.

SEC. 16. After the inquest, if no one take charge of the body, it shall be the duty of the justice of the peace to cause the same to be decently buried and pay the expense thereof from any money found with the deceased; if no such money is found, then the same shall be charged against the county.

7558. Fees—Payment by county.

SEC. 17. The fees of the justice of the peace shall be as follows: For all services in summoning a jury of inquest, three dollars; for swearing a jury, fifty cents; for issuing warrant of arrest, seventy-five cents; for issuing subpena to each witness, twenty cents; for each mile necessarily traveled in going to the presence of the dead body, twenty-five cents; for swearing each witness, twenty cents; for taking down testimony or causing same to be taken under his direction, per folio, twenty cents; for each day necessarily employed in holding an inquest, five dollars; for attending and superintending burial, five dollars. All of said fees shall be paid out of the county treasury as other demands. For all services rendered by him while acting as sheriff, the same fees as are allowed to sheriffs for similar services.

7559. Townships in which coroner may act.

SEC. 18. The coroner, created by section 2 of this act, shall have authority to perform all the duties of coroners only within the township where they as justices of the peace reside; *provided*, that the townships where there is no qualified justice of the peace, the justice of the peace residing nearest to the place where the services of a coroner are required, within the same ounty, shall have the same authority in the township where there is no ualified justice of the peace, as in the township where he resides.

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7560. Coroner's jurors to receive $2.50 per day.

SEC. 19. Every person acting as a juror under the provisions of this act shall receive the sum of two dollars and fifty cents for each day's service.

STATE PRISON AND JAILS

STATE PRISON

General act of 1873 for the government of the state prison, sections 7561–7581.

Act of 1909 relating to the government of the state prison, sections 7582–7585.

Act to provide for the release of certain prisoners in the state prison, sections 7586, 7587.

Act amendatory of and supplementary to the general act of 1873 providing for the government of the state prison, sections 7588, 7589.

Act relating to the expenses for the transportation of indigent insane persons and convicts, sections 7590–7592.

Act fixing the salary of the warden of the state prison, section 7593.

Act relating to the recapture of escaped prisoners from the state prison, sections 7594, 7595.

Act relating to payment to prisoners discharged from state prison, section 7596.

Act of 1911 relating to employment of convicts on public highways and providing a fund therefor, sections 7597–7602.

Arrest in civil cases in district court, section 5087, et seq.
Arrest in civil cases in justice's court, section 5744, et seq.
Arrest in criminal cases, sections 6930–6951, et seq.
Contempts, sections 5394–5407.
Contempts punishable in justice's court, sections 5794–5798.
Crimes and punishments, sections 6266–6850.
Death sentence, when imposed, trial judge to report statement of case to governor as chairman of board of pardons, section 7269.
District attorneys to report to attorney-general statement concerning all convictions of indicted defendants, section 1608.
Habeas corpus, sections 6226–6263.
Jurisdiction of public offenses, supreme court, sections 319, 4832, 4834; district courts, sections 321, 4840, 4848; justices' courts, sections 323, 4851; municipal or recorder's court, sections 316, 324, 4854; committing magistrates, section 6927, et seq.
Juvenile court law under jurisdiction of district court, section 729, et seq.
Pardons, sections 7620–7630.
Paroles, sections 7631–7634.
Parole may be granted by board of pardons after prisoner has served minimum time under indeterminate or indefinite sentence, section 7262.
Prosecution and expenses on offenses by persons in or escaping from state prison, section 6820.
Trial and sentence for crimes committed by imprisoned persons, sections 6818, 6819.

CONSTITUTIONAL PROVISIONS

Bail, excessive not to be required, section 235; U. S. Const., section 178.
Bail to be allowed, except when, section 236.
Civil process suspended on election day, section 253.
Extradition, U. S. Const., section 161.
Fines, governor may suspend collection of not exceeding sixty days, section 306.
Fines, remission of, section 307.
Habeas corpus not to be suspended except in case of rebellion or invasion, section 234; U. S. Const., section 130.
Imprisonment for debt prohibited, except for fraud, libel or slander, section 243.
Jeopardy, no person to be twice put in, section 237; U. S. Const., section 175.
Judicial power of state in supreme court, district courts, justices of the peace and municipal courts, section 316.
Jurisdiction of public offenses, supreme court, section 319; district courts, section 321; justices' courts, section 323; municipal or recorder's court, sections 316, 324.
Liberty guaranteed, section 230.
Militia fine, imprisonment for in time of peace prohibited, section 243.
Pardons, section 307.
Search and seizure not to take place without oath and probable cause, section 247; U. S. Const., section 174.

Slavery prohibited except for crime, section 246; U. S. Const., section 183.
Style of process, "The State of Nevada," section 328.
Treason, governor may suspend sentence until convening of legislature, section 306.
Treason not pardonable, section 307.

An Act to provide for the government of the state prison of the State of Nevada.

Approved March 7, 1873, 181

7561. Prison commissioners—Powers of—Purchase supplies—Control labor—Dispose of products or labor—Officers and employees—Salaries.
7562. Governor, president of board—Secretary—Quorum.
7563. Secretary to keep books.
7564. Warden, election of—Powers, salary and residence—Subject to commissioners.
7565. Warden's duties and powers—Engage and remove employees—What records and accounts to keep—Reports—Mileage, to certify.
7566. Residence of warden—Monthly estimates—Board to furnish supplies—Provisos.
7567. Accounts to be certified by warden—Audited by commissioners.
7568. Proposals for furnishing supplies—Notice—Bids—Limited one year's supplies.
7569. Labor of convicts—Commissioners have exclusive control.
7570. Employment of prisoners—Power of board in relation thereto—Order of board in such case.
7571. Escaped convicts, when employed away from prison—Liability of commissioners or warden.
7572. Prison extended over places of labor.
7573. Moneys received for prison labor to be paid into prison fund—Warden to report to commissioners—Paid to treasurer—Secretary to certify to controller.
7574. Action for money due for labor or materials.
7575. Inspection of books and papers—Who may inspect—Surrender to successors.
7576. Divine service at prison—Expense limited—Bible, books and papers to be furnished.
7577. United States convicts—Required to receive—How kept—Warden to certify expense—Controller.
7578. Laws, rules and regulations of prison to be kept at prison—Visitors.
7579. Penalty for violation of rules—Barbarous punishments of prisoners prohibited—Food and labor.
7580. Convicts granted credit—How forfeited—Commissioners to regulate.
7581. Required to perform labor—Time allowed for good behavior—How forfeited—Notice and proof—Attempt to escape, effect—Commissioners to regulate time of discharge.
7582. Warden to execute bond—Chief justice to approve—Vacancy, how filled.

7561. Prison commissioners, powers of—Purchase supplies—Control labor—Dispose of products or labor—Officers and employees—Salaries.

SECTION 1. The board of state prison commissioners, as named in section 21 of article 5 of the constitution [sec. 314] shall have such supervision of all matters connected with the state prison as is provided for as follows: They shall have full control of all of the state prison grounds, buildings, prison labor, and prison property; shall purchase, or cause to be purchased, all needed commissary supplies, all raw material and tools necessary for any manufacturing purposes carried on at said prison; shall sell all manufactured articles and stone, and collect the money for the same; shall rent or hire out any or all of the labor of the convicts, and collect the money therefor, and shall regulate the number of officers and employees, and fix the salaries thereof. *As amended, Stats. 1877, 66; 1893, 101.*

See secs. 314, 7565, 7569, 7570, 7601.

7562. Governor, president of board—Secretary—Quorum.

SEC. 2. The governor shall be the president, and the secretary of state secretary of the board; and any two thereof shall be a quorum, with full power to transact any business that may be required of such board.

Deputy secretary of state secretary of board, sec. 4395.
Cited, Denver v. Hobart, 10 Nev. 28, 32.

7563. Secretary to keep books.

SEC. 3. It shall be the duty of the secretary to keep, or cause to be kept,

a full and complete account, in a book or books to be kept for that purpose, all of the transactions and proceedings of the board. *As amended, Stats. 1877, 66.*

Cited, Denver v. Hobart, 10 Nev. 28, 32.

7564. Warden, election of—Powers, salary and residence—Subject to commissioners.

SEC. 4. On the third Wednesday in January, A. D. 1895, the board of state prison commissioners shall elect a warden of the state prison. The warden so elected shall take charge of the same on the first day of February following his election, and shall hold office until his successor is elected and qualified. He shall be subject, at all times, to the order and direction of said board of state prison commissioners. The warden shall be the chief executive officer of the prison, at a salary of two thousand dollars per annum, and shall reside at the prison. *As amended, Stats. 1877, 66; 1885, 69; 1893, 101.*

Salary of warden, see sec. 7593.
Cited, Denver v. Hobart, 10 Nev. 28, 32.

7565. Warden's duties and powers—Engage and remove employees—What records and accounts to keep—Reports—Mileage, to certify.

SEC. 5. The warden shall have the general superintendence of prison discipline and prison labor; shall have the power to engage and remove all employees; shall keep or cause to be kept, a book, wherein shall be recorded the name, age, sex, occupation, place of birth, where sent from, the crime charged, date of incarceration, and expiration of term for which the prisoners therein confined why [were] sentenced, and shall make out a correct monthly report of the same, and file such report with the secretary of the board, and shall securely and carefully file in his office all commitments of prisoners that may be sent to the state prison, and keep, or cause to be kept, a correct account, and certify any mileage that may be due to any sheriff or deputy sheriff for conveying prisoners to the state prison. *As amended, Stats. 1877, 67; 1893, 101.*

See secs. 7561, 7588.
Cited, State ex rel. Fox v. Hobart, 13 Nev. 420, 421.

7566. Residence of warden—Monthly estimates—Board to furnish supplies—Provisos.

SEC. 6. The warden shall reside at the state prison, and shall, within five days before the expiration of each month make out a complete statement of the probable or estimated amount of clothing, provisions, medicines, and all other stores and necessaries, and character and quality of the same, and make a requisition upon the commissioners; and they shall, as soon thereafter as possible, furnish, or cause to be furnished, the articles, provisions, or stores thus required, or so much thereof as they may deem necessary for the use of the prison during the ensuing month; *provided,* that no supplies shall be purchased or articles furnished the prison at a greater price than the usual market rates for such articles; *and, provided further,* that nothing herein contained shall be so construed as to prevent the commissioners from furnishing any necessary article, at any time not enumerated in the monthly requisition of the warden, or from purchasing or contracting for a greater than a monthly supply of any article used in said prison, when deemed for the best interest of the state.

Officials not to be interested in contracts, secs. 2827, 6331.

7567. Accounts to be certified by warden—Audited by commissioners.

SEC. 7. All accounts for provisions, clothing, medicines, fuel, lights, or other supplies or stores furnished to the state prison, as prescribed in the

preceding section, shall be presented to the warden, and if the articles therein enumerated shall have been received he shall so certify, and the account so certified shall be delivered to the secretary of the board, and if the account be correct, and the articles therein named were purchased or ordered by the board, they shall audit and allow the claim. All claims for salaries, repairs, buildings, or labor shall be certified to by the warden, presented, allowed, and paid as other indebtedness against the state prison.

7568. Proposals for furnishing supplies—Notice—Bids—Limited one year's supplies.

SEC. 8. The board of commissioners may, whenever in their judgment it would be for the best interest of the state, advertise for sealed proposals for the furnishing of supplies to the state prison. Notice of the time and place of the letting of each contract shall be given for at least two consecutive weeks in some newspaper published within this state. Such notice shall state the character, quality, and quantity of the supplies required, and any person may bid for the furnishing of all or any part of the articles enumerated in the notice; *provided*, that no contract shall be for furnishing more than one year's supplies, as estimated by the warden.

7569. Labor of convicts—Commissioners have exclusive control.

SEC. 9. The board of commissioners may, in their discretion, cause the prisoners, or any number of them, to be employed in any mechanical pursuits, and at hard labor, and furnish such convicts thus employed with any material that may be deemed necessary, in the same manner as is provided for the furnishing of supplies and stores to the state prison, and they shall, in all respects, have the exclusive control of the employment of the convicts, and may from time to time employ them in such manner as, in their opinion, will best subserve the interest of the state and welfare of the prisoners.

Employment on public highways, secs. 7561, 7597–7601.
See sec. 4426.

A sentence of one convicted of grand larceny to five years at hard labor is not void; the words "at hard labor" in said sentence are mere surplusage, and in no manner affect the validity of the judgment. Ex Parte Maher, 25 Nev. 422, 424 (62 P. 1).

7570. Employment of prisoners—Power of board in relation thereto—Order of board in such case.

SEC. 10. If, at any time, the board of commissioners be of the opinion that it would be to the interest of the state to employ any portion of the prisoners, either within or without the walls or inclosures of the state prison, either in improvement of the public grounds or buildings, or for hire upon any private work or employment, where they may be profitably employed, they shall have power to so employ or hire such labor; they shall, in such case, direct the warden accordingly in writing, and cause a record of such order to be entered at length on the records of the board. All such employment outside of the prison walls or inclosures shall be within a reasonable distance from the prison. *As amended, Stats. 1875, 62.*

See sec. 7561.
Employment of U. S. prisoners in jail, sec. 7610.
See Ex Parte Maher, under sec. 9 of this act.

7571. Escaped convicts when employed away from prison—Liability of commissioners or warden.

SEC. 11. The warden and officers of the prison shall incur no forfeiture for the escape of any convict employed without the walls or inclosures of the prison by order of the commissioners, or going to or returning from such employment, unless such escape should arise from neglect or violation of law, or the rules, regulations, or by-laws of the commissioners.

7572. Prison extended over places of labor.

SEC. 12. The state prison is hereby declared to extend to and over any place or places of employment of the convicts without the walls or inclosures of the prison, at which convicts may be employed, as provided in section 9 of this act.

7573. Moneys received for prison labor to be paid into prison fund—Warden to report to commissioners—Paid to treasurer—Secretary to certify to controller.

SEC. 13. All sums that are now or may hereafter become due to the state for any manufactured articles sold, or for labor performed either within or without the prison walls or inclosures, shall be certified to under oath by the warden to the board of prison commissioners, who shall receive and receipt for the same; and all moneys thus received shall be paid into the state treasury, and the treasurer shall place the same to the credit of the state prison fund; and the secretary of said board shall make a report thereof to the controller on or before the tenth of each month. *As amended, Stats. 1875, 116.*

7574. Action for money due for labor or materials.

SEC. 14. The board of commissioners, or either of them, are hereby authorized to commence and maintain an action in their or his own name, for the collection of any debt due, or that may become due, from any person or persons, for any manufactured article sold, labor performed by convicts, for the enforcement of any contracts made by the commissioners, or damages for the nonfulfilment of any contract; such suits to be commenced and maintained as provided by law in other cases.

7575. Inspection of books and papers—Who may inspect—Surrender to successors.

SEC. 15. All books and papers kept by or under the direction of the secretary of the board and the warden of the state prison, shall, at all times, on all legal days, be open to the inspection of the commissioners, all state officers, members of the legislature, and the sheriffs of the several counties of this state; and shall, at the expiration of their term of office, be delivered over to their successors.

7576. Divine service at prison—Expense limited—Bible, books and papers to be furnished.

SEC. 16. It shall be the duty of the commissioners to provide for the holding of divine service in the state prison on each Sabbath day, and for that purpose may secure the services of one or more ministers of the gospel; *provided,* the expense thus incurred shall not exceed the sum of five hundred and twenty dollars per annum. They shall also furnish each convict with a copy of the Bible, and such other books and papers as may be deemed for the well-being of the prisoners.

7577. United States convicts—Required to receive—How kept—Warden to certify expense—Controller.

SEC. 17. The commissioners and the warden of the state prison are hereby required to receive all criminals sentenced to the state prison by the authorities of the United States, and to keep them at hard labor or in solitary confinement, agreeably to the order of the court pronouncing such sentence, until legally discharged therefrom; and the warden shall certify to the board the expense of keeping all convicts thus sentenced, and said board shall certify the same to the state controller.

7578. Laws, rules and regulations of prison to be kept at prison—Visitors.

SEC. 18. The board of commissioners shall, from time to time, cause to be placed in some conspicuous place or places about the prison, so much of the laws of the state, and the rules, regulations, and by-laws of the state prison, as relates to the intercourse between visitors to the prison and the prisoners therein confined.

7579. Penalty for violation of rules—Barbarous punishments of prisoners prohibited—Food and labor.

SEC. 19. Any person who shall violate any of the rules, regulations, or by-laws of the prison, as adopted and published by the state prison commissioners, shall be subject to such penalties as may be prescribed by the commissioners, and proceeded against in such manner as may be prescribed by law and the rules of said commissioners; *provided,* that no barbarous punishments, by whipping, showering, or otherwise, shall be prescribed by such board of commissioners; nor shall convicts, as punishment, be deprived of regular rations of food, and at the same time compelled to work the usual number of hours per day.

Inhumanity to prisoners, penalty, sec. 2818.

7580. Convicts granted credit—How forfeited—Commissioners to regulate.

SEC. 20. The board of commissioners are hereby authorized and required to grant to any convict confined in the state prison, who shall well behave himself, and who shall perform regular labor during good health, either within or without the state prison inclosure, a credit of six days for each month of such regular work and good behavior, such credit to be computed in favor of any such convict as a commutation of sentence, and to be deducted from the entire term of penal servitude to which such convict shall have been sentenced; *provided,* that said rule of commutation shall be so applied that the six days of credit thus earned or allowed shall be forfeited by any refusal to labor, breach of the prison rules or other misconduct as may be hereafter prescribed by the commissioners during the month next succeeding that in which such credit may have been allowed. *As amended, Stats. 1887, 96.*

See secs. 7581, 7585.

7581. Required to perform labor—Time allowed for good behavior—How forfeited—Notice and proof—Attempt to escape—Effect—Commissioners to regulate time of discharge.

SEC. 21. The board of commissioners shall require of every able-bodied convict in said prison as many hours of faithful labor in each and every day during his term of imprisonment as shall be prescribed by the rules and regulations of the prison, and every convict faithfully performing such labor and being in all respects obedient to the rules and regulations of the prison, or if unable to work, yet faithful and obedient, shall be allowed from his term, instead and in lieu of the commutation heretofore allowed by law, a deduction of two months in each of the first two years, three months in each of the next two years, and four months in each of the remaining years of said term; *provided,* that any such convict who shall commit an assault upon his keeper, or any foreman, officer or convict, or otherwise endanger life, or by any flagrant disregard of the rules of the prison, or any misdemeanor whatever, shall forfeit all deductions of time earned by him for good conduct before the commission of such offense; forfeiture, however, shall only be made by the board of commissioners after due proof of the offense and notice to the offender; nor shall such

forfeiture be imposed when a party has violated any rule or rules without violence or evil intent, of which the board of commissioners shall be the sole judges. The name of no convict who attempts to escape, after the passage of this act, shall be sent by the warden or state prison officials to the board of commissioners for the commutation herein provided; *provided, further,* that of those prisoners entitled to their discharge at the date of the passage of this act by virtue of the provisions hereof, not more than one shall be discharged on any one day, and the discharge shall be made under the directions of the board of commissioners. *As amended, Stats. 1881, 109.*

See secs. 7580, 7585, 7600.

The act in question, in so far as it attempts to commute any portion of a sentence imposed by the courts prior to the time the act took effect, is inoperative and void, because it interferes with the judiciary. Ex Parte Darling, 16 Nev. 98, 99 (40 A. R. 495); Ex Parte Woodburn, 32 Nev. 136 (104 P. 245).

See Ex Parte Maher, under sec. 9 of this act.

7582. Warden to execute a bond—Chief justice to approve—Vacancy, how filled.

SEC. 22. The warden, before entering upon the discharge of his duties, shall execute a bond in such sum as the board of commissioners shall designate, not exceeding twenty thousand dollars, for the faithful discharge of his duties, which bond shall be given to the State of Nevada, approved by the chief justice of the supreme court, and filed with the secretary of state. (SEC. 6.) In the event of the death or resignation of the warden so elected, the vacancy shall be filled by the board of state prison commissioners. *As amended, Stats. 1877, 67.*

[Sec. 23 obsolete.]

An Act to provide for the government of the state prison of the State of Nevada, and repealing other acts in so far as they conflict with the provisions of this act.

Approved March 13, 1909, 98

7583. Warden to classify and separate prisoners—How graded—Clothing regulations.
7584. Idem—Warden to make rules—How posted and distributed.
7585. Commissioners to require labor—Schedule of credits allowed—How forfeited—Convict entitled to notice and hearing—Restoration.

7583. Warden to classify and separate prisoners—How graded—Clothing regulations.

SECTION 1. Immediately upon and after the completion of necessary arrangements therefor, it shall be the duty of the warden of the state prison to classify and separate the prisoners into three grades, as follows:

In the first grade shall be included those appearing to be corrigible or less vicious than the others, and likely to observe the laws and discipline of the prison and maintain themselves by honest industry after their discharge. In the second grade shall be included those appearing to be incorrigible or more vicious, but so competent to work and so reasonably obedient to prison discipline as not to seriously interfere with the productiveness of their labor, or of the labor of those with whom they may be employed. In the third grade shall be included those who are incorrigible or so insubordinate as to seriously interfere with the discipline of the prison or with the productiveness of its labor.

The prison garb or dress of the prisoners as above classified shall be as follows: The outer dress of those prisoners comprising the first grade shall be of one color throughout, said color to be selected by the state prison commission. Those prisoners comprising the second grade, as hereinbefore classified, shall be dressed in clothing of the regulation prison

stripes. And the outer clothing of those prisoners comprising the third class shall be, trousers of the regulation stripes, but their shirt and coat shall be red in color.

7584. Idem—Warden to make rules—How posted and distributed.

SEC. 2. The warden shall also make and adopt rules for the separation and classification of prisoners for their promotion and reduction from one grade to another, and from time to time to change and amend the same as circumstances may require. In making such rules and regulations, the warden shall, as far as practicable, consistent with the discipline of the prison, adopt such rules as shall, in his judgment, be most conducive to the reformation of the convicts. A printed copy of the rules and regulations shall, with the approval of the prison commissioners, be furnished every officer and guard at the time he is appointed and sworn, and so much thereof as relates to the duties and obligations of the convicts shall be hung up in a conspicuous place in each cell and shop, and such rules shall, so far as practicable, be written or printed in a language known to the convict occupying the cell.

7585. Commissioners to require labor—Schedule of credits allowed—How forfeited—Convict entitled to notice and hearing—Restoration.

SEC. 3. The state board of prison commissioners shall require of every able-bodied convict confined in the state prison as many hours of faithful labor in each and every day during his term of imprisonment as shall be prescribed by the rules and regulations of the prison. Every convict who shall have no infraction of the rules and regulations of the prison, or laws of the state, recorded against him, and who performs in a faithful, orderly and peaceable manner the duties assigned to him, shall be allowed for his term, instead of and in lieu of the credits heretofore allowed by law, a deduction of two months in each of the first two years, four months in each of the next two years, and five months in each of the remaining years of said term, and pro rata for any part of a year where the sentence is for more or less than a year. The mode of reckoning credits shall be as shown in the following table:

SCHEDULE OF CREDITS

Number of years of sentence	Good time granted	Total good time made	Time to be served if full time is made
First year	2 months	2 months	10 months
Second year	2 months	4 months	1 year, 8 months
Third year	4 months	8 months	2 years, 4 months
Fourth year	4 months	1 year	3 years
Fifth year	5 months	1 year, 5 months	3 years, 7 months
Sixth year	5 months	1 year, 10 months	4 years, 2 months
Seventh year	5 months	2 years, 3 months	4 years, 9 months
Eighth year	5 months	2 years, 8 months	5 years, 4 months
Ninth year	5 months	3 years, 1 month	5 years, 11 months
Tenth year	5 months	3 years, 6 months	6 years, 5 months

and so on through as many years as may be the term of the sentence. Each convict shall be entitled to these deductions unless the board of commissioners shall find that for misconduct or other cause reported by the warden he shall not receive them. But if any convict shall commit any assault upon his keeper or any foreman, officer, convict or person, or otherwise endanger life, or shall be guilty of any flagrant disregard of the rules of the prison, or commit any misdemeanor, or in any manner violate any of the rules and regulations of the prison, he shall forfeit all deductions of time earned by him for good conduct before the commission of such offense, or that under this section he may earn in the future, or shall forfeit such

part of such deductions as to the prison commissioners may seem just; such forfeiture, however, shall be made only by the prison commissioners after due proof of the offense and notice to the offender; nor shall any forfeiture be imposed when the party has violated any rule without violence or evil intent, of which the commission shall be the sole judges. The commission shall have power to restore credits forfeited for such reasons as by them may seem proper.

See secs. 7580, 7581, 7600.

Stats. 1909, 98, providing for greater credits to prisoners for good behavior than were authorized by prior acts, is void so far as it attempts to commute any part of a sentence imposed prior to its passage, because it interferes with the functions of the judiciary. Ex Parte Woodburn, 32 Nev. 136 (104 P. 245).

Courts are only justified in overruling former decisions where the same are deemed to be clearly erroneous. Idem.

An Act to provide for the release of certain prisoners confined in the Nevada state prison.

Approved February 13, 1879, 32

7586. Commissioners authorized to select legislative committee—Duty of committee.

SECTION 1. The board of state prison commissioners are hereby authorized and allowed, immediately on the assembling of the state legislature, or as soon thereafter as practicable, to select a commission to consist of two members of the senate and three of the house, who shall visit the state prison and consult the warden, and ascertain if there are any prisoners that, by reason of long confinement, or good conduct, or other circumstances, should in their opinion be pardoned.

7587. Idem—Duty to file report—Presented to board of pardons—Restrictions on recommendations.

SEC. 2. It shall be the duty of the commission provided for in section 1 of this act to file a report of their conclusions and recommendations before the adjournment of the legislature with the secretary of the board of pardons, to be presented to said board at its next regular meeting, providing that the report and recommendations provided for in this act, shall not contain recommendations for the pardon of more than ten per cent of the prisoners contained in said state prison.

An Act amendatory of and supplementary to an act to provide for the government of the state prison of the State of Nevada, approved March seventh, eighteen hundred and seventy-three.

Approved March 2, 1875, 116

[Section 1 amends sec. 13 of the act of March 7, 1873, sec. 7573.]

7588. Monthly statement by warden, in duplicate—Filed with secretary and controller—Contents.

SEC. 2. On or before the tenth of each month, the warden shall prepare a statement in duplicate, setting forth in detail the number, value, and description of all articles manufactured for sale at the prison, and the number and value of all articles sold during the preceding month. The original he shall file with the secretary of the board of prison commissioners, and the duplicate with the state controller.

See sec. 7565.

7589. Quarterly statement of warden, in duplicate—Contents—Where filed.

SEC. 3. The warden shall also prepare a quarterly statement, which

shall be in duplicate, and filed with the secretary of the board and the state controller, setting forth in detail the amount, description, and value of all articles sold during the preceding quarter, the amount of money collected from such sales, the amount outstanding, what for and by whom owed, the amount, description and value of manufactured and unmanufactured stock on hand, and the amount, description, and value of all tools and machinery on hand connected with the manufacture of articles at the prison.

See sec. 7565.

An Act relating to the transportation of indigent insane persons and convicts.

Approved February 15, 1875, 63

7590. Expenses of transporting convicts and indigent insane, how paid.

SECTION 1. The expense of transporting convicts and indigent insane persons from the various counties of the state, to the state prison and insane asylum, shall constitute a charge upon the state, and shall be paid by the state treasurer on the controller's warrant, to be issued on the approval by the board of state prison commissioners of the claim of the person having charge of the transportation of any such convict, or by the board of examiners, of the claim of the person having charge of the transportation of any such indigent insane person; the expense of transporting convicts to be paid out of the appropriation for the support of the state prison, and the expense of transporting indigent insane persons out of the appropriation for the support of the indigent insane.

See secs. 7393, 7606.
Insane prisoners transferred to asylum, secs. 2208, 2209.

7591. Idem—What expenses assumed by the state—What county to pay—Per diem of officer.

SEC. 2. The expenses to be paid under this act shall be:

First—The actual expenses of the officer in charge of the indigent insane person or persons, convict or convicts, in traveling to and from the state prison or insane asylum.

Second—The necessary expense of transporting the insane person or persons, convict or convicts, and the sum of five dollars per diem to the officer in charge; *provided,* that in all cases where an appeal shall have been sustained by the supreme court, further transportation of the convict or convicts, shall be at the expense of the county in which said convict or convicts were convicted, at the same per diem and expense as previously provided in this section. *As amended, Stats. 1891, 25.*

7592. Idem—No unnecessary expense—Prisoners transported collectively.

SEC. 3. The officer in charge shall transport at the same time all persons awaiting transportation, and the board of state prison commissioners or examiners shall not allow any extra expense incurred by the making unnecessary trips in transporting separately persons who might be transferred at the same time.

An Act fixing and regulating the salary of the warden of the state prison.

Approved March 5, 1909, 71

7593. Salary of warden.

SECTION 1. From and after the first day of March, A. D. 1909, the salary of the warden of the state prison shall be and the same is hereby fixed at three thousand dollars per annum, payable in equal monthly installments, out of the general fund in the state treasury, in the same manner as other state officers are paid.

See sec. 7564.

An Act concerning escaped prisoners and the recapture of the same.

Approved March 1, 1866, 164

7594. Warden may issue warrant for arrest of escaped prisoners.

SECTION 1. Hereafter, when any prisoner or prisoners escape from the state prison of this state, it shall be lawful for the warden of the state prison to issue a warrant for the recapture of said escaped prisoner or prisoners, which warrant shall have force and effect in any county in this state, and may command the sheriff of any county in this state, or any constable thereof, or any police officer of any city in this state, to arrest said prisoner or prisoners, and make return to the warden, with the prisoner or prisoners who may be arrested under said warrant.

Prison extended over place of labor, sec. 7572.

7595. Expenses for recapture—Charge against state—Proviso.

SEC. 2. Any and all expenses of enforcing the provisions of this act, or in any wise appertaining to the recapture and return of escaped convicts to the state prison, shall be a charge against the state, and shall be paid out of the state prison fund; *provided, however,* that said escape be not the result of carelessness, incompetency, or other official delinquency of the warden or other officers of the state prison.

An Act relating to prisoners discharged from the state prison.

Approved February 1, 1875, 49

7596. Discharged prisoner furnished money.

SECTION 1. Whenever any prisoner shall be discharged from the state prison of this state, either by expiration of his term of sentence, or by pardon, the warden shall furnish him twenty-five dollars in coin, the same to be allowed and paid out of the state prison fund, the same as any other claim against said fund.

See sec. 7632.

No part of discharge money to be used in employing attorney to present case before board of pardons or parole, see rule 14 of board of pardons, following sec. 7630.

An Act authorizing and relating to the employment of convicts on the public roads and highways, providing a general road fund in the state treasury to defray the expenses thereof, and for other purposes.

Approved March 16, 1911, 73

7597. Appropriation for general road fund.
7598. Commissioners may detail convicts for road work—Warden to recommend—Not compulsory.
7599. Regulations concerning same—General direction of warden—Not required to wear stripes—Maximum punishment.
7600. Pay and additional time off for convicts on public road work—May be paid to dependents of convict.
7601. Prison board to specify public roads upon which convicts shall work—Duties of state engineer and county surveyors—Preliminary agreement with county.
7602. Disbursements, how regulated.

7597. Appropriation for general road fund.

SECTION 1. The sum of twenty thousand dollars is hereby appropriated out of any money in the state treasury not otherwise appropriated which shall constitute a fund to be known as the general road fund.

7598. Commissioners may detail convicts for road work—Warden to recommend—Not compulsory.

SEC. 2. The board of state prison commissioners is hereby authorized and directed to detail for work on the public highways of the state any male convict in the state prison who, on the recommendation of the war-

den, and in the opinion of said board, may be properly so detailed, excepting prisoners under sentence of death; *provided*, that such detail shall be voluntary on the part of the convict and shall not be caused by any form of compulsion.

7599. Regulations concerning same—General direction of warden—Not required to wear stripes—Maximum punishment.

SEC. 3. Convicts detailed to road work under the provisions of this act shall, while so engaged, and without the confines of the state prison, shall be under the general direction of the warden, and guards appointed by him and shall be subject to such rules and regulations with respect to their hours of labor, conduct and control as said board shall establish. They shall not be required to wear stripes, and for infractions of the rules the maximum punishment of any convict shall be his summary return to confinement in the penitentiary and forfeiture of credits.

7600. Pay and additional time-off for convicts on public road work—May be paid to dependents of convict.

SEC. 4. In addition to the time-off for good behavior from the term of sentence now allowed by law, convicts so detailed for work upon the public roads shall be allowed ten days' time-off for each month's faithful work and compliance with such rules and regulations; and in addition thereto, each convict so detailed shall be allowed the sum of twenty-five cents for each day's labor, and which shall accumulate as a fund to be paid the convict on the termination of his sentence, or on his release by pardon or parole, and which shall be in addition to the sum of money ordinarily given discharged convicts; *provided*, that on petition of any such convict, said board, in its discretion, may pay out from any sum so to the credit of any convict a portion or all thereof in support of the dependent wife, children or parent of such convict, in distress.

See secs. 7580, 7581, 7585.

7601. Prison board to specify public roads upon which convicts shall work—Duties of state engineer and county surveyors.

SEC. 5. Said board on the recommendation of the state engineer, or the county surveyor of each county, is hereby authorized and empowered to determine upon what public roads convicts so detailed shall be employed; whether in the improvement of existing roads or the construction of new roads, and shall pass upon and approve or reject the plans and specifications of the state engineer or the respective county surveyors in respect thereto. The state engineer shall have general supervision and direction of all road work so approved. No road work, under the provisions of this act, shall be instituted in any county prior to an agreement with the county commissioners of such county with respect to the survey and character and construction of such road, and an agreement by such county to construct, at its own expense, all bridges or other structures of wood, iron, concrete or stone, requiring skilled labor, and no convict shall be employed thereon; and such county may be required by said board to contribute in part toward the expense of the maintenance of convicts on such road work.

See secs. 7561, 7565, 7567, 7569.

7602. Disbursements, how regulated.

SEC. 6. All disbursements for expenditures arising under the provisions of this act, including for road-making tools and implements, horses, wagons, tents, bedding, clothing, tobacco, medicine, and commissary utensils and supplies, shall be on warrants certified to by the officer or engineer in charge of said road work, and by the chairman of said board, and which, on approval by the state board of examiners, shall be paid on warrants

drawn by the state controller, by the state treasurer from the following funds, respectively, in the state treasury, to wit: From said general road fund in every instance, except for part payment for clothing and commissary supplies, an amount not exceeding fifty cents per day per convict, for the total number of days detailed, which shall be paid from any appropriation hereafter made for the support and maintenance of the state prison.

JAILS

Act of 1861 in relation to common jails, sections 7603–7613.

Act of 1907 in relation to branch county jails, sections 7614–7616.

Act authorizing the employment of criminals confined in jails, sections 7617–7621.

An Act in relation to common jails, and the prisoners thereof.

Approved November 25, 1861, 41

7603. County to maintain common jail.
7604. Commissioners to supervise—Precautions to take—Quarterly inspection.
7605. Sheriff to have custody of jail—Deputy or jailer—Furnish supplies—Commissioners to allow expenses.
7606. Duty of sheriff to transfer prisoners, when—Commissioners to furnish expenses — Mileage — Jailers, how paid.
7607. Allowance to prisoners—Failure of sheriff or jailer—Liability.
7608. Jailer to make returns of prisoners to commissioners—Penalty for neglect.
7609. Convicts may be hired out—Earnings, disposition of.
7610. United States prisoners committed to county jail — Expense — May be employed—Escape.
7611. Rate of imprisonment in default of fine, forfeiture or costs.
7612. Prisoner may be removed to other jail, when—Application to governor.
7613. Expenses of removal—County to pay.

7603. County to maintain common jail.

SECTION 1. There shall be built, or provided, kept, and maintained in good repair, in each county, one common jail, at the expense of the county.

Branch jail, see sec. 7614.

7604. Commissioners to supervise — Precautions to take — Quarterly inspection.

SEC. 2. The county commissioners shall have the care of building, inspecting, and repairing such jail, and shall, once every three months, inquire into the state thereof, as respects the security thereof, treatment and condition of the prisoners, and shall take all necessary precautions against escape, sickness, or infection.

7605. Sheriff to have custody of jail—Deputy or jailer—Furnish supplies—Commissioners to allow expenses.

SEC. 3. The sheriff shall have the custody of the jail in his county, and of the prisoners therein, and shall keep the same personally, or by his deputy, or by a jailer or jailers, by him appointed for that purpose, for whose acts he shall be responsible, and shall furnish all necessary sustenance, bedding, clothing, and fuel for the prisoners committed to his custody; and the county commissioners are hereby required to allow him, out of the county treasury, all necessary costs, charges, and expenses thereof. *As amended, Stats. 1862, 120; 1866, 189.*

See sec. 1646.

See Randall v. Storey Co., under sec. 4 of this act.

Stats. 1887, 108, which forbid any county officer, except county commissioners, to contract for the payment or expenditure of any county moneys whatever, being expressed in negative terms, repealed this section, and left the sheriffs without authority to bind their counties by a contract for the board of prisoners. State ex rel. Caughlin v. Washoe Co., 22 Nev. 203, 209, 210 (37 P. 486).

7606. Duty of sheriff to transfer prisoners, when—Commissioners to furnish expenses—Mileage—Jailers, how paid.

SEC. 4. It shall be the duty of the sheriff, either by himself, his deputy,

or by one or more of his jailers, to transfer all prisoners from his county to whatever place of imprisonment the sentence of the court may require, at as early a day after said sentence as practicable; and for that purpose the county commissioners are hereby required to furnish, out of the county treasury, all necessary costs, charges, and expenses of the prisoner or prisoners, and of the officer or officers having charge thereof, to which shall be added mileage for each officer, at the rate of twenty cents per mile, one way only; and the above provisions shall be applicable in cases where prisoners are taken from prisons to be tried at any courts in other counties. It is hereby made the duty of the county commissioners to allow, out of the county treasury, as in other cases provided, a fair and adequate monthly compensation for the services of all jailers by the sheriff employed or appointed. *As amended, Stats. 1866, 189.*

Expenses of transporting prisoners to state prison, how paid, secs. 7590–7592.
See secs. 1544–1545.

Where the statute authorizes the sheriff to employ a jailer and provides that he shall be allowed a fair and adequate monthly compensation for such services, the county commissioners have no authority to fix the compensation on a per diem basis and confine it to such times as prisoners were confined in the county jail. Randall v. Storey Co., 20 Nev. 37 (14 P. 583).

7607. Allowance to prisoners—Failure of sheriff or jailer—Liability.

SEC. 5. If any sheriff, or jailer, shall defraud any prisoner of his allowance, or shall not allow reasonable allowance and accommodation, he shall forfeit fifty dollars for each offense, to be recovered by an action of debt by the county commissioners, for the use of the county.

7608. Jailer to make returns of prisoners to commissioners—Penalty for neglect.

SEC. 6. Every jailer, five days prior to the opening of each term of the district court, in the district in which his county is situate, shall return to the commissioners of his county a certified list of all the prisoners then in his custody, with the time and causes of their commitment, and the length of the term for which they were committed; and he shall, also, return to said commissioners, within five days after the close of said term of said court, the name, and cause, and term of commitment, of every prisoner committed during said term of said court; and any jailer, who shall neglect to make such returns, for every such neglect, shall pay a fine not exceeding fifty nor less than twenty dollars, to be imposed at the next succeeding term of said court, on information of said commissioners of such neglect; and such fine shall go to the county.

7609. Convicts may be hired out—Earnings, disposition of.

SEC. 7. Every sheriff may hire out, or put to labor, any person or persons in his custody who shall be convicted of the following crimes: Petit larceny, grand larceny, burglary, assault and battery with intent to commit murder, bribery, perjury, and fraud, taking all necessary means to secure their safe keeping, and shall charge the earnings of said prisoners to himself, for the sustenance of said prisoners. Any surplus that may accrue from such labor shall be paid into the county treasury.

See secs. 7570, 7610, 7617, 7622.

7610. United States prisoners committed to county jail—Expense—May be employed—Escape.

SEC. 8. Persons may be committed under the authority of the United States to any jail upon payment of the expenses of supporting such prisoners, five dollars per month for each and every prisoner while confined in said county jail, to the county for the use of the said jail, and all legal fees of the jailer, and the sheriff shall receive such prisoners, and subject them

to the same employment, discipline and treatment, and be liable for any neglect of duty, as in case of other prisoners, but the county shall, in no case, be liable for any escape. *As amended, Stats. 1909, 141.*

See sec. 7570.

7611. Rate of imprisonment in default of fine—Forfeiture or costs.

SEC. 9. Whenever any prisoner, under conviction for any criminal offense, shall be confined in jail for any inability to pay any fine, forfeiture, or costs, or to procure sureties, the district court, upon satisfactory evidence of such inability, may, in lieu thereof, confine such person in the county jail, at the rate of two dollars per day, until the fine, forfeiture, or cost so imposed shall have been satisfied.

See secs. 7500, 7503, 7507.

On conviction of a felony, the sentence imposed was within the discretion vested in the district court as to the amount of the fine and the term of alternative imprisonment in the event that the fine was not paid, and was erroneous only in that it declared that such alternative imprisonment should be in the state prison, whereas, under the express provisions of this section, it should have declared that the same should be in the county jail. It was held that such direction as to the place of imprisonment might be rejected as surplusage, and did not vitiate the entire sentence. Ex Parte Tani, 29 Nev. 385, 386, 388, 389, 401, 13 L. R. A. (N. S.) 518, 91 P. 137.

7612. Prisoner may be removed to other jail, when—Application to governor.

SEC. 10. Whenever, from any sufficient cause, the sheriff shall think it expedient that the prisoners be removed from the jail, in his county, on application in writing, to the governor of the state, by the sheriff, the governor may order said prisoners to be removed to some other jail, anywhere within the state, there to be detained in the same manner, and by the same process as in the jail from whence they were removed, until remanded back, by a similar process, or discharged according to law.

7613. Idem—Expenses of removal, county to pay.

SEC. 11. All the expenses of removing and maintaining prisoners, incurred under the preceding section, shall be defrayed by the county from which they were so removed.

An Act to establish branch county jails in the several counties in this state, defining the powers of the boards of county commissioners in relation thereto, and other matters properly connected therewith.

Approved March 29, 1907, 301

7614. Commissioners may establish branch jails—Misdemeanor prisoners confined in—Courts may commit to main jail, when.

SECTION 1. The board of county commissioners of the several counties of the State of Nevada are hereby authorized to establish, by an order to be entered in their minutes, a branch county jail in any town in such counties, whenever in their judgment the public needs require it, and to provide that persons charged with or convicted of a misdemeanor in such town or other town or townships mentioned in the order shall be imprisoned in such branch county jail instead of in the county jail at the county-seat; *provided*, that nothing in said order shall prohibit any judge or justice of the peace before whom such conviction may be had from ordering any such prisoner to be imprisoned in the county jail at the county-seat of the county wherein such conviction may be had where the public safety or the safety of such prisoner may require it.

7615. Sheriff may appoint jailer of—Commissioners to approve—Compensation.

SEC. 2. The sheriff, with the approval of the board of county com-

missioners of any county wherein any branch county jail has been established, is hereby empowered to appoint a deputy who shall act as jailer for the same and who shall have the custody thereof and of the prisoners therein, and whose compensation shall be fixed by the board of county commissioners and shall be paid out of the general fund of such county; *provided,* whenever by an order of the board of county commissioners such jailer after being appointed is not longer or for a time required, such board may cease to allow any compensation after notifying the sheriff of such order.

7616. Idem—Commissioners may direct jailer to work prisoners on highways.

SEC. 3. The board of county commissioners of any county wherein such branch county jail has been established and for which a jailer has been appointed in the manner provided by this act, may direct the jailer of such branch county jail to work the prisoners imprisoned therein, on the public streets of such town or on the public roads of such district wherein such branch county jail is located.

See secs. 7609, 7617, 7622.

An Act to authorize the employment of criminals confined in the several jails throughout this state.

Approved March 8, 1879, 98

7617. Commissioners or city authorities required to employ persons committed to jails.
7618. Deemed sentenced to labor unless otherwise ordered.
7619. Control of prisoners, who to have—Public works defined.
7620. Disobedience or disorderly conduct or for character of punishment—Record and report.
7621. Prisoners to have guard.
7622. Credits for good conduct—How granted.

7617. Commissioners or city authorities required to employ persons committed to jails.

SECTION 1. The board of county commissioners in each and every county of the State of Nevada, the mayor and board of aldermen of each and every incorporated city within this state, and the board of trustees of each and every incorporated town within this state, are hereby authorized and required to make all necessary arrangements, as hereinafter provided, to utilize the labor of the prisoners committed to any jails within any county, city, or town within this state, for a term of imprisonment by the judges of the several district courts within this state, or the justices of the peace in any and all townships throughout this state.

See secs. 7609, 7616.

7618. Deemed sentenced to labor unless otherwise ordered.

SEC. 2. All prisoners sentenced by the judge of any district court, or by the justice of the peace of any justice's court, and sentenced to a term of imprisonment in any county, city, or town jail shall be deemed to have been also sentenced to labor during such term, unless the judge or justice of the peace, sentencing said prisoner, for good cause orders otherwise.

7619. Control of prisoners, who to have—Public works defined.

SEC. 3. The sheriff of each and every county in this state shall have charge and control over all prisoners committed to his care and keeping, in their respective county jails, and the chiefs of police and town marshals in the several cities and towns throughout this state shall have charge and control over all prisoners committed to their respective city and town jails; and the said sheriffs, chiefs of police, and town marshals, and each of them, shall see that the prisoners under their care are at all times kept at labor

on the public works in their respective counties, cities and towns, at least six hours a day during six days of the week, when the weather will permit, when so required by either the board of county commissioners of their respective counties, or by the mayor and board of aldermen of their respective cities, or by the board of trustees of their respective towns. By the public works, as used in this act, is understood the construction, or repair, or cleaning of any streets, road, sidewalks, public square, park, building, cutting away hills, grading, putting in sewers, or other work whatever, which is or may be authorized to be done by and for the use of any of the said counties, cities, or towns, and the expense of which is not to be borne exclusively by individuals or property particularly benefited thereby.

7620. Punishment may be inflicted for disobedience or disorderly conduct or for refusal to work—Character of punishment—Record and report.

SEC. 4. In case any prisoner or prisoners are disobedient or disorderly, or do not faithfully perform their task, the said officers having charge of them may inflict punishment upon them by confining them in dark and solitary cells, and the officers so punishing shall keep a record of the punishment so inflicted, showing its cause, mode and degree, and duration, making a correct report of the same, on the last day of each month, to their respective boards in each county, city, and town, together with the amount and character of work done by said prisoners during the month.

See sec. 2818.

7621. Prisoners to have guard.

SEC. 5. No prisoner or prisoners shall be allowed to go from the walls of the prison without a proper and sufficient guard.

7622. Credits for good conduct, how granted.

SEC. 6. For each month in which the prisoner appears, by the record provided for in section 4 of this act, to have been obedient, orderly and faithful, five days shall, with the consent of the board having power in the premises, be deducted from his term of sentence.

PARDONS AND PAROLES

Act of 1867 to make effective power of governor, justices of supreme court and attorney-general to remit fines and forfeitures, commute punishments, and grant pardons after conviction, sections 7623–7630.

Rules of board of pardons, following section 7630.

Act entitled "An act to establish a board of parole commissioners for the parole of and government of paroled prisoners," approved March 11, 1909, sections 7631–7634.

Rules of board of parole, following section 7634.

Crimes and punishments, sections 6266–6850.

Death sentence, when imposed, trial judge to report statement of case to governor as chairman of board of pardons, section 7269.

District attorneys to report to attorney-general statement concerning all convictions of indicted defendants, section 1608.

Habeas corpus, sections 6226–6263.

Parole may be granted by board of pardons after prisoner has served minimum time under indeterminate or indefinite sentence, section 7262.

Trial and sentence for crimes committied by imprisoned persons, sections 6818, 6819.

State prison and jails, sections 7561–7634.

CONSTITUTIONAL PROVISIONS

Fines, governor may suspend collection of not exceeding sixty days, section 306.

Fines, remission of, section 307.

Habeas corpus not to be suspended except in case of rebellion or invasion, section 234; U. S. Const., section 130.

Imprisonment for debt prohibited, except for fraud, libel or slander, section 243.

Jeopardy, no person to be twice put in, section 237; U. S. Const., section 175.
Militia fine, imprisonment for, in time of peace prohibited, section 243.
Pardons, section 307.
Slavery prohibited except for crime, section 246; U. S. Const., section 183.
Treason, governor may suspend sentence until convening of legislature, section 306.
Treason not pardonable, section 307.

An Act to regulate and make effectual the power of the governor, justices of the supreme court, and attorney-general, to remit fines and forfeitures, commute punishments, and grant pardons after convictions.

Approved February 8, 1867, 53

7623. Board of pardons—Fines or forfeitures, how remitted—Certificate of—Clerk to enter on docket.
7624. Idem—Proceedings when death penalty is remitted—Certificate of action.
7625. Idem—Pardon or remission of fines or forfeitures—Notice to district judge and district attorney—To commissioners, when—Time of notice may be shortened—Restoration to citizenship—Order to discharge.
7626. Duty of officers receiving notice of application for pardon to transmit information.
7627. Member may administer certain oaths—Affidavits, who may take.
7628. False oath or affirmation, perjury—Subornation—Penalty.
7629. Notice not required for restoration to citizenship or commutation from death.
7630. Bail not to be remitted.

7623. Board of pardons—Fines or forfeitures, how remitted—Certificate of—Clerk to enter on docket.

SECTION 1. Whenever the governor, justices of the supreme court, and attorney-general, or the major part of them, the governor being one, shall remit any judgment of fine or forfeiture, a certificate reciting the fine or forfeiture remitted, duly signed and attested with the great seal of the state, shall be filed in the clerk's office of the court wherein the judgment of fine or forfeiture was entered, and the clerk shall make an entry in the judgment docket or other proper place, showing that the fine or forfeiture is remitted; which filing and entry shall be evidence of the satisfaction thereof.

It requires the governor and at least two other members of the board to concur in granting a pardon. Ex Parte Janes, 1 Nev. 319.
See sec. 7631; Const., sec. 307.

7624. Idem—Proceedings when death penalty is remitted—Certificate of action.

SEC. 2. Whenever any punishment involving the death penalty is commuted, a statement in writing shall be made out and signed, reciting the name of the person whose punishment is commuted, and the time and place where convicted; also, the amount, kind, and character of punishment substituted instead of the death penalty, and the place where the substituted punishment is to be served out or suffered, and directed to the proper officer or authority charged by law with the safe keeping and execution of the punishment; which statement, attested with the great seal of this state, shall be sufficient authority for such officer or authority to receive and retain the person named in the statement as therein directed, and the officer or authority named in the statement must receive the person whose punishment has been commuted, and retain him as directed.

See sec. 7269.

7625. Idem—Pardon or remission of fines or forfeitures—Notice to district judge and district attorney—To commissioners, when—Time of notice may be shortened—Restoration to citizenship—Order to discharge.

SEC. 3. Any person intending to apply to have a fine or forfeiture remitted, or a punishment commuted, or a pardon granted, or some one in his

behalf, shall make out duplicate copies of notices in writing of such application, specifying therein the court in which the judgment was rendered, the amount of the fine or forfeiture, or kind or character of punishment, the name of the person in whose favor the application is to be made, the particular grounds upon which the application will be based, and the time when it will be presented, one of which he shall serve on the district attorney and one on the district judge for the county where the conviction was had; *provided,* in cases of fines and forfeitures a similar notice shall also be served on the chairman of the board of county commissioners. The notice shall be served as herein provided, at least thirty days prior to the presentation of the application, unless a member of the board of pardons, for good cause, prescribe a shorter time. When a pardon is granted for any offense committed, such pardon may or may not include restoration to citizenship. If the pardon include restoration to citizenship, it shall be so stated in the instrument or certificate of pardon; and when granted upon conditions, limitations, or restrictions, the same shall be fully set forth in the instrument as aforesaid. Such instrument or certificate shall also contain an order to the officer having the person in custody to discharge him or her from such custody, upon a day to be named in said instrument, upon the conditions, limitations, or restrictions therein named. *As amended, Stats. 1875, 79.*

See sec. 7629 and rule 3 of board of pardons, following sec. 7630.

7626. Duty of officers receiving notice of application for pardon to transmit information.

(SEC. 2.) It shall be the duty of all district judges, attorneys, and county commissioners receiving notice of an application for a pardon, commutation or remission of punishment, or fine or forfeiture, to transmit forthwith to the board of pardons a statement in writing of all matters within their knowledge affecting the merits of such application. *As amended, Stats. 1875, 79.*

Report of legislative committee to be presented to board of pardons, secs. 7586, 7587.

7627. Member may administer certain oaths—Affidavits, who may take.

(SEC. 3.) Any member of the board of pardons shall have authority to administer an oath or affirmation to any person offering to testify upon the hearing of an application for a pardon, or the commutation of a punishment, or the remission of a fine or forfeiture; and any district judge, county clerk, or notary public may take and certify affidavits and depositions to be used upon such applications, either for or against the same. *As amended, Stats. 1875, 80.*

7628. False oath or affirmation, perjury—Subornation—Penalty.

(SEC. 4.) Every person having taken a lawful oath, or made affirmation in an application to the board of pardons for a pardon or commutation of punishment, or the remission of a fine or forfeiture, who shall swear or affirm wilfully, corruptly, and falsely in any matter material to the issue or point in question, or shall suborn any other person to swear or affirm as aforesaid, shall be deemed guilty of perjury or subornation of perjury (as the case may be), and upon conviction thereof shall be punished by imprisonment in the state prison for any term not less than one nor more than fourteen years. *As amended, Stats. 1875, 80.*

7629. Notice not required for restoration to citizenship or commutation from death.

(SEC. 5.) No notice shall be required of an application for a restoration

to citizenship to take effect at the expiration of a term of imprisonment, or for the commutation of the death penalty. *As amended, Stats. 1875, 80.*

See sec. 7625 and rule 3 of board of pardons, following sec. 7630.

7630. Bail not to be remitted.

SEC. 4. The fines and forfeitures herein mentioned shall not be so construed as to include the remittance or discharge from liability on any bail bond.

Other acts in relation to this subject were cited as follows:

Act of 1864–5, sec. 6: For interpretation of this section making the lieutenant-governor ex officio warden of the state prison, and allowing him a salary for such services, see Crosman v. Nightingill, under Const., secs. 291 and 377.

Cited, Ex Parte Ryan, 10 Nev. 263; Denver v. Hobart, 10 Nev. 31.

Act of 1861, 123, cited, Denver v. Hobart, 10 Nev. 31.

Act of 1877, 66, sec. 4: The authority to employ a physician is vested in the warden under the clause conferring upon him the power to appoint "all necessary help." State ex rel. Fox v. Hobart, 13 Nev. 419, 420.

RULES OF BOARD OF PARDONS [1]

As amended July 12, 1911

1. On and after the second Monday in April, 1912, the regular meetings of the board shall be held on the second Monday in April and the second Monday in September of each year. [As amended, July, 1911.]

2. Special meetings may be called by the governor at any time when the exigencies of any case demand it, notice thereof being given to each member of the board.

3. No application for the remission of a fine or forfeiture, or for a commutation of sentence or pardon, shall be considered by the board unless presented in the form and manner required by the act of February 8, 1867, as amended February 20, 1875 (secs. 7625–7629); provided, that no application that has been filed with, or considered by, the board of parole commissioners at any session next preceding the regular meeting of the board of pardons shall be heard or considered by this board unless consent be given by a majority thereof.

4. In every case where the applicant has been confined in the state prison, he or she must procure a written certificate of his or her conduct during such confinement from the warden of said prison, and file the same with the clerk of this board, on or before the day of hearing.

5. All oral testimony offered upon the hearing of any case must be presented under oath, unless otherwise directed by a majority of the board.

6. Action by the board upon every case shall be in private, unless otherwise ordered by the consent of all the members present.

7. After a case has once been acted upon, and the relief asked for has been refused, it shall not, within twelve months thereafter, be again taken up or considered upon any of the grounds specified in the application under consideration, except by the consent of a majority of the members of the board; nor in any case except upon new and regular notice as required by law in case of original application.

8. In voting upon any application the roll of members shall be called by the clerk of the board in the following order:

First—The attorney-general.
Second—The junior associate justice of the supreme court.
Third—The senior associate justice.
Fourth—The chief justice.
Fifth—The governor.

Each member, when his name is called, shall signify his vote in favor of or against an application by answering "aye" or "no."

9. No document relating to a pending application or to a prior application which has been denied, shall be withdrawn from the custody of the clerk after filing, unless by consent of the board.

10. All applications must be filed with the clerk at least ten days before the meeting of the board, at which the application is to be considered, unless the time be shortened by a majority of the board.

11. All papers pertaining to applications must be properly indorsed before presentation for filing; and the name of the attorney for the applicant must appear in such indorsement on the petition and notices to the district judge and district attorney. The indorsement on each paper must begin at the top with "Board of Pardons," and include the name of the document.

12. Attorneys shall first present their evidence through witnesses, affidavits, the record

[1] For rules of board of parole commissioners, see note under sec. 7634.

or documents, and then argue their cases concisely and not exceeding one-half hour for each counsel appearing, unless additional time be granted by the board, and in the event that an attorney digresses from the evidence, or states facts not supported thereby, or reiterates in his argument, he shall be called to order. Papers shall be filed separately, or attached before they are read in evidence, and shall not be withdrawn without the order of the board.

13. On behalf of an applicant for pardon who has been convicted of felony, evidence of facts relating to the commission of the crime other than that contained in the record may be presented only by witnesses, who know the circumstances, appearing and testifying under oath, or by depositions or affidavits, copies of which shall have been served upon the district judge and district attorney of the county in which the indictment was found, at least thirty days before the hearing, unless for good cause shown this time be shortened by the board.

See secs. 7625–7627.

14. The money allowed by the state to a prisoner upon his discharge, is solely for the purpose of aiding him until he can find employment, and shall not be used for attorney's fees to employ counsel to present his case to the board of pardons or parole. Prisoners shall not pay, or agree to pay, any portion of their discharge money for services of an attorney to present their case, nor shall any attorney accept or receive, directly or indirectly, any portion of said money for such services. [Adopted at a meeting of the board July 12, 1911.]

Regarding payment to prisoners paroled, see sec. 7632.

Concerning payment to prisoners on final discharge, see sec. 7596.

An Act to establish a board of parole commissioners for the parole of and government of paroled prisoners.

Approved March 11, 1909, 84

7631. Parole commissioners—Majority may act—Rules—Prisoners entitled to parole—Control over paroled prisoners—Revocation—Duty of peace officers—Leaving state without permission—Escape.
7632. Paroled prisoner may receive funds—Board to recommend.
7633. Paroled prisoners to report.
7634. Governor's private secretary, secretary of board—Duties.

7631. Parole commissioners — Majority may act — Rules — Prisoners entitled to parole—Control over paroled prisoners—Revocation—Duty of peace officers—Leaving state without permission—Escape.

SECTION 1. The governor, the justices of the supreme court, and the attorney-general are hereby constituted a board of parole commissioners, a majority of whom shall have power to act under the provisions of this statute. They shall have power to establish rules and regulations under which any prisoner, who is now, or hereafter may be imprisoned in the state prison, and who may have served one calendar year of the term for which he was sentenced and who has not previously been convicted of a felony and served a term in a penal institution, may be allowed to go upon parole outside of the buildings and enclosures, but to remain, while on parole in the legal custody and under the control of the board of parole commissioners, and subject at any time to be taken within the enclosure of said prison. They shall have full power to make and enforce rules and regulations governing the conduct of paroled prisoners, and to retake or cause to be retaken and imprisoned, any convict so upon parole, whose written order certified to by the secretary of the board shall be a sufficient warrant for all officers, named therein, to authorize such officer to return to actual custody any conditionally released or paroled prisoner, and it is hereby made the duty of all sheriffs, officers and members of the state police, constables, chiefs of police, and all prison or other peace officers to execute any such order in like manner as ordinary criminal process; *provided, however,* that no prisoner imprisoned under a sentence for life shall be paroled until he shall have served at least seven calendar years. If any prisoner so paroled shall leave the state without permission from said board, he shall be held as an escaped prisoner and arrested as such.

See sec. 6724, et seq., and Const., sec. 307.

7632. Paroled prisoner may receive funds—Board to recommend.

SEC. 2. Upon the recommendation of said board, and subject to its conditions, the warden shall advance such paroled prisoner an amount of money not exceeding that authorized by law to be paid to prisoners upon their discharge from the prison upon the expiration of their term, which sum shall be paid out of the state prison fund, the same as any other claim against said fund.

See sec. 7596.

7633. Paroled prisoners to report.

SEC. 3. All paroled prisoners shall be required to report to the secretary of the board at least once a month, during the time they are on parole, except in case of sickness or other good cause shown.

7634. Governor's private secretary, secretary of board—Duties.

SEC. 4. The governor's private secretary shall be secretary of said board, and it shall be his duty to attend to the reports of all paroled prisoners, and advise said board of any case of violation of the conditions of parole, and shall perform such other duties as the board may require.

RULES OF BOARD OF PAROLE COMMISSIONERS

1. The regular meetings of the board shall be held immediately after the regular meetings of the board of pardons.

[Sections 2, 4 to 10, inclusive, and 12 to 14, inclusive, same as corresponding sections of rules of board of pardons.]

3. No application for parole shall be considered by the board unless presented in the form and manner required by the act of February 8, 1867; as amended February 20, 1875 (sec. 7625–7629); provided, that no application for parole that has been filed with, or considered by, the board of pardons at any session next preceding the regular meeting of the board of parole commissioners shall be heard or considered by this board unless consent be given by a majority thereof.

11. All papers pertaining to applications must be properly indorsed before presentation for filing; and the name of the attorney for the applicant must appear in such indorsement on the petition and notices to the district judge and district attorney. The indorsement on each paper must begin at the top with "Board of Parole Commissioners," and include the name of the document.

[See rule 14, board of pardons.]

CERTIFICATE OF AUTHENTICATION

STATE OF NEVADA }
DEPARTMENT OF STATE } SS.

I, GEORGE BRODIGAN, the duly elected, qualified and acting Secretary of State of the State of Nevada, do hereby certify that the foregoing is a true and full revision and compilation of the general laws of the State of Nevada, as prepared by Honorable James G. Sweeney, Honorable G. F. Talbot and Honorable F. H. Norcross, Justices of the Supreme Court of the State of Nevada, under and by authority of the Acts of the Legislature of the State of Nevada entitled "An Act to provide for revising, compiling, annotating and publishing the laws of the State of Nevada, and the compiling, annotating and publishing therewith certain laws of the United States of particular interest to the State of Nevada," approved March 31, 1909, and March 20, 1911.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of State at my office in Carson City, Nevada, this 29th day of January, 1912.

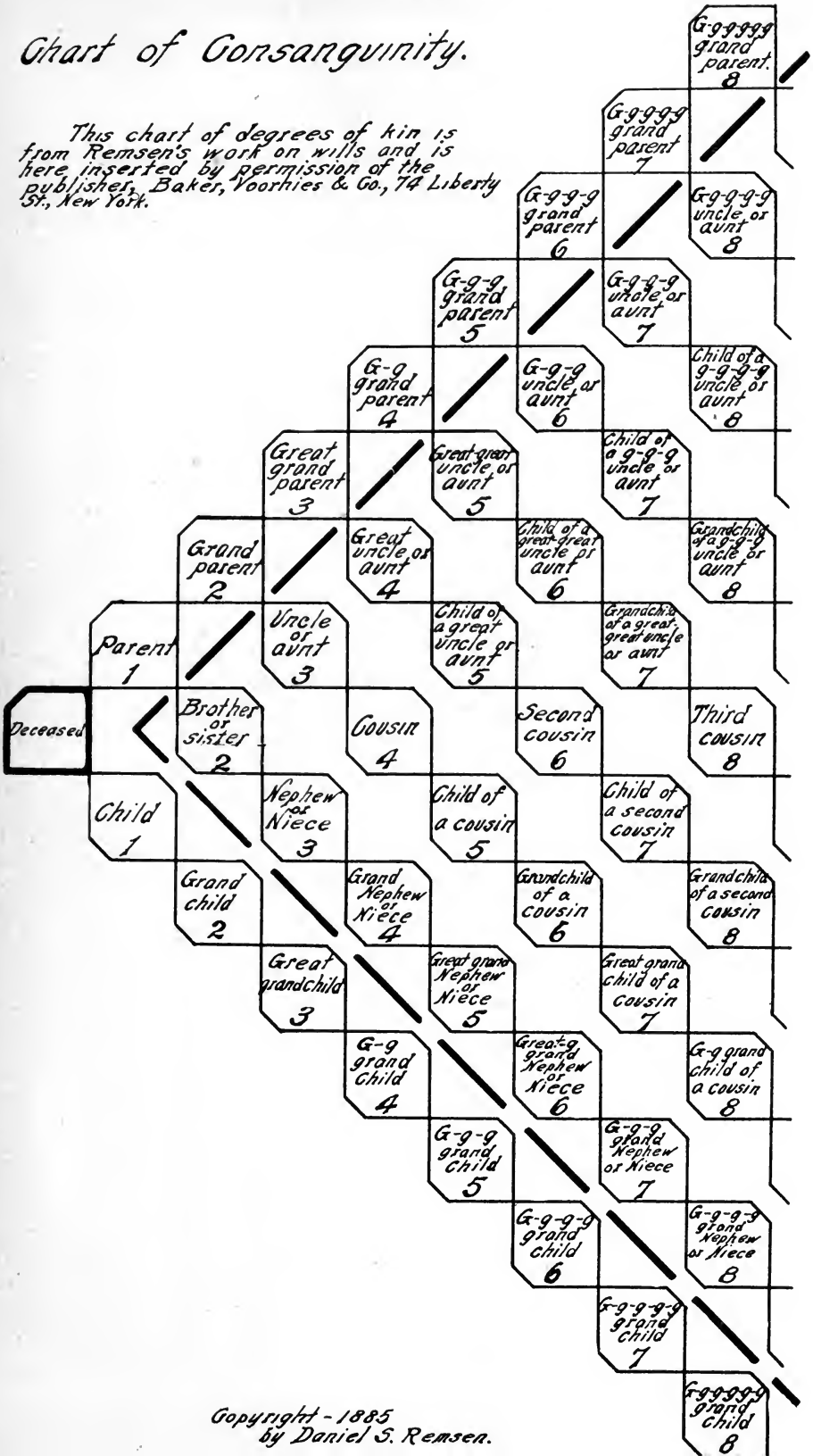
George Brodigan

Secretary of State.

APPENDIX A

Chart of Consanguinity.

This chart of degrees of kin is from Remsen's work on wills and is here inserted by permission of the publishers, Baker, Voorhies & Co., 74 Liberty St., New York.



APPENDIX B

AMERICAN TABLE OF MORTALITY

With Death-Rate per 1,000 and "Expectation of Life"

The "Expectation of Life" is the average number of years which a large number of persons of any given age have yet to live; that is, the sum of the years which all will live divided by the number of persons.

Age	Number Living	Deaths Each Year	Death Rate Per 1,000	Expectation of life	Age	Number Living	Deaths Each Year	Death Rate Per 1,000	Expectation of life
10	100,000	749	7.49	48.72	53	66,797	1,091	16.33	18.79
11	99,251	746	7.52	48.08	54	65,706	1,143	17.40	18.09
12	98,505	743	7.54	47.45	55	64,563	1,199	18.57	17.40
13	97,762	740	7.57	46.80	56	63,364	1,260	19.88	16.72
14	97,022	737	7.60	46.16	57	62,104	1,325	21.33	16.05
15	96,285	735	7.63	45.50	58	60,779	1,394	22.94	15.39
16	95,550	732	7.66	44.85	59	59,385	1,468	24.72	14.74
17	94,818	729	7.69	44.19	60	57,917	1,546	26.69	14.10
18	94,089	727	7.73	43.53	61	56,371	1,628	28.88	13.47
19	93,362	725	7.76	42.87	62	54,743	1,713	31.29	12.86
20	92,637	723	7.80	42.20	63	53,030	1,800	33.94	12.26
21	91,914	722	7.85	41.53	64	51,230	1,889	36.87	11.67
22	91,192	721	7.91	40.85	65	49,341	1,980	40.13	11.10
23	90,471	720	7.96	40.17	66	47,361	2,070	43.71	10.54
24	89,751	719	8.01	39.49	67	45,291	2,158	47.65	10.00
25	89,032	718	8.06	38.81	68	43,133	2,243	52.00	9.47
26	88,314	718	8.13	38.12	69	40,890	2,321	56.76	8.97
27	87,596	718	8.20	37.43	70	38,569	2,391	61.99	8.48
28	86,878	718	8.26	36.73	71	36,178	2,448	67.66	8.00
29	86,160	719	8.34	36.03	72	33,730	2,487	73.73	7.55
30	85,441	720	8.43	35.33	73	31,243	2,505	80.18	7.11
31	84,721	721	8.51	34.63	74	28,738	2,501	87.03	6.68
32	84,000	723	8.61	33.93	75	26,237	2,476	94.37	6.27
33	83,277	726	8.72	33.21	76	23,761	2,431	102.31	5.88
34	82,551	729	8.83	32.50	77	21,330	2,369	111.06	5.49
35	81,822	732	8.95	31.78	78	18,961	2,291	120.83	5.11
36	81,090	737	9.09	31.07	79	16,670	2,196	131.73	4.74
37	80,353	742	9.23	30.35	80	14,474	2,091	144.47	4.39
38	79,611	749	9.41	29.62	81	12,383	1,964	158.60	4.05
39	78,862	756	9.59	28.90	82	10,419	1,816	174.30	3.71
40	78,106	765	9.79	28.18	83	8,603	1,648	191.56	3.39
41	77,341	774	10.01	27.45	84	6,955	1,470	211.86	3.08
42	76,567	785	10.25	26.72	85	5,485	1,292	235.55	2.77
43	75,782	797	10.52	26.00	86	4,193	1,114	265.68	2.47
44	74,985	812	10.83	25.27	87	3,079	933	303.02	2.18
45	74,173	828	11.16	24.54	88	2,146	744	346.69	1.91
46	73,345	848	11.56	23.81	89	1,402	555	395.86	1.66
47	72,497	870	12.00	23.08	90	847	385	454.54	1.42
48	71,627	896	12.51	22.36	91	462	246	532.47	1.19
49	70,731	927	13.11	21.63	92	216	137	634.26	.98
50	69,804	962	13.78	20.91	93	79	58	734.18	.80
51	68,842	1,001	14.54	20.20	94	21	18	857.14	.64
52	67,841	1,044	15.39	19.49	95	3	3	1,000.00	.50

APPENDIX C

Corresponding Sections of Former Nevada Compilations

Three previous compilations of the laws of Nevada have been issued by the State, namely:

"The Compiled Laws of the State of Nevada, embracing Statutes of 1861 to 1873, inclusive, published under authority of law, by M. S. Bonnifield and T. W. Healy, compilers, in two volumes; Carson City, Charles A. V. Putnam, State Printer, 1873." [Authorized by Acts of 1873, page 222.]

"The General Statutes of the State of Nevada, in force from 1861 to 1885, inclusive, with citations of the decisions of the Supreme Court relating thereto, arranged and annotated by Dav. E. Baily and John D. Hammond; Carson City, Josiah C. Harlow, Superintendent of State Printing, 1885." [Authorized by Acts of 1885, page 82.]

"The Compiled Laws of Nevada, in force from 1861 to 1900 (inclusive), with annotations from Volumes I to XXV, of the decisions of the Supreme Court of the State of Nevada, compiled and annotated by Henry C. Cutting of the Nevada Bar; Carson City, Nevada, Andrew Maute, Superintendent of State Printing, 1900." [Authorized by Acts of 1899, page 19.]

Many of the citations of statutes are made by reference to the various sections of the above compilations. For the convenience of those not possessing the same, tables are herewith appended containing a list of said section numbers, and set opposite the same is the corresponding section of the present compilation. In a number of instances, however, the section has been changed by amendment, and thereby made radically different from the former reading. The word "Repealed" after a section number indicates that such section has been repealed. The word "Suspended" following certain sections in the following tables refers to "An act for the relief of insolvent debtors and protection of creditors" (Stats. 1881, p. 124), the operation of which is suspended during the pendency of the national bankruptcy law. (See note, page 189, supra.)

COMPILED LAWS OF NEVADA (Bonnifield & Healy) 1873

C. L.	R. L.	C. L.	R. L.	C. L.	R. L.	C. L.	R. L.
3	Repealed	292	1078	884	498	1104	5041
4	Repealed	294	1080	893	507	1110	5047
9	Repealed	297	1083	897	511	1114	5060
14	Repealed	302	1088	899	513	1127	5039
32	2499	336–338	2750–2752	915	4833	1131	5084
33	2500	350	6227	930	4845	1133	5065
41	5585	363	6240	939	4854	1134	5066
42	5586	364	6241	950	4865	1135	5087
50	5595	367	6244	955	4870	1143	5097
78–85	5849–5856	368	6245	1016–1048	4946–4985	1174	5138
126–140	2213–2231	389–415	5656–5672	1022	4955	1184	5147
141–143	5493–5494	394	5666	1031	4967	1189	5152
144–146	5499–5500	416	5114	1033	4970	1190	5153
151	2155	424	5122	1034	4971	1191	5154
152	2156	426	Suspended	1036	4975	1192	5155
159	2163	434	Suspended	1038	4977	1193	5156
162	2166	461	Suspended	1051	4929	1208	5238
169	2173	464	Suspended	1054	4930	1209	5239
186	2142	557	5922	1055	Repealed	1211	5241
189	2145	589	5944	1067	4986	1212	5237
218	5841	596	5950	1068	4988	1213	5236
220	5843	611	5964	1074	4996	1225	5200
223	5191	612	5965	1077	5001	1251	5315
231	1020	618	5970	1079	5044	1252	5316
235	1024	630	5980	1085	5016	1256	5320
239	1028	680	6025	1087	5018	1257	5321
243	1032	702	6039	1089	5020	1258	5323
250–251	Repealed	729	6059	1092–1097	5023–5034	1259	5322
254	1040	763	6097	1094	5027	1263	5269
283	1069	791	6109	1102	5038	1264	5270
289	1069	833	6149	1103	5040	1266	5273

COMPILED LAWS OF NEVADA (Bonnifield & Healy) 1873—*Continued*

C. L.	R. L.
1267	5274
1268	5275
1280	5287
1282	5288
1292	5298
1295	5301
1309	5501
1321	5512
1323	5518
1338–1341	5538–5541
1388	5325
1390	5327
1391	5329
1392	5330
1393	5331
1395	5336
1396	5337
1398	5339
1400	5359
1401	5346
1402	5346
1403	5347
1406	5351
1407	5352
1408	5353
1409	5354
1410	5355
1411	Repealed
1421	5250
1422	5251
1440	5419
1441	5420
1449	5431
1450	5432
1453	5435
1455	5437
1456	5438
1459	5442
1460	5443
1461	5444
1497	5684
1503	5690
1508	5695
1509	5696
1521	5394
1522	5396
1528	5402
1534	5403
1539	5380
1557	5369
1558	5370
1559	5373
1560	5374
1561	5375
1568	5476
1575	5722
1577	5727
1597	5737
1600	5721
1618	5779–5780
1623	5800
1643	5794
1644	5791
1652	5242
1658	5007
1669	Repealed
1671	Repealed
1673	5003
1674	Repealed
1675	6266
1677	6266
1678	6266
1679	6858
1680	6854
1684	6855
1687	6858
1719	6918
1729	6928
1779	6977
1780	6978
1782	6980
1783	6981
1784	6982
1786	6984
1794	6992
1795	6993
1807	7004
1818	7014
1838	7031
1839	7032
1852	7044
1853	7046
1858	7050
1859	7051
1860	7052
1862	7054
1863	7055
1867	7059
1876	7071
1899	7090
1900	7090
1904	7092
1905	7093
1906	7093
1910	7097
1914	7101
1916	7103
1918	7105
1919	7106
1920	7107
1921	7107
1925	7110
1936	7121
1937	7122
1944	7130
1947	7133
1948	7134
1954	7138
1958	7142
1960	7144
1961	7145
1964	7148
1966	7150
1968	7152
1984	7167
2004	7192
2005	7193
2011	7199
2012	7200
2020	7208
2021	7209
2037	7219
2043	7224
2046	7227
2048	Repealed
2049	Repealed
2051	7230
2073	7257
2075	7263
2076	7264
2080	7269
2105	7295
2109	7299
2113	7303
2123	7311
2167	7355
2169	7357
2170	7358
2171	7359
2206	7395
2207	7396
2208	7397
2211	7400
2212	7401
2229	7485
2278–2286	7435–7443
2299	7465
2300	7466
2301	7467
2303	Repealed
2305	Repealed
2306	Repealed
2316	6275
2322	6385
2323	6386
2324	6387
2327	6390
2329	6392
2350	6442
2352	6412
2353	6413
2365	6634
2373	6649
2380	6654
2383	6663
2441	6695
2450	6754
2464	6291
2466	Repealed
2467	Repealed
2505	1768
2543	1806
2548	1811
2555–2560	1818–1822
2633	2799
2720	Repealed
2730	Repealed
2742	2000
2766	Repealed
2767	Repealed
2773	4128
2778	4133
2811	4157
2812	4158
2813	4159
2816	4162
2821	4167
2822	4168
2915	Repealed
2916	4921
2921	2872
2929–2931	2880–2882
2935	1593
2956	1647
2957	1648
2961	1652
2967	1658
2968	1659
2981	1676
2984	1679
2985	1680
2988	1683
2991	1686
2993	1535
2995	1629
3025	1617
3027	1619
3029	1621
3070	1501
3074	1505
3077	1508
3086	1517
3092	1523
3093	1524
3094	1525
3105	1530
3128	3621
3129	3622
3130	3624
3131	3625
3132	3626
3133	3627
3134	3628
3136	3632
3139	3638
3146	Repealed
3148	3654
3149	Repealed
3153	3659
3154	3661
3155	3663
3156	3664
3158	Repealed
3160	Repealed
3164	Repealed
3186	3733
3195	Repealed
3200	Repealed
3202	Repealed
3209	Repealed
3210	Repealed
3211	3755
3212	3756
3219	Repealed
3221	Repealed
3222	Repealed
3225	Repealed
3228	3705
3230	3706
3231	3707
3232	3708
3233	3709
3238	Repealed
3245	3687
3246	Repealed
3250	3688
3254	Repealed
3288	7463
3292	Repealed
3322	3242
3361	3400
3393	1223
3394	1224
3397	1227
3398	1228
3401	1231

COMPILED LAWS OF NEVADA (Bonnifield & Healy) 1873—*Continued*

C. L.	R. L.	C. L.	R. L.	C. L.	R. L.	C. L.	R. L.
3404	1234	3445	3531	3663	Repealed	3749–3759	2915–2925
3406–3408	1236–1238	3466	3552	3677	4053	3852–3855	4710–4713
3410	1240	3543	Repealed	3678	4054	3857	1981
3425	3511	3544	Repealed	3679	4055	3947	Repealed
3429	3515	3641–3642	Repealed	3680	4056	4240	Repealed
3442	3528						

GENERAL STATUTES OF NEVADA (Baily & Hammond) 1885

G. S.	R. L.	G. S.	R. L.	G. S.	R. L.	G. S.	R. L.
257	5606	1561	1804	2722	5897	3274	5505
267	5618	1659	1812	2724	Repealed	3275	5506
290	3233	1657–1670	2786–2799	2733	5905	3284	5518
327	3199	1658	2787	2734	5906	3295	5534
331	3203	1667	2796	2739	5910	3311	5553
333	3205	1668	2797	2797	5963	3312	5554
337	3209	1737	2891	2798	5964	3318	5560
362–365	4710–4713	1777	4250	2799	5965	3334	5576
380	3920	1779	4129	2800	5966	3342	5656
387	3925	1798	4260	2801	5967	3343	5657
456	3015	1799	4261	2803	5968	3349	5325
459	3022	1807–1831	4154–4178	2805	5970	3350	5326
471	2338	1809	4156	2806	5971	3352	5329
496	5843	1811	4158	2888	6038	3353	5330
499	2155	1812–1831	4159–4178	2897	6042	3354	5331
517	2173	1813	4160	2919	6064	3355	5335
539	2142	1814–1818	4161–4165	2921	6066	3357	5337
542	2145	1854	4349	2922	6067	3358	5338
548	6149	1895	4458	2927	6072	3360	5359
583	6168	1896	4459	2989	6077	3361	5359
646	Repealed	1898	4461	2981	6116	3362	5346
670	4049	1918	3905	3021	5474	3363	5346
679	Repealed	1942	1501	3026	4986	3364–3367	5347–5351
694	4071	1944	1503	3034	4998	3364–3369	5347–5355
757–767	2233–2242	1945	1504	3037	5002	3367	5351
802–829	1219–1241	1949	1508	3039	5008	3402	5423
843	3520	1950	1509	3040	5011	3406	5427
948–974	Repealed	1951	1510	3043	5015	3458	5684
1080	3621	1962	1521	3048	5020	3464	5690
1082	3624	1964	1523	3050	5022	3469	5695
1084	3626	1972	1530	3051	5023	3470	5696
1088	3633	1981–1991	2915–2925	3052	5026	3482	5394
1091	3638	1986	2920	3053	5027	3496	5376
1096	3645	1988	2922	3062	5040	3539	5728
1105	3659	[b]1995		3066	5044	3565	5760
1108	3664	2008	1555	3067	5045	3603	5788
1110	3658	2024	877	3068	5046	3604	5790
1111	3665	2037	890	3069	5047	3612	Repealed
1112	3666	2089	Repealed	3086	5039	3618	5409
1128	Repealed	2116	1604	3090	5084	3632	4951
1129	Repealed	2139	7605	3093	5066	3636	4956
1161	3745	2140	7606	3160	5162	3644	4967
1205	3628	2197	1639	3163	5165	3645	4968
1263	Repealed	2300	4893	3170	5239	3651	4975
[a]1269		2308	4893	3171	5240	3671	6226
1292	3244	2430	4833	3173	5237	3685	6240
1304	Repealed	2464	4865	3212–3215	5315–5318	3687	6242
1314	3363	2485–2494	Repealed	3213	5316	3689	6244
1317	3363	2529	500	3215	5318	3711	5656
1318	3363	2537	506	3216	5319	3722	5667
1368	3387	2538	507	3217	5320	3723	5667
1465	4089	2539	508	3218	5321	3724	5659
1466	4090	2540	509	3219	5323	3736	5680
1469	4092	2542	511	3227	5273	3784	Repealed
1471	4094	2594	1039	3233	5280	3795	4931
1505	1709	2603	1048	3243	5288	3812	2217
1512	1716	2624	1069	3248	5293	3816	2221
1524	1767	2630	1075	3253	5297	3822	2227
1558	1801	2641	1086	3270	5501	3835–3844	5114–5123
1560	1803	2719	5894	3273	5504	3845	Suspended

[a]Declared unconstitutional, 19 Nev. 349. [b]Omitted as unconstitutional.

GENERAL STATUTES OF NEVADA (Baily & Hammond) 1885—*Continued*

G. S.	R. L.	G. S.	R. L.	G. S.	R. L.	G. S.	R. L.
3882	Suspended	4240	7167	4367	7302	4579	6384
3952	6893	4244	7171	4368	7303	4581	6386
4001	6940	4245	7180	4374	7307	4592	6394
4002	6940	4257	7291	4378	7311	4602	6426
4029	6970	4262	7194	4380	7314	4620	6625
4031	6972	4292	7219	4382	7315	4634	6655
4032	6973	4293	7220	4384	7317	4635	6653
4036	6977	4303	7231	4389	7322	4673	6456
4106	7042	4330	7263	4395	7328	4688	6747
4107	7043	4331	7264	4403	7336	4903	2499
4141	7080	4333	7269	4469	Repealed	4931	5846
4214	7142	4349	7286	4561	Repealed	4932	5847
4220	7148	4356	7291	4562	7456	4933	5848
4222	7150	4359	7294	4576	7451		

COMPILED LAWS OF NEVADA (Cutting) 1900

C. L.	R. L.	C. L.	R. L.	C. L.	R. L.	C. L.	R. L.
208	2422	1542	2952	2703	1078	3259	5206
209–214	2423–2428	1588	1770	2705	1080	3277	5227
210	2424	1624	1806	2715	1090	3279	5230
221	2435	1636	1818	2718	1093	3284	5235
224	2438	1640	1822	2730	1098	3285	5315
228	2442	[a]1642–1645		2736	1635	3286	5316
271	3233	1693	1833	2776	2900	3290	5320
281	2456	1782	2765	2803	5874	3292	5322
282	2457	1790	2773	2805	5876	3300	5273
283	5606	1793	2776	2826	5897	3303	5276
325	3224	1804	2787	2834	5905	3304	5277
327	3226	1814	2797	2869	5940	3311	5284
341–345	1982–1986	1815	2798	2870	5941	3341	5313
346	1987	1816	2799	2886	5957	3351	5514
349	1990	1987	4363	2893–2896	5964–5967	3364	5530
437	3019	2040	4411	2896	5967	3396	5565
448	3005	2044	4414	2898	5969	3422	5325
454	3051	2111	1508	2899	5970	3425	5327
459	3056	2116	1513	2909	5980	3426	5330
479	3015	2124	1521	2943	6014	3427	5331
504	5840	2137	1555	2951	6022	3431	5338
507	5843	2242	1645	3038	6109	3432	5339
550–553	2142–2145	2267	7611	3041	6112	3434	5340
552	2144	2296–2310	1593–1607	3043	6114	3435	5346
780	2335	2299	1596	3055	6126	3436	5346
781	2336	2306	1603	3067	6138	3440	5351
783	2337	2338	Obsolete	3095	5474	3443	5354
971	3511	2348	1640	3096	4943	3446	5360
1079	3619	2453	2850	3116	5015	3472	5420
1084	3624	2457	1994	3123	5022	3474	5419
1093	3633	2459	1996	3125	5026	3481	5429
1095	3635	2460	1997	3126	5027	3522	5417
1096	3636	2462	1999	3133	5037	3531	5684
1098	3638	2468	2005	3134	5038	3537	5690
1106	3646	2471	2008	3135	5040	3538	5691
1118	3658	2474	2011	3139	5044	3542	5695
1124	3664	2506	2043	3142	5047	3543	5696
1149	3689	2507	2044	3149	5063	3555	5394
1178	3718	2508	4828	3160	5075	3556	5396
1187	3727	2513–2515	4833–4835	3163	5084	3557	5397
1205	3745	2518	4838	3166	5066	3564	5404
1208	3748	2528	4848	3218	5147	3581	5387
1211	3751	2531	4851	3219	5148	3592	5370
1223	3763	2545	2865	3225	5154	3593	5373
1224	3764	2565	4885	3226	5155	3601	5482
1232	3818	2571	4906	3227	5156	3602	5476
1301	3363	2573	4922	3234	5163	3603	4947
1303	3365	2621	507	3241	5193	3604	5714
1338	Repealed	2625	511	3245	5241	3607	5771
1428	7569	2663	1038	3246	5237	3622	Repealed
1429	7570	2664	1039	3250	5197	3652	5779
1440	7581	2669	1044	3255	5203	3676	5788

[a]Declared unconstitutional, 28 Nev. 230.

COMPILED LAWS OF NEVADA (Cutting) 1900—*Continued*

C. L.	R. L.
3677	5790
3679	5792
3694	5006
3707	4952
3708	4954
3709	4955
3710	4956
3718	4967
3722	4970
3727	4977
3735	Repealed
3736	Repealed
3761	6244
3809	Repealed
3858	5331
3860	5317
3862	5321
3863	5321
3864	5321
3869	4931
3877	4939
3881	2213
3885	2217
3889	2221
3983	5647
3984	5648
3986	6266
3988	6266
3996	6856
4038	6894
4051	6907
4055	6911
4060	6917
4073	6930
4079	6937
4121	6977
4136	6992
4149	7004
4150	7005
4167	7020
4177	7029
4199	7050
4200	7050
4201	7052
4203	7054
4206	7057
4208	7059
4208–4210	7059–7061
4209	7060
4224	7078
4225	7079
4240	7090
4241	7090
4271	7115
4305	7148
4307	7150
4325–4327	7167–7169
4330	7180
4341	7203
4361	7208
4362	7209
4364	7212
4377	7219
4386	7227
4390	Repealed
4391	7230
4392	7332
4413	7257
4415	7263
4418	7266
4438	7290
4439	7291
4440	7291
4444	7294
4445	7295
4476	7324
4554	Repealed
4555–4560	7445–7450
4645	7463
4646	Repealed
4655	6270
4656	6271
4667	7451
4672	6386
4687	6399
4701	6413
4710	6624
4711	6625
4712	6626
4713	6634
4714	6427
4715	6638
4719	6648
4734	6665
4751	6377, 6801
4788	6827
4802	6843–6844
4804	6653
4840	6339
4860–4867	6619–6623
4866	Repealed
4879	6640
5007	1496
5008	1497
5010	1499

APPENDIX D

Lists of Omitted Acts

The following acts have been omitted as obsolete, or nearly so, or are not of sufficient general interest to justify publication:

For the permanent location of the seat of government at Carson City. Stats. 1861, 54.

Relative to public records. Stats. 1861, 285, amended Stats. 1862, 94.

Authorizing collection of toll on roads already constructed within the Territory of Nevada. Stats. 1861, 309.

Empowering corporations and associations for mining to sue individual members. Stats. 1862, 72.

In relation to the records of the probate courts of Carson and other counties of the territory. Stats. 1862, 91.

To levy a tax on gross proceeds of toll roads and bridges. Stats. 1862, 112.

To issue bonds and coupons. Stats. 1862, 118.

To legalize the election and official acts of the several probate judges, and prosecuting attorneys in the territory. Stats. 1864, 49.

To issue bonds and coupons. Stats. 1864, 90, amended Stats. 1864, 136.

To provide the several county clerks of the territory with a seal. Stats. 1864, 148.

To legalize proceedings under the laws of Utah Territory prior to the organization of Nevada Territory. Stats. 1864, 152.

Authorizing issuance and sale of certain state bonds. Stats. 1864–5, 82.

To provide for the payment of the compensation of district judges. Stats. 1864–5, 95.

Providing for the transfer of judgments, actions and proceedings from the several probate courts of the territory to the district courts of the state. Stats. 1864–5, 123.

To provide for carrying out in part the provisions of section 7 of article 17 of the constitution. Stats. 1864–5, 155.

To provide for the disposition of the 16th and 36th sections of the public lands. Stats. 1864–5, 173, amended Stats. 1866, 194.

To provide for the removal of certain incorporated companies to this state by their own election. Stats. 1864–5, 186.

In relation to toll roads and bridges. Stats. 1864–5, 352.

To provide for the selection and location of forty sections of unappropriated public lands donated to the state. Stats. 1864–5, 366.

An act supplemental to an act to provide for carrying out in part the provision of section 7 of article 17 of the constitution. Stats. 1864–5, 367.

To provide for the selection and location of 500,000 acres of lands donated to this state. Stats. 1864–5, 376.

An act amendatory of an act to provide for the payment of the compensation of district judges. Stats. 1864–5, 398.

Authorizing issuance and sale of certain state bonds. Stats. 1866, 47.

To provide a fund for the payment of salaries of district judges. Stats. 1866, 160, amended Stats. 1869, 98.

Authorizing a state loan. Stats. 1867, 50, amended Stats. 1867, 65.

To provide for the selection, sale and reclamation of the swamp and overflowed lands belonging to this state. Stats. 1869, 190.

Authorizing a state loan. Stats. 1871, 80, amended Stats. 1873, 94.

To authorize a state loan. Stats. 1871, 80, amended Stats. 1873, 95.

For the payment of the salaries of district attorneys. Stats. 1873, 133.

To provide for the payment of the state debt proper. Stats. 1875, 48, amended Stats. 1879, 17.

To provide for the purchase for the benefit of the state school fund of the bonds of this state known as the territorial bonds. Stats. 1877, 191, amended Stats. 1879, 15.

Authorizing a state loan. Stats. 1881, 87.

Fixing price of lands within the limits of the Central Pacific Railroad grant. Stats. 1881, 115, amended Stats. 1883, 42.

To appropriate funds for the relief of the several orphan asylums of this state. Stats. 1881, 122.

Fixing the salaries of certain county officers. Stats. 1883, 114.

Relating to the unpaid salaries of county officers. Stats. 1885, 33.

To establish and provide for an Indian school. Stats. 1887, 23.

To give consent to the annexation of additional territory. Stats. 1887, 36.

Concerning operations in the boot and shoe shop of the Nevada State Prison. Stats. 1887, 93.

Authorizing a state loan. Stats. 1887, 109.

Authorizing a state loan. Stats. 1889, 86.

Authorizing a state loan. Stats. 1893, 111, amended Stats. 1895, 79, Stats. 1897, 86.

To authorize the board of regents of the state university to lease and purchase land for an experiment station farm. Stats. 1897, 164.

An act supplemental to an act authorizing a state loan. Stats. 1899, 106.

Authorizing a state loan. Stats. 1901, 83.

Providing for the appointment and payment of a state agent at Washington, D. C., to attend to the certification of lands granted by Congress to the state, and such other business as may be referred to him under the authority of the governor. Stats. 1901, 85.

Authorizing the adjustment and payment of certain claims against counties in this state. Stats. 1901, 93.

An act supplemental to an act authorizing a state loan. Stats. 1903, 98.

Relative to proving up of Indian war and Indian depredation claims. Stats. 1903, 205.

An act supplemental to an act authorizing a state loan. Stats. 1905, 196.

Providing for a state loan and its repayment by issuing certain bonds therefor. Stats. 1909, 184.

The following acts have been omitted for the reason that by the terms thereof it appears that they were not intended to be of general application throughout the state:

An act to regulate the fees and compensation of justices of the peace and constables in townships having a certain number of voters at the general election of 1882. Stats. 1883, 54.

An act fixing the salaries of county officers in certain counties of this state and other matters relating thereto. Stats. 1883, 73.

An act defining the duties and privileges of boards of county commissioners and members of boards of county commissioners relative to the care of indigents, and to repeal an act in relation thereto, approved February 14, 1881. Stats. 1883, 107.

An act requiring county commissioners to give bonds and providing additional security for the proper disbursement of public money. Stats, 1883, 109.

An act in relation to the salaries of county assessors. Stats. 1885, 13.

An act relating to and consolidating certain county officers in the State of Nevada. Stats. 1887, 77, amended Stats. 1889, 23.

An act to provide for the appointment of deputy county assessors and to provide for their compensation. Stats. 1887, 77.

An act consolidating certain county offices in the State of Nevada, and fixing the compensation of the officers thereof. Stats. 1887, 85.

An act authorizing the board of county commissioners of counties having a certain number of votes at the general election of 1890 to apportion county revenues. Stats. 1891, 126.

An act to regulate the fees and compensation of justices of the peace and constables in townships having a certain number of votes at the general election in 1890. Stats. 1891, 127.

An act to authorize the boards of county commissioners of certain counties in the State of Nevada to cut and change the channels and courses of rivers and waterways of said counties for the purpose of preventing damage to and destruction of taxable property in said counties by the overflow of water from such rivers and waterways, and other matters relating thereto. Stats. 1893, 68.

An act to provide revenue for the support of certain counties of the State of Nevada. Stats. 1893, 116.

An act to empower boards of county commissioners to lease county roads and to fix and authorize the collection of tolls thereon. Stats. 1893, 121.

An act in relation to public roads and highways. Stats. 1893, 122.

An act to provide revenue for the support of certain counties in the State of Nevada and matters pertaining to the apportioning and disbursement thereof. Stats. 1897, 35, amended Stats. 1899, 39, Stats. 1901, 71.

An act empowering the boards of county commissioners in certain counties of this state to classify, regulate and fix the price of licenses for county purposes. Stats. 1899, 59.

The following acts have been omitted because they were expressly declared unconstitutional in the case cited after the title of the respective acts:

An act entitled an act authorizing the county commissioners of the several counties of this state to appoint additional justices of the peace. Stats. 1867, 87. State, ex rel. Bull, v. Snodgrass, 4 Nev. 524.

An act to aid the Nevada Benevolent Association in providing means to erect an insane asylum. Stats. 1871, 110. Ex Parte Blanchard, 9 Nev. 101.

An act to define and establish the boundary lines of Eureka County. Stats. 1875, 66. State, ex rel. Chase, v. Rogers, 10 Nev. 250.

An act to establish and maintain a state asylum for the indigent, poor, and maimed of this state. Stats. 1879, 142. State, ex rel. Keyser, v. Hallock, 14 Nev. 202.

An act to aid the Nevada Benevolent Association in aiding in providing means for the care and maintenance of the insane of Nevada and for other charitable purposes. Stats. 1881, 166. State, ex rel. Murphy, v. Overton, 16 Nev. 136.

An act providing for the licensing of traveling merchants and merchants doing business through soliciting agents, commonly known as drummers. Stats. 1885, 36, amended Stats. 1885, 69. Ex Parte Rosenblatt, 19 Nev. 439.

An act prescribing the qualifications of electors and modifying the oath for the registration of voters in conformity therewith. Stats. 1887, 106. State, ex rel. Whitney, v. Findlay, 20 Nev. 198.

An act concerning grand juries, defining their number and prescribing the manner in which they shall be drawn. Stats. 1893, 31. State v. Hartley, 22 Nev. 353.

An act to incorporate Storey County and provide for the government thereof. Stats. 1895, 73. Schweiss v. District Court, 23 Nev. 226.

The "Act for the relief of insolvent debtors and protection of creditors" (Stats. 1881, 124, amended Stats. 1883, 94, Stats. 1885, 29, Stats. 1887, 94, 110) is omitted because the operation of the same is suspended during the pendency of the national bankruptcy act. See note, page 189.

INDEX

The numbers refer to sections unless otherwise indicated.

Desired sections may be found also by reference to the alphabetical list of titles and table of contents in the front of each volume and to the schedules under titles.

A

Abandonment, child abandoned may be adopted without consent of parent 5831.
Consent of parent adjudged guilty of, when not necessary on adoption of child 5826.
Of homestead 2143.
Of way by railroad, land reverts 3531.
Of wife or child, penalty 6446.
Abatement, action does not abate by death, disability or assignment, when 5004.
Abatement of nuisance. See Nuisance.
Action for by county commissioners 1562.
In unincorporated town 919, 912.
In unincorporated town, action for recovery of expense 921.
Judgment, damages 5504.
Within county, commissioners to order, district attorney to bring action 1562.
Abbreviations, permissible in court proceedings 4885.
Abduction, defined, jurisdiction, penalty 6415, 6419, 6421.
Abolish or consolidate county offices, legislature may (Nev. Const. art. iv, sec. 32) 290.
Abortion, defined, attempts at, trial, evidence, penalty 6403, 6405, 6447, 7177.
Absence, from state of judicial officer, penalty for (Nev. Const. art. vi, sec. 17) 332.
Leave of forbidden to judges 332, 4868.
Leave of not to be granted by legislature to judicial officer (Nev. Const. art. vi, sec. 17) 332.
Leave of to county officers 1566-1568.
Leave of to state employees 4109.
Of attorney, any questions may be heard on law day in district court, D. C. rule v, p. 1426.
Of judges, when forfeiture of office 332, 4868.
Of justice of the peace, another may attend in his behalf 5811.
Or inability of governor and lieutenant-governor, president pro tempore of senate to act (Nev. Const. art. vi, sec. 17) 332.
When prevents running of statute of limitations 4975.
Absent heirs, attorney for 5872, 6047.
Absent members of legislature, attendance may be compelled (Nev. Const. art. iv, sec. 13) 271.
Abstract of judgment in justice's court filed in recorder's office creates lien on land 5782.
May be obtained and entered in docket of district court and execution issued in other counties 5779, 5780, 5781.
Abstract of public records may be made 3232.
Abstract of testimony in statement on appeal, when must be filed in supreme court 5333.
Abstract of title, in actions for partition, how made, verified and corrected 5545.
In actions for partition, when notice of must be filed 5544.
Acceptance of bills of exchange 2679-2689.
Notary public may demand 2747. See Negotiable Instruments.
Accessory. See Accomplice.
Defined, penalty 6275, 7071, 7072.
Indictment, trial, conviction 6276, 7071, 7072.
Jurisdiction of 6918.
Accident insurance companies 1106, 1310-1329. See Corporations.
Accidents, duty of railroads to notify commission, investigation of 4578.
In mines, notice to be given, investigation by state inspector 4207.
Serious, public utilities, notice to commission 4541.
To employees, notice to employers 1918.
Accommodation party to negotiable instrument liable, when 2576.
Accomplice. See Accessory.
Corroboration of testimony 7180.
Account, copy of as complaint in justice's court 5736.
Copy of may be ordered delivered and filed 5068.
Court may hear evidence or order reference after default 5236.
Of securities and investments in action for partition to be kept for inspection by clerk 5569.
Open for goods, wares or merchandise, action may be brought upon within four years 4967.
Store, action for any article charged may be brought within four years 4967.
When inspection and copy may be ordered in action in justice's court 5769.
When statute of limitations begins to run from last item 4969.
Accounts, contents of numerous may be proved 5417.
Limitations of actions on 4967.
Accountant, expert, board of examiners to employ when, by county or state 2855-2860.
Accounting, action for when adverse claim made 5479.
Reference may be ordered 5229, 5231.
Accusation, prosecution by 7000.
Right to be informed of nature of (U. S. Const.) 176.
Accused, not to be compelled to be a witness against himself, right to appear and defend in person or by counsel (Nev. Const. art. i, sec. 8) 237.

Acknowledgment, by father, illegitimate child becomes legitimate from birth 5833.
Must be in writing to prevent bar by statute of limitations 4985.
Of consent to adoption of children, how made 5831.
Of satisfaction of judgment 5279.
Acknowledgment of written instrument. See Conveyances.
By commissioners of deeds 1000-1003.
By party making mark must have two witnesses 5475.
Certificate of to have court seal attached 4879.
False certificate forgery, penalty 6669.
Form and certificate of 1022-1026.
Good where taken, valid 1025.
Identity of person making 1023.
Judge and clerk of district court may take 1020, 4883.
Justice of the peace may take 1020, 4883.
Justices and clerk, supreme court, may take 1020, 4883.
Notary public may take 1020, 2749, 2764.
Of conveyances 1017-1026.
Of wife, form 2143, 2186-2188.
Of wife, to convey realty 2186.
Of wife's power of attorney 2187.
Officers taking to keep record 1098, 1099.
Record of, failure to keep, penalty 1098, 1099.
Recorder may take 1629.
Taken out of state 1096, 1097.
What officers may take 1001, 1020, 1629, 4883.
Who may make 1017-1020.
Acquittal, court may advise, jury not bound by 7202.
Acre of land defined 4795.
Acting governor, who becomes, when (Nev. Const. art. v, sec. 18) 311, 2807, 4250.
Action, criminal, record of what included in 7263.
Actions. See Civil Practice, Criminal Practice, Constitution, State, Estates of Deceased Persons, Suit 1508, 1523, 5013, 5023.
Civil, venue 5011-5015.
Controversy submitted without 5252-5254.
Criminal, if offense amounts to felony supreme court has appellate jurisdiction on questions of law alone (Nev. Const. art. vi, sec. 4) 319.
How commenced 5016-5034.
Law and equity administered in same (Nev. Const. art. vi, sec. 14) 329, 4943.
Limitations of. See Civil Practice 4946-4985.
One form of civil (Nev. Const. art. vi, sec. 14) 329, 4943.
Acts, of bankruptcy, what are 545.
Of Congress. See Bills.
Of Congress, states to give full faith and credit to (U. S. Const.) 159.
Of Congress, supreme law of land (U. S. Const.) 168.
Of legislature, authentication of under act of Congress 526.
Of Territory of Nevada in force at time of admission of state to remain in force until repealed (Nev. Const. art. xvii, sec. 2) 386.
Pertaining to elections prohibited and punished. See Elections 1705-1914.
Relating to civil practice applicable to suits for delinquent taxes 3666.
Acts of bankruptcy—continued.
Repealed by civil practice act, schedule 5821.
Actual bias of juror defined 7147.
Adjournment. See Civil Practice.
Entry regarding to be made in justice's court docket 5800.
In justice's court, not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
May be had on hearing in contempt proceedings 5402.
Not granted in action for forcible entry or unlawful detainer, when admission that evidence would be given 5598.
Of court, after submitting criminal action to jury, effect 7211, 7212.
Of court, when may be made by sheriff or clerk 4872.
Of legislature by governor (Nev. Const. art. v, sec. 11) 304.
Of legislature from day to day (Nev. Const. art. iv, sec. 13) 271.
Of legislature, neither house to adjourn for more than three days or to other place without consent of other house (Nev. Const. art. iv, sec. 15) 271.
On amendment of pleadings in justice's court if necessity for be shown under oath, costs 5742.
When civil action to be continued without in justice's court 5756.
Adjudication in bankruptcy 560.
Adjutant-general, aide-de-camp to rank as colonel 4023.
Assistants, to appoint 3993.
Board to investigate state police, member of 4281.
Bond of 3996.
Chief of governor's staff 3993.
Chief of ordnance 3993.
Commissary-general 3993.
Commissions, to attest 3967.
Duties and rank of, ex officio offices 3993-3995.
Duties of relative to state police 4280, 4294-4298.
Ex officio commissary of state police 4294-4298. See State Police.
Governor to appoint, when 4039.
Inspector-general 3993.
Lieutenant-governor ex officio 4250 (Nev. Const.) 310.
Mileage of 3992.
Militia, annual drill to call out for 4022.
Must verify records, when certified by him are evidence 4080.
Property, duty as to 4040, 4043.
Quartermaster-general 3993.
Rank of brigadier-general on governor's staff 3993, 4004.
Staff of 4005.
To receipt for property 4043.
Ad litem, guardian, how appointed 4993, 5726. See Guardians, Civil Practice, D. C. rules xxix-xxxi, p. 1430.
Administration. See Estates of Deceased Persons, Civil Practice.
Community property not subject to if wife pays or secures indebtedness 2165.
Judgment rendered after death of party payable in course of 5272.

Administration—continued.
Of estates of deceased persons, payment of court fee upon commencement of proceeding 2030.
Special letters of may be granted by district judge in vacation 4850.
Administrator. See Estates of Deceased Persons, Public Administrator, Civil Practice.
Action against on rejected claim to be brought within 30 days after notice 5968.
Action for death by wrongful act 5648.
Action not to be maintained on claim against estates of deceased persons unless claim has been filed 5972.
Allegation of as a legal conclusion, when sufficient 5078.
Costs in action by or against and how chargeable 5385.
Duty to commence action to set aside fraudulent conveyance made by decedent, application and payment of costs by creditors 6029, 6030.
Limitation of action to recover estates sold by or to set aside sale 4864.
May have execution issued on judgment after death of party 5285.
May make conveyance under contract of decedent 6147.
May sue without joining beneficiary 4987.
Public 1615-1627.
Time within which action may be brought by or against 4977, 4978.
When may have execution stayed on appeal without giving stay bond 5352.
With will annexed, powers 5890.
Administratrix, marriage of extinguishes authority 5898.
Admission, of counterclaim by failure to demur or reply 5058.
Of genuineness of instrument copied into complaint if no verified denial 5062.
Of making of note or instrument in justice's court unless denied by verified answer 5770.
Of Nevada, proclamation announcing 430.
Of service of summons 5032.
That evidence alleged in affidavit on motion for continuance would be given allows trial to proceed 5202.
That evidence would be given in action for forcible entry or unlawful detainer avoids continuance 5598.
That evidence would be given when avoids postponement in civil action in justice's court 5759.
Adoption of children. See Civil Practice, Juvenile Court Law.
Act relating to does not apply to Mongolians 5834.
Child adopted entitled to protection, support and inheritance 5826, 5829.
Child adopted may take name of persons adopting 5830.
Children adopted and persons adopting bear legal relation of parent and child 5830.
Consent, how given, agreement, how executed, procedure 5826.
Guardian, when may consent to adoption, 746.
Habitual drunkard, consent of not required, when 5828.
Adoption of children—continued.
How consent of nonresident parent to be executed and acknowledged 5831.
Husband and wife not lawfully separated cannot adopt without consent of other 5827.
Judge to file papers, have order entered in court minutes and recorded in office of county recorder, notice to the world 5832.
Proceedings before district judge, order and rights of adopted child 5829-5831.
Requirements 5825.
Schedule of sections 5825.
When consent of absent parent must be obtained or need not be obtained 5831.
When consent of parent of abandoned child not necessary, custodian or next friend to be cited and examined 5831.
When illegitimate child deemed adopted by consent of father 5833.
When not to be had without consent of parents, child over 12 years must consent in writing 5828.
Adoption of constitution, abstract of vote on 224, 225.
Adoption of constitution of United States by state (Nev. Const. art. i, sec. 2) 277, 231.
Adulterated foods, drugs or liquors, sale of, penalty 3486, 4511, 6916.
Adulterated milk, sale of, penalty 6536-6539.
Adulteration of drugs, penalty 4511.
Of foods, drugs and liquors, act to prevent 3486-3510. See Pure Food and Drug Law.
Adultery, as affecting division of community property upon decree of divorce 2166.
Consent of parent adjudged guilty of or divorced for, when not necessary on adoption of child 5828.
Defined, penalty 6458, 6460.
Of husband, what disposition of property may be made if wife obtains divorce 5843.
Since marriage unforgiven is ground for divorce 5838.
Advancements 6089, 6120-6124, 6218. See Estates of Deceased Persons, Wills.
Adverse action, for mining claim on application for patent, what necessary to be shown 5526.
Adverse claim, action to determine 5479.
To land under right of way for railroad, payment into court 3541.
To real property, action to determine, how and by whom brought 5522.
To real property, service of summons in action to determine 5523.
Adverse claimant to mine on application for patent to bring suit 2384.
Adverse possession not established unless taxes are paid 4960.
Of one lot not deemed possession of other lots of same tract 4956.
Of real property for fifteen years as ground for action 5522.
Requisites of 4956-4961.
Under claim of title without written instrument 4958-4960.
Under written instrument, effect 4956
Advertising, for divorce business, penalty 6462.
Official 2867, 4481.
On property of another, penalty 6753.
To prevent conception, penalty 6451-6455.

Advising suicide, penalty 6381-6383.
Advocating anarchy, penalty 6614, 6617, 6618.
Affidavits (civil action) 5450-5453. See Civil Practice.
Affidavits (criminal action), entitlement 7414.
For change of venue 7116.
For new trial 7235.
For search warrant 7414.
Affidavits. See Civil Practice.
Before judge out of state, genuineness of signatures to be certified by clerk under seal 5453.
For taking deposition in state 5455.
For use in this state, before whom made 5450.
Made in foreign country, by whom taken 5452.
Made out of state, how taken in other state or territory 5451.
May be taken by judges and clerks of supreme and district courts 4883.
Notary public may take 2750.
Of annual work on mine, recorded or certified copy when prima facie evidence 2431.
Of publication of notice relating to partnership is prima facie evidence 2914.
Of service of notice for presentation of claims against bank in hands of bank examiner 671.
Of service of notice upon persons holding claims against closed bank 671.
Regarding nonpayment for annual work on mine by delinquent coowner, when prima facie evidence 2432.
Taken before notary public may be used before any court, judge or notary public 2750.
That controversy is real when submitted without action 5252.
That district judge is absent from state or unable to act, as ground for having another district judge extend time, D. C. rule 43, p. 1431.
That person is 65 years of age exempts from jury 4941.
"Affinity," when signifies connection existing in consequence of marriage between each of the married persons and blood relative of the other 5475.
Affirmation, false deemed perjury 5448.
In lieu of oath (Nev. Const. art. xv, sec. 2) 370.
Included in oath 5475.
May be taken by witness instead of oath, when 5448.
Oath, form of to jury 5208.
Or official oath (Nev. Const. art. xv, sec. 2) 370.
Who may administer 5483.
Affray, defined, penalty 6594.
Age, exemption from jury 4941.
Of consent 6442.
Of consent, action for annulment of marriage of person under 2357.
Of discretion 6268, 6269.
Of majority, male and female 431, 2339, 6154.
Orphans' act 4095.
Qualifications of elector (Nev. Const. art. ii, sec. 1) 250.
Qualifications of president (U. S. Const.) 144.
Age—continued.
Qualifications of representative (U. S. Const.) 89.
Qualifications of state officers (Nev. Const.) 296, 310, 2766.
Qualifications of United States senators (U. S. Const.) 95.
Aged and infirm indigents, relief to be provided (Nev. Const. art. xiii, sec. 3) 367.
Agent or employee, violation of duty, penalty 6786.
Agent, registry for elections 1705-1719. See Elections, and Justice of the Peace.
Agents, resident, of corporations 119, 1120. See Corporations.
Under pure food and drug act, how appointed, compensation 3507.
Aggravation or mitigation of judgment, in criminal action, court may hear facts relative to 7254, 7255.
Agriculture, agricultural college. See Agricultural College.
District associations 432-444.
Experiment farms 465-476.
Experiment station 456-464.
Improvement to be encouraged 353.
Society, state 3916-3932. See full index State Agricultural Society.
Artesian wells, bounties for 702-717.
College of. See Agricultural College.
Extermination of pests 454, 455.
License for sale of products, exemption 445.
Products exempt from license 445.
State bureau of 4486-4494. See full index State Bureau of Industry, Agriculture and Irrigation, post.
Water and irrigation 4672-4791. See full index Water, post.
Agricultural college. See University of Nevada.
Act of Congress in aid of 4655.
Established at University (Nev. Const.) 356-360, 4639, 4656.
Investment of funds by regents, instruction in (Nev. Const. art. ii, sec. 4) 356.
Land grants to 3182, 3186, 3191, 3192.
Agricultural district associations, aid by counties 440-444.
Funds, how used 442.
Funds, not for racing 441.
Funds, limited 443.
Directors of 434-437.
Classified 437.
Governor to appoint 435.
Districts established 432.
Fiscal year 437.
Formation of 433.
Officers of 434.
Reports to governor 439.
State institution 438.
Agricultural experiment farm, at Logan, Clark County 465-470.
Board of control and meetings, expenses 468-470.
Governor to appoint 470.
At Pleasant Valley, Elko County 471-476.
Board of control, governor appoint 476.
Qualifications, expenses and meetings 474-476.
Agricultural experiment station 456-464.
Acceptance federal aid 460, 461, 464.

Agricultural experiment station—continued.
Board of control 457-463.
Federal act establishing 4655.
Funds, disposition of 458-462.
Pure food and drug law, adulteration defined 3489.
Adulteration or misbranding food, drugs, liquors, import or sale of, penalty 3486.
Agent, appointed, compensation 3507.
Analyses contested, hearings on, publication, chemist, duties concerning 3503.
District attorney, duties concerning 3505, 3509.
Drugs, adulterated, defined 3492.
Defined 3490.
Standard of purity defined 3491.
Employer responsible for act of employee, when 3510.
Experiment station director, report to district attorney 3504.
May buy samples and procure information, when 3502.
Records to keep and publish 3506.
To analyze and examine samples 3498, 3499.
To make rules 3497.
Food defined 3487.
Food seized, destroyed, when 3508.
"Misbranded" drugs, liquors, food defined 3493.
"Mislabeled," "misbranded" food, liquor, drugs, when deemed 3494.
"Package" defined 3495.
Purity of food, drugs, liquor, standard of defined 3488.
Purity, retailer not punishable when wholesaler guarantees 3509.
Possession prima facie evidence 3496.
Retailer not punishable when wholesaler guarantees purity 3509.
Rules, experiment station to make 3497.
Samples, analysis and examination of, experiment station to make 3498, 3499.
Divided and sealed, when 3499.
Experiment station may buy, when, refusal to sell to or give information, penalty 3502.
Suspected food, drug, liquor, sheriff to obtain, when 3500.
Sheriff, fees 3501.
Sheriff to obtain samples of suspected food, drug, liquor, when 3500.
Violation of act, misdemeanor, penalty 3508.
Reports, publication of 459, 463.
University regents to control 457-463.
Aid of state to certain corporations prohibited (Nev. Const. art. viii, sec. 9) 346.
Aiding prisoner to escape, penalty 6340.
Aiding suicide, penalty 6381-6383.
Alias summons 5017, 5729. See Civil Practice.
Alienation pending suit does not prejudice action for recovery of real property 5521.
Aliens. See Naturalization, Chinese.
How may become citizens of United States 2517.
May be naturalized by United States courts and state district court 2516.
Not to be naturalized within 30 days prior to general election 2519.
Aliens—continued.
Rights of guaranteed (Nev. Const. art. i, sec. 16) 245.
When lost record relating to naturalization may be restored 5640.
Alimony and divorce 5838-5845. See Divorce.
Alimony pendente lite, husband may be ordered to pay 5843.
Allegiance, paramount (Nev. Const. art. i, sec. 2) 231.
Alleys, eminent domain may be exercised for 5606.
Alphabetical index, to docket, in justice's court, required to be kept 5802.
Altering or destroying evidence, penalty 6358.
Amendment. See Civil Practice, Constitution.
Amendments of indictment, when allowed 7060.
Amendments to constitution, article on (Nev. Const.) 383, 384.
How adopted, limitation (U. S. Const.) 166.
Amendments to pleadings (civil) 5080-5086, 5742. See Civil Practice.
American eagle, killing, penalty 6811.
American flag, desecration of, penalty 6603.
American independence, declaration of 65-70.
American Indian or red race, marriage with white race unlawful, penalty 6514.
Analysis of foods and drugs 3498, 3499.
Contested hearing 3503. See Pure Food and Drug Law.
Analysis of minerals at university. See University of Nevada.
Anarchy defined 6613-6618.
Ancient Free and Accepted Masons, incorporation of 1418-1423.
Ancient Order of Hibernians, incorporation of 1410-1415.
Animals. See Live Stock, Marks and Brands, Bureau of Animal Industry, Sheep Commission, State Veterinarian.
Brand prima facie proof of ownership 7172.
Cruelty to 1378-1380, 6815.
Diseased, bringing into state 2995.
Exposing 6530-6532, 6815.
Sale of 2995.
Dog, vicious unlawful to keep 6441.
Domestic, working without consent 6744.
Driving or removing from range 6640, 6642.
Estray, to impound, book of, fees 2261, 2265, 2275, 2282, 2329-2331.
False certificate of registration 6746.
False representation of breed 6746.
Killing, maiming, disfiguring or poisoning 6640, 6747, 6753.
Larceny of, ranging in several counties 6914.
Liens on by ranchmen and others 2332, 5499-5500.
Noxious, bounties for 718-727.
Running at large in city or town 794 (71), 2261.
Stealing or unlawfully branding or defacing mark or brand 6640.
Vicious, allowing at large 6591.
Vicious dog unlawful to keep 6441.
Vicious or dangerous causing death, manslaughter 6407.
Annual labor or assessment work on mining claims 2046, 2382, 2383, 2395, 2430.
When affidavit recorded of performance or certified copy is evidence 2431.

Annual statement of franchise filed with assessor 2136.
Annual tax, legislature shall provide for to meet expenses of state for fiscal year or ensuing two years, and deficiencies (Nev. Const. art. ix, sec. 2) 349.
Annulment of marriage for want of consent 2355.
Anonymous letters or writing, penalty 6438.
Answer. See Civil Practice.
District court 5046-5052.
Justice's court 5738. See Civil Practice.
To arraignment, how made, time 7088, 7089.
Antedating mining location notice, penalty 6675.
Antelope, open season, limit 2093, 2094.
Appeals See Civil Practice, Constitution, Criminal Practice, District Court, Justice Court, Supreme Court, Estates, Railroads.
Civil, from district court 5325-5361.
From justice's court 5788-5794.
Criminal, from district court 7286-7307.
From justice's court 4848, 7286, 7512-7518.
Appearance. See Civil Practice.
Appellant. See Civil Practice.
Appellate jurisdiction, district court (Nev. Const. art. vi, sec. 6) 321, 4840.
Supreme court (Nev. Const. art. vi, sec. 4) 319, 4832, 4833.
See Civil Practice, Criminal Practice, Estates of Deceased Persons.
Apex, of lode controls vein 2426.
Apiaries, commissioners to appoint inspectors of 477.
Compensation, to fix 478.
Duties of inspectors 479, 480.
Penalties 481.
Appliances and appurtenances, of public utility having franchise, to be of best make 1263.
Application, for discharge from arrest in civil action, hearing 5117.
For discharge from arrest in civil action, renewal of 5120.
For order refused not to be made again except to judge of higher court, violation a contempt, order may be vacated 4881, 4882.
For rule or order made to one district judge not to be made to another unless upon written consent, D. C. rule 32, p. 1431.
For underground survey of mine, how made and served 5511.
Appointed officers, who 2765.
Appointment, by governor or county commissioners of successor to officer removed for malfeasance 2853.
Of another to perform duties of suspended revenue officer 3753.
Of officers, ambassadors, ministers and consuls (U. S. Const.) 149.
Of receiver, when may be made 5193.
Or choosing of officers whose election or appointment is not otherwise provided for may be made as prescribed by law (Nev. Const. art. xv, sec. 10) 378.
When not to be made of assemblyman or senator to office created during his term (Nev. Const. art. iv, sec. 8) 266.
Appointments, constitutional, provisions concerning (Nev. Const.) 270, 301, 378, 406. See County Commissioners, Governor.
Apportionment, of school fund (Nev. Const.) 354, 355, 3390-3392. See Public Schools.
Of senators and assemblymen (Nev. Const.) 381, 390, 4110, 4111.
Based on population (Nev. Const.) 381.
Appraisers, asking or receiving bribe, penalty 6312.
How to be selected on condemnation of land for toll road 3052.
May be appointed to estimate value of homestead under execution 2144.
May determine value of attached property to be released by undertaking 5164.
Of estates of decedents 5943-5949.
Of land appropriated for ditch or flume 4711.
Of right of way for telegraph line, appeal from 4629.
Or arbitrators, district court or judge in vacation may appoint 4849, 4850.
Apprentices, general act relating to 482-497.
Action to determine damages for breach of contract 491.
Action to set aside covenants, costs 492, 493.
County commissioners, duties to 483, 490.
County recorder, records 488, 489.
Covenants, form, execution 484, 485.
Cruelty to, action for abuse of 490, 491, 492.
Duties of master or mistress 487.
Fees, recorder, witnesses, jurors 489, 494.
Guardians, liability 492, 497.
Indenture, form, execution 484, 485.
Jury, breach of contract 491.
Justice of peace, complaints, hearings 490-496.
Master or mistress, duties 486, 487.
Minors, bound as 483.
Orphans may be bound as 483, 4097.
Penalties 495, 496.
Records 488, 489.
Runaways, aiding or concealing 495, 496.
Teaching 486, 487.
Appropriation of water. See Water.
For desert lands 3150.
What water subject to 4672.
Appropriations by legislature, accounts with, controller to keep 4159.
Money not to be drawn from treasury except upon (Nev. Const. art. iv, sec. 19) 277.
State indebtedness, to be made for (Nev. Const. art. ix, sec. 3) 350.
Aqueducts, injury to, penalty 6757.
Arbitration 5255-5264. See Civil Practice, Employer and Employee.
Under employers' liability act 1922, 1923, 1931, 1935.
Arbitrator, asking or receiving bribe, penalty 6320.
District court may appoint 4849, 4950.
Influencing or attempting to influence unlawfully, penalty 6323.
Receiving communication unlawfully, penalty 6324.
Unlawful promise or agreement of, penalty 6324.
Arbitrators. See Civil Practice.
Failure to agree under employers' liability act, either party may have adjudication by court 1923.
Fees and expenses on voluntary submission of dispute between employer and employee 1935.

Arbitrators—continued.
If decision of unanimous under employers' liability act to be final and binding 1922.
Insolent behavior toward is contempt 5394.
Majority of may act 5488.
On voluntary submission of dispute between employer and employee may subpena witnesses and administer oaths 1932.
Statement of facts by on proceedings for contempt 5396.
Arbor day 3349, 3350.
Archives and records of Territory of Nevada vested in state (Nev. Const. art. xvii, sec. 4) 388.
Argument. See Civil Practice, Criminal Practice.
Arms, military 363. See State Militia.
Public, safe keeping of (Nev. Const. art. xii, sec. 1) 363.
Right of people to keep and bear (U. S. Const.) 172.
Armed association, when unlawful, penalty 6604.
Armed force, when may be called out 2839-2843, 3982, 4058.
Army, Congress to raise and support, appropriation for limited (U.S. Const.) 122, 124.
Constitutional provisions concerning (Nev. Const. art. i, sec. 11) 240.
Arraignment, on indictment 7074-7089.
Answer to, how made 7089.
Answer to, time for 7088.
Bail, when increased on 7083.
Defendant committed when 7084.
Demurrer 7089.
Failure to appear, bench warrant 7077.
For felony, defendant present 7075.
For misdemeanor, may appear by counsel 7075.
How made, copy delivered 7086.
Increased bail 7083.
Informed of right to counsel 7085.
Motion to set aside on 7089.
Name of defendant 7087.
Officer to present defendant 7076.
Plea 7089.
Right of counsel on 7085.
Time to answer 7088.
True name to give 7087.
Arrest (criminal), after bail, when 7340.
Authorized by telegraph 4618, 6967.
By private person, duty 6964.
By private person, when 6954.
By sureties 7334.
By whom, and how made 6951-6967.
Cities, who may make in 800.
Custody of defendant 6934.
Defendant taken before magistrate without delay 6947.
Duty of officer making 6940, 6944-6950.
Duty on making 6964-6966.
Duty to aid, when 2820, 2833, 6361, 6606, 6956.
Escape or rescue from, recapture 6968, 6969.
Examination, preliminary, on 6970-6998. See Preliminary Examination, post.
Force may be used 6960-6962, 6969.
How made 6952.
In other county, procedure, bail 6940.
Magistrate may orally order, when 6955.
Misdemeanor, proceedings on 6950.
Arrest—continued
Of convicted defendant on bench warrant 7250.
Offense not bailable, duty of officer 7322.
Officer making to receipt for property taken 7450.
Officer refusing to make on lawful command 2820, 2833, 4290, 6361, 6606, 6863, 6956.
On bench warrant right to bail 7321, 7322.
On order of recommitment 7342.
Person making may orally summon aid 2833, 6361, 6606, 6956.
Proceeding on, bail 6934, 6940, 6944, 6949, 6950.
Property taken, receipt for 7450.
Resistance of or attempted flight, force 6960.
Restraint on, no more than necessary 6952.
Unlawful, penalty for 6806.
Warrant of to be shown, when 6959.
Weapons taken, delivery to magistrate 6963.
When may be made, day, night 6957.
Without warrant 6953, 6958, 6965, 6966.
Arrest of judgment (criminal), bail, disposition of 7241.
By court of own motion 7239.
Defendant, order concerning 7241.
Defined 7238.
Effect of allowance 7240.
Grounds for 7238.
Motion for, grounds 7105.
Motion in 7238.
Not bar to further prosecution 7241.
Proceedings after allowance 7241.
Arrest and bail (civil). See Civil Practice.
District court, proceedings 5087-5123.
Elector exempt from on election day (Nev. Const. art. ii, sec. 4) 253.
Excessive bail, release on habeas corpus 5113.
Justice's court, proceedings 5744-5748.
Legislature, members of exempt from (Nev. Const. art. iv, sec. 11) 269.
Privilege of members of Congress from (U.S. Const.) 106.
Release from arrest 5119-5122.
Release from arrest in contempt proceedings 5398.
Arrested person, refusing communication with attorney or intimidation of 6807.
Arson 6624-6631.
Attempt, what is, penalty 6631.
Investigation to determine if committed 7532-7539.
"Set on fire," defined 6628. See Incendiarism 7532-7539.
To defraud insurer 6626.
Art curiosities, exempt from execution 5822, 5823.
Articles of confederation 71-85.
Articles of incorporation, what to set forth 1108, 1114, 1115, 1119. See Corporations.
Artesian wells, bounties for 702-717. See Bounties.
Machinery for exempt from execution 5288.
Sinking of, gives preferred right to purchase state land 3208.
Asking or receiving compensation or reward for compounding or concealing crime or impeding prosecution thereof, penalty 6393.
Asking or receiving subscriptions without authority, penalty 6718.

Assault 6412.
And battery, penalty 6414.
Action for may be brought within two years 4967.
Provoking or attempting to provoke, penalty, 6415.
Where mayhem attempted, penalty 6418.
With deadly weapon, penalty 6413.
With intent to kill or commit felony, penalty 6413.
With whip or stick with intent to intimidate by reason of possession of deadly weapon, penalty 6411.
Assay, when ore extracted from mine presumed to be twice the value, 5509.
Assayers, failing to identify bullion or amalgam or keep record of, penalty 2483-2486, 6763, 6764.
Assemblage of anarchists, penalty 6615.
Assemble, right of people to guaranteed (U.S. Const. 191; Nev. Const. art. i, sec. 10) 239.
Assembling to disturb peace, penalty 6593.
Assembly (Nev. Const.) 261, 263-5, 267, 389, 390, 395, 4111-4127.
Bill may originate or be amended in (Nev. Const. art. iv, sec. 16) 274.
Has sole power of impeachment, majority of all members necessary (Nev. Const. art. vii, sec. 1) 334.
Judge of qualifications of its members, may choose officers and punish or expel members (Nev. Const. art. vi) 264.
May punish or imprison person not member (Nev. Const. art. iv, sec. 7) 265.
Speaker of to receive $2 per day additional (Nev. Const. art. iv, sec. 33) 291.
Assembly and senate, legislative authority vested in (Nev. Const. art. iv, sec. 2) 259.
Assemblymen, compensation of (Nev. Const. art. xvii, sec. 5) 389.
Compensation not to be increased or diminished during session (Nev. Const. art. iv, sec. 28) 286.
Compensation to be fixed by law, not to be increased during session (Nev. Const. art. iv, sec. 22) 291.
Payment of expense of for postage, express charges, newspapers and stationery (Nev. Const. art. iv, sec. 33) 291.
People have right to instruct (Nev. Const. art. i, sec. 10) 239.
Prohibited from receiving fees or perquisites (Nev. Const. art. xvii, sec. 5) 389.
Qualifications (Nev. Const. art. iv, sec. 5) 263.
Term of office to be two years (Nev. Const. arts. iv, xvii, secs. 3, 10) 261, 394.
To be apportioned according to population (Nev. Const. art. i, sec. 13) 242.
Vacancy in office, governor to issue writ to fill (Nev. Const. art. iv, sec. 12) 270.
When to be elected (Nev. Const. art. iv, sec. 3) 261.
When not to be appointed to office created during term (Nev. Const. art. iv, sec. 8) 266.
Assessment. See Revenue.
And collection of state, county and township taxes, local or special laws invalid (Nev. Const. art. iv, sec. 20) 278.
Assessment—continued.
District court has jurisdiction of cases involving legality of (Nev. Const. art. vi, sec. 6) 321.
If legality of involved in justice's court, case to be transferred to district court for trial 5721.
In action involving legality supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
Municipal, jurisdiction of municipal court 833.
Powers of city or town restricted (Nev. Const. art. viii, sec. 8) 345.
Roll, how prepared, when, by whom 3633.
Special, action by city for recovery of 867.
Special by city, if irregular, court may nevertheless render judgment for expenses 868.
Special by city, roll and ordinance certified are prima facie evidence 867.
Suit may be maintained for by mutual fire insurance company against members 1296.
Assessment and taxation, how to be made upon all property, including mines, exemptions (Nev. Const. art. x, sec. 1) 352.
Assessment work, annual on mining claims 2382, 2383, 2395, 2400.
Assessor 1569-1581. See County Assessor, Revenue.
Assignee, may have execution issued on judgment after death of party 5285.
To pay preferred claim for wages 5493.
Assignment, by vendor in possession of goods without delivery conclusive evidence of fraud 1078. See Partnership.
Making of claim under employers' liability act operates as of assignable cause of action in tort 1927.
Mortgage or debt, county recorder to certify copy as evidence 3789.
Of negotiable paper before due, right of action without set-off 4988.
Of property by partnership, publication of when, where 2906.
Subject to preferred claim for wages 5493, 5494.
Unless in good faith fees and salaries of public officers are subject to attachment and execution 2864.
When void in bankruptcy proceedings 809.
Assignor, not to testify when other party to transaction is dead 5419.
Assistance, writs of, district court may issue, where and when 4843.
Associations. See Corporations.
Associates may be sued by common name, summons, judgment 5007.
District court may make order for sale or mortgaging of property of 1369.
Included in word "person" 5475.
When state shall donate or loan money or subscribe to (Nev. Const. art. viii, sec. 9) 346.
Assumed name, transacting business under, penalty 6728-6731.
Assumption. See Employer and Employee.
By state of debt of territory (Nev. Const. art. xvii, sec. 7) 391.
Of debt of counties, towns or cities by state prohibited (Nev. Const. art. ix, sec. 4) 351.

Assumption—continued.
Of risk in hazardous occupation 1915.
Of territorial debt by state (Nev. Const.) 391, 408.
Astray animals notice and proceedings in regard to 2274-2284.
Attachment and garnishment. See Civil Practice.
Bank in charge of examiner not liable to 671.
Dead body not subject to 6476.
District court, proceedings in 5147-5168, 5192, 5194.
Justice's court, proceedings in 5749-5752.
May issue, on nonjudicial day 4870.
Of person on refusal to obey writ of habeas corpus 6234.
Attainder, bill of, forbidden (Nev. Const. art. i, sec. 15) 244.
Attempt, defined and punished 6291.
Jury may convict for 6290, 7219.
To intimidate public officer, penalty 6364.
To provoke assault, penalty 6415.
To suborn perjury, penalty 6351.
To suicide, aiding or advising, penalty 6381-6383.
To vote unlawfully, penalty 1827.
Attendance, of absent members of the legislature may be compelled (Nev. Const. art. iv, sec. 13) 271.
Of prisoner as witness, how obtained 5342-5344.
Attestation of instrument, statute relating to competency of witnesses does not apply 5419.
Attorney. See Attorney, Counsel under Civil Practice, Criminal Practice, Court Rules, Estates of Deceased Persons.
Absence of, when questions may be heard on law day in district court, rule v, p. 1426.
Admission of 499-505.
Advertising for divorce business 6462.
Any person except constable may appear as in justice's court 5725.
Appointed to defend criminal prosecution, compensation 7540, 7541.
Authority, change, notice, death, removal, 507, 510.
City attorney to be 820.
Clerk of may verify cost bill 5387.
Clerk of, when not to testify 5425.
Conviction of, effect 512.
Counselors 498.
Disbarment or suspension 511-524.
District attorney must be 525.
Entitled to notice of proceedings after appearance 5374.
Estates of deceased persons, appointments in. See Estates of Deceased Persons.
Examination, time, place and subjects, S. C. rule 1, secs. 1-5, p. 1421, 500-504.
Fee, fixed by court in action on bond for construction of railroad fence under eminent domain 5619.
For admission, S. C. rule i, sec. 5, p. 1421, 500, 503, 2006, 3953.
Governed by agreement, lien for 5376.
In action for damages for herding or grazing live stock on lands of another 2336.
Recoverable as costs in justice court 5814.
Recoverable by prevailing party in action by workmen caused to change place of employment by misrepresentation 1938.
Attorney—continued.
Fee recoverable by prevailing party under employers' liability act 1923.
Settlement between parties does not affect lien for 5376.
Female may be 499.
For absent heirs 5872, 6047.
In case not entitled to fee as witness 2038.
Judge must be 525.
Not to act as unless party 4866.
Not to have partner in practice 4867.
Judgment, disbarment or suspension 523.
Library and certain property of exempt from execution 5288.
License 501, 503, 506.
May acknowledge satisfaction of judgment 5279.
May apply to clerk to open deposition in D. C., rule xvi, p. 1428.
May be appointed for child under juvenile court law 742.
May bring action in quo warranto for usurpation of public office 5660.
May certify to statement and papers on appeal 5356.
May give written notice of appearance 5374.
May make affidavit to accompany summons against parties served after judgment in action on joint contract 5245.
May move for speedy trial in quo warranto 5680.
May receive money and enter satisfaction of judgment 507.
May subscribe to pleading 5060.
May use instructions in addressing jury, rule 40, p. 1431.
Name of plaintiffs to be indorsed on summons in justice's court 5727.
Not to be partner of judge or justice of the peace 4867.
Not to be received as surety in district court, rule xiv, p. 1428.
Not to testify regarding communication of client, when 5425.
Notice of hearing in justice's court, when to be given to 5733.
Oath (S. C. rule i, sec. 6, p. 1421) 500, 503.
Obtaining order or judgment in district court to furnish form to clerk, rule xxxii, p. 1430.
Or clerk may verify cost bill 5387.
Partner of district attorney, when not to appear in action by or against state or county 1610.
Pleadings subsequent to complaint to be served upon 5077.
Practicing without license 506.
Proceedings and judgment for disbarment 513-523.
Roll of 502, 505.
Secretary of, when not to testify 5425.
Service of papers upon 5367-5369.
Sheriff not to practice as 1646.
Suspension 511-524.
To verify memorandum of exceptions on error of law occurring at trial 5322.
What papers may be served upon 5375.
When judge not to act as 4866.
When may be appointed guardian ad litem, compensation, rules xxix, xxx, p. 1430.
When may certify to statement on appeal 5337.

Attorney—continued.
When may verify pleadings 5064.
When not to be witness in district court, not to comment on own testimony, rule xiii, p. 1428.
When service may be made upon for non-resident 5375.
Witness fees, not entitled to 2038.
Attorney's fee, fixed by court in action on bond for construction of railroad fence under eminent domain 5619.
Governed by agreement, lien for 5376.
In action for damages for herding or grazing live stock on lands of another 2336.
Recoverable as costs in justice's court 5814.
Recoverable by prevailing party in action by workman caused to change place of employment by misrepresentation 1938.
Recoverable by prevailing party under employer's liability act 1923.
Attorney's clerk or secretary, when not to testify 5425.
Attorney-general, absence of 4128.
Action for money due state, controller may direct to bring 3685, 4160, 4162.
All moneys to account for 4131.
Annual statements of mining corporations, to file with 1330-1340.
Articles of bonding or surety companies to approve 1243.
Attend supreme court, duties 4129.
Bank examiner, duty to aid 669.
Bank examiner to advise and consult 669.
Board of county assessors to attend, chairman in absence of governor 3798.
Board of examiners, member of (Nev. Const. art. v, sec. 21) 314, 4455, 4475.
Board of irrigation, member of 4706.
Board of pardons and parole, member of (Nev. Const. art v, sec. 14) 307, 7622, 7623.
Board of prison commissioners, member of (Nev. Const. art. v, sec. 21) 314, 7560.
Board of railroad, member of 4549.
Board of revenue, member of 3809, 3828.
Board to investigate state police, member of 4281.
Bond to furnish 4128.
Bonding companies, articles to approve 1243.
Bureau of industry, agriculture and irrigation, member of 4486.
City or town officer, removal of, when 983.
City or town tax, excessive, duty as to 976, 977, 981.
Contest for state office, when to prosecute 1823.
Controller may direct to bring action for money due state 3685, 4160, 4162.
Corporations, foreign, to prosecute, when 1350, 1354.
County revenue acts, violation of, duty as to 3830, 3834.
Criminal action, may dismiss, when 7400.
Deputies, may appoint 4135.
Deputy school superintendents, to advise 3355.
Deputy, salary for one 4396.
Deputy, salary of, how paid 4396, 4397.
District attorneys, duty to prosecute, when 1340.
Attorney-general—continued.
District attorney, may instruct to bring action to remove county commissioner, when 3830, 3834.
District attorneys to report to 1608, 1609.
District school superintendents to advise 3355.
Docket of causes, to keep 4131.
Duty to prepare necessary election forms 1766.
Duty, refusal to perform, penalty 4134.
Election of 312, 2765, 2773, 2774.
Escheats, duty in relation to 1625, 6130, 6131-6136.
Excessive town or city tax, duty as to 976, 977, 981.
Ex officio mineral land commissioner, 4141-4447. See Mineral Land Commissioner, post.
Fees and perquisites prohibited 389.
Fire insurance companies, mutual, duties as to 1290, 1298.
Foreign corporations, to prosecute, when 1350, 1354.
Health, public, duties concerning 2973.
Impeachments 4132.
Invited to attend execution 7281.
Life insurance companies, duties as to, 1320.
May defend action or commence same, when 4133.
Member of board of pardons and to perform other duties (Nev. Const. art. v, sec. 22) 315.
Member of board of state prison commissioners and board of examiners (Nev. Const. art. v, sec. 21) 314.
Mine owner, neglect, inspector of mines to notify 4205.
Mineral land commissioner, ex officio 4141-4147.
Mining corporations, annual statements to file with 1330-1340.
Municipal tax excessive, duty as to 976-981.
Mutual fire insurance companies, duties as to 1290, 1298.
Mutual fire insurance companies, duties on request of controller 1320.
Oaths, deputies to subscribe 4136.
Oath to take 4128.
Office at capitol 2774.
Powers, criminal prosecution, may take charge 4137.
District attorneys, supervision of 4137.
May appear before grand jury 4137.
Subpenas to issue 4137.
Prohibited from receiving fees or perquisites (Nev. Const. art. xvii, sec. 5) 389.
Public health, duties concerning 2973.
Public service commission, duties in relation to 4538, 4544.
Qualifications (Nev. Const. art. v, sec. 19) 312.
Quo warranto, when to commence action 5658.
Railroad board, member of 4549.
Railroad commission, report violations to, duty to prosecute 4579.
Mineral land commissioner, attorney-general, ex officio 4146.
Contest, record of to be kept 4144.
When duty to make 4143.

Attorney-general—continued.
Mineral land commissioner, deputies, may appoint 4145.
Fees, not allowed 4145.
Governor, to report to 4144.
State mineralogist, if appointed, information to furnish 4147.
Office created 4141.
Office, duties of 4142.
Persons who may lodge information, duty of commissioner to contest 4143.
Report to governor 4144.
Salary of 4145.
Removal of town or city officer 983.
Residence and office of 4128.
Salary of 4394.
School officers to advise 3355.
School text-book commission, action to bring for, when 3406.
State, actions to prosecute for money due 3685, 4160, 4162.
State board of county assessors, act as chairman of, when 3798.
State police, board to investigate, member of 4281.
Stenographer, authorized to employ 4138.
Compensation, how paid 4139.
Suits, to bring, when 4162.
To commence 4140.
Superintendent of public instruction, to advise 4130.
Supreme court, attendance on, duties 4129.
Surety companies, articles to approve 1243.
Tax, excessive city or town, duty as to 976, 977, 981.
Term of office (Nev. Const.) 312, 402, 2774.
The name "The State of Nevada" to be used 4140.
To attend on supreme court 4129.
To perform duties prescribed by law (Nev. Const. art. v, sec. 22) 315.
To prosecute and defend certain causes 4130.
To report to 4132.
Typist, salary of 4398.
Violations, commission, to report to 4579.
Written opinions to give, when 4133.
Attorney in fact, 1017, 1041, 1082. See Conveyances.
Form of acknowledgment of 1025.
To be recognized by referee in action for partition 5579.
Attornment 1060, 1061.
Auction sale. See Conveyances.
Of goods, when memorandum of auctioneer is contract of sale 1077.
Auctioneer, license for 3896, 3897.
Or constable, to sell baggage left at hotel or lodging-house 2153.
Auditing, allowing or paying, false or fraudulent claims, penalty 6376.
Auditor, city. See Cities.
County 1582-1592. See County Auditor.
If fee or salary of public officer garnished, may pay into court 2865.
May be removed or suspended and another appointed to perform duties pending charges 3753.
State 4148-4153. See State Auditor.
Australian ballot law 1833-1862. See Elections.
Authentication of records, federal act concerning 526-529.
Authentication of records—continued.
Foreign, relating to land titles 528.
Full faith and credit 526, 527.
Judicial proceedings 526.
Legislative acts 526.
Public records generally 527, 528.
Seal, how to be attached to copy of record or document 5481.
Seal of court to be affixed to copy of record 4879.
United States laws and treaties 529.
Automobiles, running for rent without license, penalty 3878.
Wrongful use of, penalty 6707, 6753.
Award of arbitrators 5258. See Civil Practice.
On voluntary submission of dispute between employer and employee 1930.
Under employers' liability act 1922, 1923.
When court may modify or correct 5262.

B

Badge of organization or society, unlawful wearing, penalty 2503-2505, 6715-6717.
Badger, bounty for 718-722.
Baggage, checks on, refusal to issue, penalty 3553.
Failure to deliver, damages, evidence 3553.
Hotel proprietor may sell, when 2151-2154.
Wilfully or carelessly injuring by railroad employee 6755.
Bail. See Bonds and Undertakings, Civil Practice.
Action on forfeited, district attorney to bring 7338.
Allowable when (Nev. Const. art. i, sec. 7) 236, 7314, 7315.
Appeal, when may be admitted to on 7326, 7328.
Arraignment, increased on when, 7083.
Civil arrest, bond in contempt proceedings, form and conditions 5400.
District court in, 5087-5123.
Exonerated in commitment for insanity of accused person 7391.
Justice's court in 5744-5748.
May arrest defendant who has been released from arrest in civil action 5098.
May be forfeited in contempt proceedings if defendant fails to appear on return day, measure of damages 5406.
May be given by person arrested in contempt proceedings 5398.
May surrender defendant who has been released from arrest in civil action 5097.
On arrest in civil action, deposit in lieu of, certificate, discharge 5106.
Reduced on habeas corpus, when 5113. See Civil Practice.
When party receiving fees may be held to in election contest, 1815.
Criminal arrest, action on forfeiture 7338.
After conviction 7314.
Answerable for reexamination 7093.
Arrest after, when 7340-7342.
Arrest on bench warrant, rights of defendant 7321.
Before conviction 7313.
Bond, form of 6941.
Cash deposit returned or forfeited 7335, 7336, 7510.
Cash in lieu of 7330-7332, 7335.

Bail—continued.
Bail, cash in lieu of forfeited, when 7510.
Cases allowed in 236.
Chapter on 7308-7347.
Charge punishable by death 7311.
Clerk to pay forfeited bail money to treasurer 7339.
Constitutional right of 236.
Consists of what 7309.
Defendant held to answer, who may grant 7316.
Defendant may surrender, bail exonerated 7333.
Defined 7308, 7309.
District attorney, notice to of application for, when 7312, 7327, 7333.
District attorney to bring action on forfeited 7338.
Discretion, when matter of 7310, 7314.
Duty of arresting officer, bench warrant 7321.
Excessive forbidden, 178, 235.
Exonerated, demurrer sustained 7102.
Exonerated on reversal, when 7304.
Exonerated upon surrender 7333.
Exonerated, notice to district attorney 7333.
Felony, minimum for 6989.
Forfeiture discharged 7337.
Forfeiture of 6940.
Forfeiture of action on 7338.
Forfeiture of, when 7336, 7337.
Forfeiture of deposit in lieu of 7510.
Form, held to answer 7317.
Form on bench warrant 7324.
Form on recommitment 7346.
Habeas corpus, allowed, reduced or released on 6247-6249, 7323.
Insanity exonerates 7391.
Insufficient grounds for arrest 7340.
Justice court, power to grant 7308-7347, 7498, 7520.
Justification 7319, 7320, 7325, 7347.
Magistrate to certify, discharge 6943.
May surrender defendant 7333.
Money deposited for, refunded 7092.
Notice to district attorney 7312, 7327, 7333.
On appeal, conditions 7315, 7328.
On appeal, who may admit to 7326.
On arrest; forfeiture 6940.
On extradition 7438, 7439.
On recommitment 7344-7346.
Order for on warrant 6934.
Pending examination 6934.
Preliminary examination, minimum for felony 6989.
Qualifications, personal sureties 6942, 7318 7325, 7347.
Recommitment after, when 7341-7344.
Right of guaranteed 236.
Sureties, examination, justification 6942, 7319, 7320, 7325, 7347.
Sureties, may arrest 7334.
Sureties, number of 7317.
Sureties, qualifications, justification 6942.
Surety company may furnish 695, 7329.
Who entitled to 7310-7315.
Bailee, defined, embezzlement by 6653.
Bailiff, for district court in certain counties, duties, powers, qualifications and compensation 4914-4920.
Bailiff—continued.
May perform duties of sheriff, when 4919.
Of district court in certain counties, duties, powers, compensation 4914-4920.
Of supreme court, sheriff of Ormsby County to be, compensation 4888.
Bailments, animal, vehicle or automobile, wrongful use by bailee, penalty 6707.
Bailee defined 6653.
Common carriers 537-542.
Freight unclaimed 537-542.
Goods in storage 543, 544.
Jewelers and watch repairers 530, 531.
Pawnbrokers 536.
Sale of unclaimed property 530-542.
Ballot, election by people to be by (Nev. Const. art. ii, sec. 5) 254.
Ballots, ballot boxes and paper for elections. See Elections.

BANKS AND BANKING

Actions for penalties 637.
Advertisements of capital, restrictions 663.
Agent for certain purposes may be 1119.
Appropriation for 693.
Articles of incorporation of 616-617.
Assessment on stockholders, when 651.
Assessment for taxes 3790, 3820-3824.
Assessor, statement to, what to contain 3823.
Assistants to give security 670.
Attachment or execution, when not to be levied on 671.
Available funds required 629.
Bank, may act as fiscal agent or trustee of municipal corporation 1119.
BANKING BOARD. *See State Board, infra.*
Bonds, may transfer or countersign 1119.
Bonds of examiner and deputies 680-681.
Borrowers' liability limited 630.
Borrowing on assets 650.
Business in which may engage 619-621.
Cannot plead statute of limitations in action to recover deposit 4974.
Capital, minimum 623.
Capital, not to be withdrawn 643.
Capital stock, increase or decrease 624.
Capital stock, reduction of 651.
Certificates of stock of other corporations, may transfer 1119.
Certificate, secretary of state to issue 617.
Charter annulled, when 626.
Checks, drawing on without deposit, penalty 6672.
Clearing-house associations 667.
Clearing-house, how established 667.
CLOSED BANK—
Claims presented 671.
Collections deposited, how 673.
Dividends, how paid 674.
Expenses, how paid 673.
Final liquidation 676.
Inventory to be filed 672.
Notice to creditors 671
Recovery of control 675.
Rejected claims, action on 671.
Reports on 677.
Surplus, deposit of 677.
Closed for violation of law 626.
Closing voluntarily 638.
County treasurer may deposit money in 1687.
Debtors, names of, not to be given in reports 637.

Definition of words and terms 690.
Deposit, drawing checks without, penalty 6672.
Deposits, no limitation for recovery 4974.
Deposits received by insolvent bank felony 634, 6724, 6725.
DIRECTORS—
Duty to examine bank 634.
Liabilities 625.
Meetings 625.
Qualifications 625.
Directors and officers 625.
Director or officer, borrowing powers 633.
District attorney to be notified of violations 686.
Dividends of closed bank, how paid 674.
Dividends of, profits 641.
Dividends, when not to be paid 643.
Drawing checks on without deposit 6672.
Employee, receiving deposit in insolvent bank 6724, 6725.
EXAMINER—
Assistants, security from 670.
Attorney-general to advise 669.
Authorize commencement of business 617.
Bond of 680.
Deputies, appointment 665.
Deputies, bond of 681.
District attorney to advise 669.
District attorney to notify of violations 686.
Duties and powers 666.
Duties as to liquidation 669.
Effect of taking charge 668.
Employ assistants 669.
Examinations 682.
Expenses and payment of 683, 684.
Forms, to provide for reports 659.
Governor to appoint 665.
Liquidation of bank 669.
List stockholders sent to 653.
May require bank to pay off borrowed money 650.
May revoke authority, when 654.
May take charge 668.
Notice to creditors, to give 671.
Offer rewards 646.
Permit reopening 679.
Powers and duties 666.
Proceedings against, to recover control 675.
Qualifications 665.
Refusal of inspection to, penalty 654.
Reports on closed banks 677
Reports to 636.
Require impaired capital made good 651.
Salary, 665.
Salary, how paid 684.
Security from assistants 670.
Statement filed with 618.
Subject to control of state board 666.
Violation of duty, penalty 685.
Voluntary surrender to 678.
Embezzlement of fund 648.
Examination, refusal to allow 654.
Examined twice yearly 682.
Existing banks, effect of act on 687.
Existing charters to conform to act 687.
Expenses of examiner 683.
False oath, perjury 660.
False report as to solvency, circulation of, misdemeanor 661.
False statements on reports 631.
Felony, false statement 631.
Felony to receive or assent to reception or fail to prevent deposit in insolvent bank 6724, 6725.
Fiscal agent may act as 1119.
Fraudulent transactions 648.
Funds, per cent on hand 629.
General corporation act adopted 691.
General penal provision 689.
How taxed 3790.
Impaired capital made good 651.
Incorporation of 616-617.
Indorsements, officers forbidden to make 632.
Injunction against examiner 675.
INSOLVENT—
Assent to reception of deposit in, felony 634.
Deposits, not to receive in 634.
Deposit, receiving in, felony 634, 6724, 6725.
Liability of officers. *See Examiner, infra.* 634.
When deemed 629, 640.
Interest, time deposit excessive, misdemeanor 644.
Inventory of closed bank 672.
Liability of for tax on shares 3824.
Liability of stockholders 627.
License for business 662.
Lien on stock for assessment 651.
Limitation of action for recovery of deposit none 4974.
Limitation on amount of individual loan 630.
Liquidation of 669.
Liquidation, voluntary 639.
List of stockholders and shares to be furnished, when 3823.
Loan, amount limited 630.
Loans, officer or employee not to indorse 632.
Loans, to officers, restricted 633.
Losses, how cared for 643.
Losses, how charged 642.
May indorse its paper 650.
Misapplication of fund 648.
Money borrowed, what deemed 630.
Names of debtors, not in reports 636.
National bank may become state bank 652.
Notes, circulation as money forbidden (Nev. Const. art viii, sec. 6) 343, 1219.
Notice to creditors closed bank 671.
Officers and directors 625.
Officer or employee of insolvent receiving deposits, felony 6724, 6725.
Officer or employee having power to close, failing to prevent deposit in insolvent, felony 6725.
Overdrafts, limitations, converted into notes 649.
Overdrafts, regulations 649.
Penalties, actions for 637.
Penalties, misconduct of board or examiner 685.
Penalty for paying excessive interest on deposits 644.
Per cent of funds available 629.
Preferences forbidden 650.
Profits and dividends 641.
Prohibited transactions 628.
Real estate, regulations 656.
Reception of deposit in insolvent bank 635.
Reduction of capital stock, when 651.
Refusal to comply with orders of board or examiner 668.
Repealing clause 692.
Reports, contents, confidential 659.

Reports, failure to furnish, penalty 637.
Reports to examiner 636.
Reports preserved 659.
Resumption after suspension 679.
Revocation of authority 654-655.
Rewards for violation of act 646.
Salaries, how paid 684.
Sale of real estate 656.
Savings bank, pass-book regulations 622.
Savings bank, restrictions, regulations 621, 622.
Secretary of state to issue certificate 617.
Sections of act independent 688.
Security from assistants 670.
Shares of stock, deemed personal property 657.
Shares of stock, taxation of 3820-3824.
Shares of stock, transfer 657.
Sinking funds, may manage 1119.
STATE BOARD—
Attestation 665.
Control over examiner 666.
Disposition of surplus closed bank 677.
Examiner, secretary 665.
Expenses of 664.
Governor to appoint 664.
May remove examiner 665.
Members of 664.
Meetings 664.
Powers of 664.
Rules of 666.
Seal of 665.
Violation of duty, penalty 685.
State, fiscal agent for, may act as 1119.
Stock and bond transfers, may handle 1119.
STOCKHOLDERS—
Liability of 627.
List subject to inspection 653.
List to be kept 653.
Shares, list to be furnished for revenue purposes 3823.
Sign articles 617.
Stock, loans on, unlawful 658.
Stock, sign articles 617.
Stock sold on lien, foreclosure 651.
Surplus fund 641, 642.
Taxed, how 3790.
Time deposit, interest on 644.
Transfer agent may act as 1119.
Transfer of stock 657.
Transfer of stock, when invalid 657.
Treasurer, county, may deposit money in 1687.
Trust company business 620.
Trustee may be for certain purposes 1119.
Unlawful to certify check when drawer without sufficient funds on deposit 647.
Unlawful to loan on stock of stockholders 658.
Vacancy in office created 632.
Violation of provisions of act, felony 645.
Voluntary closing 638.
Voluntary liquidation 639, 678.
When deemed insolvent 629.
Words and phrases defined 690.

Bank examiner. See Banks.
Banking board. See Banks.
Banknotes not to circulate as money (Nev. Const. art. vii, sec. 6) 343, 1219.

BANKRUPTCY (Federal Act)

Acts of 545.
Adjudication of 560.
Allowance of claims 599.
Appeals and writs of errors 567
Appraisement of property 612.
Arbitration 568.
Assignments within three months of filing petition 609.
Attorney-general (U. S.), report of 595.
BANKRUPT—
Codebtors of 558.
Compositions, when confirmed 554.
Compositions, when set aside 555
Death or insanity of 550.
Discharge, when granted 556.
Discharge, when revoked 557.
Duties of 549.
Exemption allowed under state law 548.
Extradition of 552.
Protection and detention of 551.
Suits by and against 553.
Who may become 546.
Cases, transfer of 574.
Claims, proof and allowance 599.
Clerk of court, compensation 594.
Clerk of court, duties 593, 613.
Compromises 569.
Congress may enact uniform laws on subject (U. S. Const.) 114.
Counterclaims 610.
Courts and jurisdiction 544, 565, 566.
CREDITORS—
Claims, proof and allowance 599.
Meetings of 597.
Notice to 600.
Preferred 602.
Voters at meeting of 598.
DEBTS—
Dividends 607.
Not affected by discharge 559.
Priority 606.
Proof of 605.
Definitions 543.
Depositories for money 603.
Dividends, payment of 607.
Dividends, unclaimed 608.
Estates, expense of administering 604.
Evidence 563.
Exemptions 548.
Expense of administration 604.
Federal act 543-615.
Forms, rules and orders 572.
Jurisdiction federal and state courts 544, 565, 566.
Jury trial 561.
Liens, 609.
Marshal, compensation of 590, 594, 614.
Marshal to take property, when 611.
Meaning of words and phrases 543.
Newspapers, designation of 570.
Oaths and affirmations 562.
Offenses 571.
Orders, forms and rules 572.
Partners and partnership 547.
Petition for, dismissal of 601.
Petitions for, who may file 601.
Pleadings 560.
Process 560.
Proof of claims 599.
PROPERTY—
Appraisement of 612.
Marshal to seize 611.
Possession, title and sale 611-612.
Receiver, compensation of 590, 614.

REFEREE IN 575-585—
Absence or disability 585.
Appointment 576.
Bond of 592.
Compensation of 582, 614.
Contempts before 583.
Disability or absence 585.
Districts 576.
Duties of 581.
Jurisdiction 580.
Number of 579.
Oath of office 578.
Office created 575.
Qualifications 577.
Records of 584.
Removal of 576.
Reference after adjudication 564.
Rules, forms and orders 572.
Sale of property 611-612.
Set-offs and counterclaims 610.
Statistics of proceedings 596.
Time, computation of 573.
Transfer of cases 574.
Trial by jury 561.
TRUSTEE—
Accounts and papers of 591.
Appointment of 586.
Bond of 592.
Compensation 590, 614.
Conveyance of property 612.
Death or removal 588.
Duties of 589.
Office created 575.
Qualifications 587.
Removal of 588.
Vested with property 612.
Uniform law, Congress may enact (U. S. Const.) 114.
Words and phrases, meaning of 543.
Writs of error 567.

Barbarous punishments to prisoners prohibited 2818, 7579.
Barrel, weight for certain commodities 4802.
Bath houses, public, in cities 794 (38).
Battalion 4001, 4027. See State Militia.
Battery, defined, penalty 6414.
Action for may be brought within two years 4967.
Beaver, protected 2100.
Bees, apiaries, act in relation to 477-481. See Apiaries.
Spreading diseases among, penalty 481.
Bell signals in mines, official code of 4236.
Bench warrant, absent convicted defendant 7246-7250.
Bail, form of, on 7324.
Bail on 7313, 7321.
Convicted defendant, form of 7248.
For convicted defendant to several counties 7247.
How and where served 7249, 7250.
Offense not bailable, duty of officer 7322.
On presentment 7037.
Beneficial use of water, what constitutes 4674, 4675. See Water.
Benevolent institutions to be fostered (Nev. Const. art. ii, sec. 1) 353.
Incorporations for 1365-1409. See Corporations.
Bequeathed property to state pledged to educational purposes (Nev. Const. art. xi, sec. 3) 355.
Berries, standard measure, what 4806. See Weights and Measures.
Betting on elections, penalty 1788.
Bible to be furnished convicts at state prison 7576.
Bigamy, jurisdiction, penalty 6456, 6457, 6916.
Bill, enacting clause of (Nev. Const. art. iv, sec. 23) 281.
How may be passed over governor's veto (Nev. Const. art. iv, sec. 35) 293.
Legislative, method of reading, passage and signing (Nev. Const. art. iv, sec. 18) 276.
Legislative, to embrace but one subject (Nev. Const. art. iv, sec. 17) 275.
May originate or be amended in either house of the legislature (Nev. Const. art. iv, sec. 16) 274.
No law to be enacted except by (Nev. Const. art. iv, sec. 23) 281.
When becomes law without governor's approval (Nev. Const. art. iv, sec. 35) 293.
Billiard or pool room, minor not allowed in without consent of parent, penalty 6506.
Bill of attainder, not to be passed 131, 137.
Bill of exceptions (civil). See Civil Practice.
Bill of exceptions (criminal). See Criminal Practice.
Bills, origin, amendment, passage and approval (U. S. Const.) 104, 108, 109.
Passage over veto (U. S. Const.) 109.
When become law without signature of president (U. S. Const.) 109.
Bill of health, sheep inspector to issue, when 4593.
Bills of credit, state not to emit 137 (U. S. Const.) 137.
Bills of exchange. See Negotiable Instruments.
Or other instruments when admitted in justice's court unless denied by verified answer 5770.
Parties and liability of in actions on, schedule of sections 2548.
Birds. See Game.
Duty of officers to prosecute for killing certain, penalty 6813.
Eggs protected 2091, 6811, 6812.
Game birds defined and protected 2086-2091.
Insectivorous, plumage or song, protected 2085.
Nests and eggs protected 2091,
Teachers to instruct pupils 3347.
Unlawful killing or interference with eggs 6811, 6812.
Birth, certificate, altering of, penalty 2972.
Certificate, duties of local health officer regarding, what 2970.
Certificate, false, penalty 2987.
Certificate, made by whom, when 2964.
Certificate, what to contain 2965.
Birth, concealing, penalty 6450.
Failure to record, penalty 2986.
Failure to report, penalty 2972.
Registration of in cities 794 (58).
Registered how, where, by whom 2963, 2983-2987.
Still, recorded how, by whom 2975, 2983-2987.

Black and white, "rouge et noir," gambling game, forbidden, penalty 6518.
Blacklisting, defined, penalty 6780-6782.
Black race, marriage with white race, unlawful, penalty 6514.
Blanks, must be filled in all papers except subpena before issuance by justice of the peace 5809.
Blind. See Deaf, Dumb and Blind.
Deaf and dumb, institution to be supported by the state (Nev. Const. art. xiii, sec. 1) 365.
Education of 1702-1704.
Blind lodes, discovered in tunnel 2381, 2443. See Mines and Mining.
Board of arbitrators, under employer's liability act 1922, 1923.
Board of canvassers of elections, county 1513.
State (Nev. Const. art. v, sec. 4) 297. See Elections.
Board of capitol commissioners, additional offices, may rent 4415.
Annual inventory to make 4419.
Board, what officers compose 4411.
Buildings and property, control to have 4413.
Capitol decorations to preserve 4423.
Certain expenditures to control 4414.
Certain help, may employ 3962, 3963, 4420.
Clerk to prepare inventory of sales 4418.
Decoration, minerals, curios, not to be removed, except 4422.
Employees, salaries of 4401.
Employees, duties of, to control 4420.
Engineer, to appoint 3962.
Governor, chairman, to be 4412.
Governor, lieutenant-governor, secretary of state, controller and treasurer, constitute board 4411.
Governor's secretary, secretary to be 4412.
Janitors, to appoint 3963.
Joint commission with orphans' home board for water supply 4424.
Legislative chambers may be used for public purposes 4416.
Meetings to hold 4421.
Movable property may sell, conditions 4418.
Officers to constitute 4411.
Orphans' home water supply, how obtained 4424.
Personal property from one office to another may transfer 4417.
Prison labor to be utilized 4426.
Quorum, what constitutes 4412.
Salary of employees 4401.
Surveyor-general, surveys to make 4425.
Board of control of agricultural experiment station, regents of university constitute 457.
To report to governor, when 2929.
Board of county commissioners, 1501-1568.
Legislature to provide for in each county and duties, 284. See County Commissioners.
Board of dental examiners, applicants, examination of 4429, 4433.
Applicants, age, requirement 4433.
Apprenticeship, affidavit of intention to begin, receipt to issue for 4436.
Board, organization of 4429.
Certificate, failure to register, penalty 4434.
Board of dental examiners—continued.
Compensation 4430.
Complaint, who may prefer 4441.
Dentists, registered to be 4433.
Dentistry, unlawful to practice without license, proviso 4427.
District attorney to prosecute 4441.
Examination, eligibility for 4435.
Examination, to include 4433.
Fees, annual, application of 4437.
Fees, remission of, penalty 4437.
Fines, penalties, and forfeitures, how paid 4441.
Governor to appoint 4428.
Governor to report to 4442.
List of practicing dentists, secretary to furnish 4437.
Meeting called 4429.
Members, address to file 4431.
Money, how deposited and drawn 4437.
Offenses, specified, certain cases not to apply 4439, 4440.
Office, power to remove from 4432.
Office, term of 4428.
Operations, unlicensed persons not to perform 4438.
Other states, certificate from 4435.
Physicians and surgeons not to apply to 4444.
Practicing dentistry, how defined 4438.
Quorum 4443.
Report to make, when 4442.
Seal, to have 4429.
Board of education. See Public Schools.
County, election, powers and duties, temrary board 3417-3419.
State, who compose, powers and duties 3239-3242.
Boards of election, who constitute. See Elections.
Board of embalmers. See Public Health.
Dead body, attachment or detention of 6476.
Burial of without certificate or permit 2972, 6549, 6550.
Burial or cremation of 6474.
Laws relating to transporting, not affected 4454.
Person accompanying, obstruction or detention of 6476.
Removal without authority 2972, 6475.
Stealing or receiving unlawfully 6475.
Unlawful dissection 6473.
Unlawful removal or interference with 6814.
Death, failure to record 2986.
False certificate of 2987.
Death certificate, altering of 2972.
Carrier shipping without 2972.
Physician failing to issue or issuing false 2972, 6551.
Disinfection 4448.
Examinations 4448.
Examinations, fees 4449.
Fees, balance to go to school fund 4452.
Fees, to whom paid 4452.
Funds, not to exceed limit 4452.
Governor to appoint 4445.
Governor to report to 4452.
Health officer, undertaker must register with local 2967.
Licenses 4448.

Board of embalmers—continued.
License, practicing without, penalty 4451.
Practicing without, not to apply to certain persons 4451.
Regulation of 4450.
Renewal of 4449.
Meetings, when 4447.
Office, term of 4445.
Organization of 4446.
Practicing without license 4451.
Prior licenses respected 4453.
Public health act, violating, penalties 2972.
Qualifications and duties 4446.
Quorum of 4447.
Regulations of 4446.
Salaries and expenses of 4446.
Seal 4450.
Undertakers, must register with local health officer 2967.
Board of equalization 3638, 3693, 3793, 3797, 3839, 3844. See County Commissioners, Revenue.
Board of examiners, county, members of, duties 1549-1551.
Neglect of duty, penalty 1551.
Board of examiners, state, accountant, expert to employ, when 2855-2860.
Accounts between surveyor-general and state printer, to approve 4356-4358.
Accounts of officers to cause to be examined, penalty for failure 2855-2860.
Action may be brought on claim rejected by 5653.
Affidavit of auditing, accounts 2844.
Audit expenditures secretary of state 4263.
Bonds, official, settlement with sureties 2886.
Books and accounts to examine 4455.
Bullion tax agent, bond, examiners to approve 4248.
Claims, controller not to draw warrant, when 4459.
Failure of board to act 4459.
Itemized duplicate to be filed 4465.
When no appropriation has been made to pay, to recommend to legislature 4458.
Where appropriation has been made 4459.
Controller and treasurer, examination of books to permit 4457.
Convicts, road work by, expense of, to approve 7602.
Deficiencies, restriction on, no allowance or warrant 4467.
Depositions, may take 4461.
Duties, requisition for supplies issued only on 4470.
Duties, where appropriation has been made, unliquidated demands 4459.
Expenditures of secretary of state, to audit 4263.
Expenses of 4473.
Expenses, university, to pass on 4650.
Expert accountant, to employ, when 2855-2860.
Ex-soldiers, claims of, notice to claimants, proofs 4479.
Ex-soldiers, collection of claims, state not liable for 4480.
False testimony before, penalty 4462.
Furnishing board ex officio 4468.
How constituted and powers (Nev. Const. art. v, sec. 21) 314.
Board of examiners—continued.
Insane, claims for, to approve 2206.
Insane, expense of transporting, to approve 7590.
Inventory, secretary of state to take 4471.
Legislature, stationery 4472.
Library claims, to approve 3956.
Meetings, semimonthly 4463.
Members of, duties (county) 1549-1551.
Money to count 4455.
Newspapers to do official advertising 4481.
Newspapers to publish decisions, expense limited 4481.
Oaths, may administer 2845, 4461.
Official reports, to examine before going to state printer 4316.
Penalty for neglect to examine accounts of officers 2859.
Printing office, duties in relation to 2931, 4316, 4320, 4323.
Process, chairman may issue 4460.
Quorum, what constitutes 4464.
Reports to edit, examine and revise 2930.
Restrictions as to other officers 4476.
Road work by convicts, expense of, to approve 7602.
Rules, may establish 4461.
Salary, none 4473.
Secretary of state, duties of 4470.
Secretary of state, expenditures, to audit 4263.
Sessions, records of 4463.
Stationery, how issued to legislature 4474.
Supplies, bidder to furnish, bond 4469.
Controller to withhold warrants, when 4475.
For legislature 4472.
Inventory of 4470.
Lowest bidder to receive bid, provided 4469.
May purchase in open market 4469.
Purchase of claims for, not to be paid, when 4477.
Purchase of, how made 4476.
Surplus returned by legislature 4475.
To advertise for 4469.
Sureties on bonds, settlement with 2886.
To investigate claims of United States, ex-soldiers 4478.
Treasury, amount of money in, affidavit to file and publish 4456.
University expenses, to pass on 4650.
Vouchers, examination of 4471.
Who to consist of 4455.
Witnesses, allowance for 4460.
Board of fish commissioners 4483. See Fish Commissioners.
Board of health. See Public Health.
City 794 (56).
County 2981, 2982.
State 2952-2980.
Board of irrigation, members of, powers 4692-4694, 4706. See Water.
Board of military auditors, powers, seal 4053-4055.
Board of orphans' home directors, member of 4089. See State Orphans' Home.
Board of pardons, affidavits to be used before, officers who may take 7627.
Attorney-general member of 7623.
Bail not to be remitted by 7630.

Board of pardons—continued.
Certificate of action 7624.
Certificate of death 7624.
Certificate of forfeiture 7624.
Clerk of, duties 7623.
County commissioners notified of applications for remission of fines or forfeitures filed with 7625-7626.
Created how, who to constitute 307, 7623-7630.
Death penalty, when remitted by, proceedings 7624, 7269.
District attorneys to be notified of applications for pardon filed with 7625-7626.
District judges to be notified of applications for pardon filed with 7625-7626.
Duty of officers receiving notice of application for pardon 7626.
False oath or affirmation, perjury, penalty 7628.
Fines or forfeitures, remitted how 7623.
Governor, member of, 7623-7630. (Nev. Const. art v, sec. 14) 307.
Justices supreme court members of, 307, 7623-7630.
Members of, authority to administer oaths 7627-7628.
Notice of application for pardon filed and served how, where 7625.
Notice not required for restoration to citizenship or commutation from death 7629, 7625, rule iii, p. 2109.
Oath, any member may administer 7627-7628.
Order to discharge prisoner from custody 7625.
Personnel and powers (Nev. Const. art. v, sec. 14) 307.
Perjury, false oath to member of 7628.
Proceedings when death penalty is remitted 7624.
Restoration to citizenship how obtained, when 7625.
Rules of, 7630, pp. 2109-2110. (Nev. Const. art. v, sec. 14) 307.
Board of parole commissioners, attorney-general member of 7631.
Board of pardon rules applicable thereto 7360. See pp. 2109-2110.
Control over paroled prisoners 7631.
Created how 7631.
Duty of peace officers 7631.
Escape, prisoner out on parole when deemed 7631.
Funds, parole prisoner to be supplied with, how, when 7632.
Governor, member of 7631.
Governor's private secretary, secretary of, duties 7634.
Justices supreme court, members of 7631.
Majority of may act 7631.
Parole, board of, rules 7634. See notes 2, 3.
Parole, commissioners, board of, created, duties, powers 7631-7634.
Paroled prisoners to report to 7633.
Peace officers, duties concerning paroled prisoners 7631.
Powers of 7631.
Prisoners entitled to parole, when 7631.
Prisoners paroled leaving state without permission 7631.
Board of parole commissioners—continued.
Recommendation of 7632.
Report, prisoners paroled to 7633.
Revocation of parole 7631.
Rules of 7630, pp. 2109-2110 (Nev. Const. art. v, sec. 14) 307.
Secretary, private, of governor, secretary of 7634.
Warden of state prison, duties pertaining thereto 7632.
Board of pharmacy, act to take effect, when 4514.
Adulteration of drugs, penalty 4511.
Applicants, certificates issued, list to keep 4497.
Applicants, examination of 4497.
Applicants, fees of, money, how used 4499.
Book of entry, open to inspection 4512.
Certain poisons, retail of, unlawful, except, entry of sale to be made 4512.
Certificates, how issued and what authorized by 4508.
Revocation of, filing, appeal to courts 4504.
To be issued to 4498.
To be recorded with 4502.
To issue, showing to be made 4497, 4501.
To practice, temporary may issue 4498.
To refuse, when 4504.
Compensation, to serve without 4510.
Complaints, investigated 4511.
Compounding drugs without license, penalty 4513.
County clerks, to be notified 4497.
Creation of board 4495.
Diploma, forged or fraudulent, penalty 4500.
Drugs, adulteration of 4511.
Adulterated, forbidden, sale of, penalty 4511.
Compounding without license, penalty 4513.
Label, omitting or wrong, penalty 6542, 6543.
Narcotic, sale of, without prescription, penalty 6543, 6544.
Negligence in compounding, penalty 4503.
To add or remove ingredients for adulteration, unlawful 4511.
To produce miscarriage, sale of, penalty 6448, 6449.
Examination to practice 4498.
Expense, how paid 4506.
Fees, to charge 4499.
Governor to appoint 4495.
Gratuitous services, not prohibited, when 4505.
Label on drugs, omitting or wrong, penalty 6542, 6543.
Licensed pharmacists only, to compound drugs 4513.
Meetings of board 4496.
Miscarriage, sale of drugs to produce, penalty 6448, 6449.
Narcotic drugs, sale without prescription, penalty 6543, 6544.
Noncompliance with act, penalty 4509.
Officers 4496.
Pharmacists of army or navy, exemption 4505.
Physicians, act not applicable to 4512.
Poisons, to be labeled, penalty for sale without 4512, 4513.

Board of pharmacy—continued.
Practicing unlawfully, proceedings, who may institute, penalty 4509.
Presenting fraudulent diploma, penalty 4500.
Prosecutions, how made 4511.
Provisions of act not applicable to physicians 4512.
Pure food and drugs, adulterating or misbranding, penalty 3486.
Qualifications of 4495.
Quorum 4508.
Receipts and disbursements, state aid, when 4506.
Sale of poisons, regulations concerning 4512, 4513.
Seal 4497.
State aid limited 4507.
Temporary certificate, may issue, when 4498.
Term of office 4495.
Testimony, may take 4497.
Vacancies, how filled 4495.
Board of printing commissioners 4328. See State Printer.
Board of railroad commissioners, members of 4549. See Railroads.
Board of regents. See University of Nevada.
Board of control of agricultural experiment station, 457.
Chairman to be appointed 4642.
Clerk, duties, qualifications, salary 4642.
Compensation, none 4642.
Election of 4640.
Expenses of 4640.
From accruing interest to maintain mining department (Nev. Const. art. xi, sec. 8) 360.
Governor, annual reports to 4641, 4658.
Legislature to provide for and define their duties (Nev. Const. art. xi, sec. 7) 359.
Meetings of 4643.
Number of 4640.
Oath of 4640.
Powers and duties of 4641, 4657.
Quarterly and special meetings 4643.
Records of proceedings open to public inspection 4642.
Reports to governor 4641, 4658.
Term of office 4640.
To control state university, duties to be prescribed by law (Nev. Const. art. xi, sec. 4) 356.
To invest in separate fund, to be irreducible, proceeds from land granted by act of Congress of July 2, 1862, for college for benefit of agriculture, mechanic arts, military tactics (Nev. Const. art. v, sec. 8) 360.
Vacancy, governor to fill 4640.
Board of revenue, state, members of 3809, 3828.
Board of sheep commissioners 4586-4602. See Sheep Commissioners, Live Stock.
Board of state prison commissioners, who constitute, powers and duties (Nev. Const. art. v, sec. 21) 314, 7561-7585. See State Prison.
Board of visitors, state university 4666-4670. See University of Nevada.
Appointed, how 4667.
Chief justice, chairman 4666.
Duties 4668.
Expenses 4670.
Notice 4669.
Term 4666.
Board to determine conflicting applications to purchase land, member of 3208.
To investigate state police 4281.
Boat, definition 6294 (6).
Boats, rafts or other water craft, injury to or unlawful interference with, penalty 6756.
Boat or vessel, for passengers overloading, death caused by, penalty 6406.
Boilers, in and about mines, to be examined 4228.
Liable to cause fire, liability for operating 6580.
Boilermakers, liens of 2231.
Bona fide purchaser without notice 1087. See Conveyances.
Bonds and undertakings. For bonds of several state and county officers see index of such officers.
Bonds, action upon, justice's court has jurisdiction if amount not over $300 5714.
Actions between sureties for contribution, civil practice 5479.
Additional may be required on attachment 5149.
Affidavit and justification of sureties generally 5484, 5485.
Affidavit of sureties, what required under civil practice act 5484.
Amendment proposed to art. xi, sec. 3 of the constitution passed at the legislative sessions 1909, 1911, subject to ratification by the people at the general election 1912, provides for the investment of school moneys in bonds of any county in the state (Nev. Const. art. ii, sec. 3) 355.
Attorney not to be received as surety in district court, D. C. rule xiv, p. 1428.
Bail. See Bail.
City, county or state not required to furnish in actions by or against 5487.
Corporations organized to furnish 1242-1248.
Defined in civil practice act 6294 (12).
For bail in contempt proceedings, form and conditions 5400.
For obedience to order regarding children in action for divorce 5840.
For payment of judgment when adjournment for more than ten days in justice's court 5760.
In actions in quo warranto for usurpation of public office 5660.
In justice's court, deposit may be made in lieu of in all cases 5816.
Justification of sureties, civil practice act 5485.
Of assessor, action on for underassessing or failure to assess land 3839, 3840.
Of county recorder, action on for entering satisfaction of mortgage without affidavit that taxes are paid 3755.
Of guardian ad litem, D. C. rule xxxi, p. 1430.
Of guardian, different actions may be maintained upon 6184.
Of guardian of insane person for payment of expenses in advance to secretary of state 2201.
Of guardian, time within which action may be brought against sureties 6185.

Bonds—continued.
Of sheriff liable for deposit on arrest in civil action 5107.
Of sheriff liable for escape of defendant arrested in civil action 5111.
Of the United States or any state, legislature may invest school moneys in (Nev. Const. art. xi, sec. 3) 355.
Of trustee appointed on dissolution of corporation in quo warranto, suit may be brought on 5673.
Official, may be furnished by surety company 2888.
Official or statutory, how sureties may be released, liability 2880-2883.
Official, to State of Nevada, action may be brought on in his own name by any person injured 2870.
On appeal, affidavit of sureties, waiver, deposit in lieu of, exception of sureties 5334.
On appeal and stay of execution in action for forcible entry or unlawful detainer 5601.
On appeal, entry of in justice's court docket 5800.
On appeal from justice's court, requirements with or without stay, deposit, justification of sureties 5792.
On appointment of elisor 5495.
On motion for continuance by defendant in action for forcible entry or unlawful detainer 5597.
State may not incur debt exceeding $300,000 (Nev. Const. art. ix, sec. 3)350.
Surety company may act as sole surety 695.
Surety company or cash may be accepted in place of personal sureties 5486.
To be executed by railroad company for building of fences in proceedings under eminent domain 5619.
To defendant when plaintiff occupies premises pending proceedings in eminent domain 5615.
To stay execution of judgment or order pending appeal 5361.
Official bonds, additional, when may be required 2873, 2875.
Approval, record and filing 2872.
Condition expressed 2869.
Defect in not material, how remedied 2871.
Form of 2868.
Justification of sureties 2878.
Laws, applicable to 2869.
New, penalty of 2884.
Number of sureties 2877, 2888.
Subscriptions to, how taken 2885.
Surety company may furnish 2888-2890.
Surety, liability, ratable 2886.
Sureties, death, removal or insufficiency 2873, 2874.
Sureties, justification of 2878.
Sureties, liability amount may assume 2879.
Sureties, number of 2877, 2888.
Sureties, released how 2880, 2881.
Sureties, settlement with 2886.
Suit on, who may bring 2870.
Time in force 2869.
Bonds—continued.
Peace, bound to keep, forfeiture and recovery 6874-6876.
State not required to furnish in action by or against 5487.
Sureties, actions between for contribution 5479.
Sureties, affidavit and justification 5484, 5485. See Civil Practice.
Surety company, appoint controller as attorney 696.
Articles filed with secretary of state 696.
Bond of not approved, when 701.
Certificate from secretary of state 697.
Civil practice act, permits acceptance 5486.
Corporation organized to furnish 1242-1248.
Criminal practice act permits acceptance 7329.
Estopped to deny power 700.
Evidence of responsibility 698.
Expense of bond, costs 699
Justification 698.
May be accepted under civil practice act 5486; criminal practice act 7329.
Release from liability 695.
Service of process on 696.
Sole surety 695.
Bonds of irrigation district, sale of, when 4752. See Water.
Bonds of states and United States, school fund to be invested in (Nev. Const. art. ii, sec. 3) 355, 3387.
Bonds, school district 3431-3441. See Public Schools.
Books, bringing of by witness may be required 5431.
Judgment for delivery of in quo warranto 5667.
Of corporation, may be ordered delivered to trustee on dissolution in quo warranto 5675.
Of public utility, public service commission may require production of 4529, 4531.
Witness may be compelled to produce 5416.
Booths for election purposes 1850. See Elections.
Bottomry or respondentia, contracts of 1081.
Boundaries, of county, commissioners may cause survey of 1489-1495, 4349.
Of irrigation district 4771.
Of mineral lands. See Mines and Mining.
Of state, fixed in constitution 368.
Of township changed, effect 2784.
Surveyor-general custodian of maps of state and county 4355.
Bounties, artesian wells 702, 717.
Artesian wells, state reimbursed 714, 715.
Badger 718-722.
Coyote 718-722.
Gopher 723-727.
Lynx 718-722.
Mountain lion 718-722
Natural gas wells 702-706, 712-717.
Noxious animals 718-727.
Noxious animals, procedure to obtain 719 727.
Oil wells 702-717.
Pocket gopher 723-727.

Bounties—continued.
Prairie wolf 718-722.
Wells, procedure to obtain 703-717.
Wildcat 718-722.
Box for names of jurors summoned, judge to approve kind 5204.
Boxing, glove contests 3881-3889. See Glove Contests.
Branch jail may be established 7614.
Branches of learning required to be taught in university 4639. See University of Nevada.
Brands and marks. See Marks and Brands, Live Stock.
Breach of peace, before magistrate, security 6873.
Refusal to prevent, penalty 6606.
When punishable as contempt in justice's court 5795.
"Break," word defined 6294 (20).
Breweries, location and control by cities 794 (54).
Bribery, asking or receiving bribe, penalty 6312.
Conviction of excludes from jury unless restored to civil rights (Nev. Const. art. iv, sec. 27) 285.
Defined, penalty 6311.
Disqualification for office or jury (Nev. Const.) 268, 285.
In relation to election or procurement of office disqualifies from holding office (Nev. Const. art. iv, sec. 10) 268.
Laws to be passed preventing at elections (Nev. Const. art. iv, sec. 27) 285.
Of officer, penalty 6311-6328.
Offender competent witness, proviso 6328.
Or attempting to bribe electors or election officers 1829, 6802.
Or attempting to bribe employee or agent, penalty 6796.
Or attempting to bribe juror, penalty 6323.
Or receiving bribes, labor representative, penalty 6794, 6795.
Bridges. See Public Highways, County Commissioners.
Eminent domain may be exercised for 5606.
Fast riding or driving on, penalty 6772.
Injury to, penalty 6757.
Measure of damages for cutting timber for repair of 5507.
Viaducts and tunnels, control of by city, 794 (29).
Brigade 4003. See State Militia.
Brigadier-general 4003, 4005. See Militia, State.
Bringing or instigating false suit, penalty 6366.
Budget of county expenses, commissioners to make 2826-3829.
Building and loan associations, foreign 1356-1364. See Corporations.
Building defined 6294 (18).
Destruction by explosive, penalty 6572, 6573.
Building stone, land entries 3166. See Public Lands.
Building stone material, mining claims for, located how 2393.
Bulk, merchandise sold in, regulations 3908-3912. See Sales of Merchandise.
Bulkhead, required near collar of mining shaft 4217.
Bull fight, city may prevent 794 (75).
Bullion, and gold dust to be returned as money and not sold under execution 5287.
Assayer or purchaser failing to inquire concerning or keep record of, penalty, 2483-2486, 6763, 6764.
Lien and attachment 5492.
Preferred lien upon when sold at reduction works 5492.
Bullion tax agent 4240-4248. See State License and Bullion Tax Agent.
Bunco-steering defined, penalty 6464.
Burden of proof, in action of railroad company against railroad commission to set aside rate 4564.
In action to review order of public service commission 4540 (e).
Bureau of Animal Industry (U. S.), agents, duty of 4390.
Commissioner, special examination to make 4390.
Diseased live stock, to prevent exportation of 4390.
State sheep commission to adopt rules of 4588.
Bureau of Immigration and Naturalization (Federal) established 2514-2544. See Naturalization.
Bureau of industry, agriculture and irrigation, appointment of commissioner 4486.
Appropriation for 4492.
Attorney-general, member of commission 4486.
Carey act lands, to have control of 4489.
Chairman, governor to be 4486.
Commission, to control 4486.
Commission, to govern, composed of, whom 4486.
Commissioner, governor to appoint 4486.
Commissioner, oath to take, 4487.
Office at pleasure of governor 4487.
Salary of 4491.
Secretary of bureau 4486.
Contributions, may accept 4490.
Correspondence, to answer 4489.
County contributions, authorization of 4490.
Disbursements, how made 4492.
Distributing unreliable literature, penalty 4494.
Established 4486.
Expenses, how paid 4491.
Experiments, certain to conduct 4489.
False statements, penalty for 4494.
Fees, may exact when, paid to whom 4490.
Governor, member of commission 4486.
Information, to collect and preserve 4489.
Information, to gather, preserve and disseminate 4489.
Index to information 4489.
Industrial problems, to study 4489.
Irrigation problems, to study 4489.
Meetings of commission 4488.
Office rooms and hours 4488.
Panama Pacific exposition, to assist in exhibit at 4489.
Passes on railroads, may accept 4490.
Penal provisions 4494.
Powers, duties, and functions of 4489.
Printing, where may be done 4493.
Restrictions 4489.
Secretary, commissioner to be 4486.
State engineer, member of commission 4486.

Bureau of industry—continued.
Surveyor-general, member of commission 4486.
Term of office of commissioner 4487.
Title of 4488.
Transportation and contributions, may accept 4490.
Bureau of weather 4405-4410. See Weather Bureau.
Burglary 6634-6636.
Burglar tools, making or having, penalty 6637.
Committing other crime therewith, penalty 6636.
Degrees of 6634.
Jurisdiction 6634, 6917.
Presumption of intent 6635.
Property restored 6650, 6651, 7448.
Burial. See Board of Embalmers.
Certificate must issue, when, proviso 2974.
Coroner, permit to issue 6549, 6550.
Exhuming remains unlawfully 6552, 6553.
Health officer, permit to issue 2974.
Pauper, allowance for 2920.
Permit, what to contain 2961.
Removal and reburial 2974.
Without permit or certificate, penalty 2972, 6549-6553.
Bushel, standard for charcoal 4824.
Bushel, weight for certain commodities 4802.
Butter, imitation, sale of, penalty 6526, 6528.
Butter, standard package, weight 4804.
By-laws for corporations, how made 1125. See Corporations.

C

Cabinets, specimen mineral, geological, art or paleontological exempt from execution 5822-5824.
Cables and ropes in mines, regulations 4227.
Cadets, university 4664. See University of Nevada.
Cages in mines, regulations of 4215, 4222, 4235. See Mining Inspector.
Calendar, court, pp. 1423-6. See Civil Practice.
Calendar month, defined 5475.
Calf, age limit before sale 2991.
California, State of Nevada may be enlarged by relinquishment of territory by 368.
Camp fire, failure to extinguish, penalty 6632.
Canals, eminent domain may be exercised for 5606.
Candidates for nomination, primary law 1737-1745. See Elections.
Canvass, election returns, city board to 801.
County commissioners to 1503, 1513.
District judge to 1513.
Justices of supreme court to 297, 1796, 1842, 1863, 1881, 1884. See Elections.
Canvass of votes of constitutional amendments 1881.
Canvass of returns, of election for ratification of constitution 419.
Of election for state officers by chief justice and associate justices 297.
Canyon, right of way through for road and railroad 5628.
Capital offenses, bail not to be allowed if proof evident or presumption great 236.
Capital punishment, for what crimes inflicted 6532, 6386, 6413, 6422, 6442, 6572, 6573, 6625, 6819.
Capital punishment—continued.
How inflicted, hanging or shooting 7281.
Suspension of 7270-7278.
Warrant for execution 7268.
Capital stock of incorporation, increased or diminished, how 1236. See Corporations.
Capitation tax, how laid by Congress 132.
Capitol, to be at Carson City 369.
Terms of supreme court to be held at 322.
Capitol commissioners 4411-4426. See Board Capitol Commissioners.
Capitol grounds, defacement or obstruction, penalty 6774.
Cards, playing, when deemed gambling, penalty, 6518.
Carey act lands, federal and state acts concerning 3063-3097. See Public Lands.
Carson City, orphans' home children may attend public school at 4106.
Seat of government located at 369.
Carrying concealed weapons, penalty 6568.
Cash in lieu of bail accepted 7330, 7332, 7335.
Catalogue, to be kept of specimens, ores or curiosities exempt from execution 5824.
Cattle. See Live Stock.
At large upon uninclosed land, how assessed 3843.
Guards, recovery of cost under bond for construction of railroad fences in proceedings under eminent domain 5619.
Or domestic animals, wounding or poisoning, penalty 6747.
Caucasian race, marriage with other races forbidden, penalty 6514.
Cause of action. See Civil Practice.
Joinder 5039.
When successive actions may be maintained on 5477.
Cause or controversy, may be submitted and determined without action 5252.
Cemeteries, cities under general act may control or vacate 794 (57-59).
Constructing road or public utility through without permission, penalty 6477.
Eminent domain may be exercised for 5606.
Exempt from execution, when 3621.
Injury to, penalty 6759.
Property of lot owners in, inalienable 1408.
Rural, corporations for 1398-1409. See Corporations.
Census. See Public Schools.
Marshals, school 3361-3372.
State and federal to be taken, basis of representation in legislature (Nev. Const. art. xv, sec. 13) 381.
Certiorari, supreme court empowered to issue writ of 319.
Writ of, district court or judge may issue 321, 5683-5693. See Civil Practice.
Central Pacific railway grant, price of state lands within 3198.
Certificate. See Corporations, Criminal Practice, Elections, Medicine and Surgery, Mines and Mining, Public Health, Revenue.
And seal of county clerk to be attached to summons in action in justice's court to be served out of town 5732.
And seal to prove records of other states 5410.
Filing of paper includes 2036.

Certificate—continued.
For authentication of records under act of Congress 526-529.
How seal to be attached 5481.
Of acknowledgment to have court seal affixed 4879.
Of birth, by whom made, what to contain 2964, 2965.
Certified copies of, issued, when 2971.
False, penalty for 2987.
Recorded, when and where 2985.
Of clerk for stay of execution pending motion for new trial in district court, D. C. rule xxvi, p. 1429.
Of clerk of district court that appeal is perfected, when to stay execution, D. C. rule xxii, p. 1429.
Of clerk or judge, consul, minister or embassador to judicial record of foreign country 5411.
Of clerk to signature of judge taking affidavit out of state 5453.
Of corporation, what to set forth 1108, 1114, 1115, 1119, 1286.
Of county surveyor or deputy may be submitted as evidence 1667.
Of death, certified copy of issued how 2971.
False, issuance of, penalty 2987.
Regulations concerning, recorded when and where 2958-2960, 2985.
Of district judge as to which justice of the peace is successor when two equally entitled, to be filed with county clerk 5807.
Of election 1513, 1796, 2775, 2793, 2794. See Elections.
Becomes void if no appeal taken within thirty days from judgment of district court annulling election 1812.
To be issued by clerk of board of county commissioners in accordance with judgment 1810.
Of foreign corporation, if not filed with secretary of state, action not to be brought or defended 1350.
Not filed, other proof 1347.
Of incorporation certificate, when is evidence 1221.
Of indebtedness against county not presented within six months after notice that it is payable, funds may be paid for other purposes but demand becomes due on re-presentation 1563.
Of judge or referee to settlement of statement on appeal and filing 5337.
Of judgment of supreme court to be entered in trial court 5360.
Of location of mining claim, recorded when 2424.
Of nomination filed 1837, 1839.
Of probable cause, stay pending appeal 7294.
Of proof of annual labor on mines 2046, 2382, 2383, 2395, 2430.
Of sale of real estate under execution, what to state, duplicate to be filed with county recorder 5298.
Of redemption of real property sold under execution to be acknowledged and recorded 5301.
Of sale to include all property sold for taxes bid in by county treasurer, recording 3669.
Certificate—continued.
Of sale under execution conveys all right debtor had in property on day execution levied 5296, 5297.
Of secretary of state to qualifications of surety company, evidence 698.
Of stock of corporation, district court may order new issued in lieu of one lost 1165.
Of survey of mine by licensed surveyor, when prima facie evidence 2429.
Of tax sale, 3667.
Physician's on commitment of insane person to be transmitted to asylum 2204.
To purchase on sale by assessor of personal property for delinquent taxes 3679.
When to be issued by district judge to new officers on removal of officers of corporation 1182.
Certified copy, of affidavit filed with testimony taken for perpetuation prima facie evidence of facts 5469.
Of delinquent tax list is evidence 3658.
Of incorporations of athletic, historic, scientific or literary societies prima facie evidence 1384.
Of incorporations of W. C. T. U. prima facie evidence 1437.
Of instrument affecting real property, when may be read in evidence 5414.
Of judicial record of this state or the United States is evidence 5408.
Of order of railroad commission prima facie evidence 4565.
Of record in office of county recorder may be read in evidence 1094.
Of record of instrument recorded in office of county recorder may be read in evidence 1094.
Of record of notary or predecessor, when prima facie evidence 2754, 2759.
Of record of this state or the United States other than judicial in custody of public officer or certified or verified copy may be read in evidence 5409.
Of record relating to naturalization is evidence 2541.
Of restored records validated 5639.
Of will admissible in evidence 5877.
Or record of United States or state patent, when admissible in evidence 5415.
Certified records and documents, originals and copies admissible in evidence 5408-5415.
Certiorari (Nev. Const.) 319, 321, 4840, 4843, 5683-5693, 5711-5713, S. C. rule 18, p. 1424. See Civil Practice.
Chain gang, city may have 799.
Chairman political parties. See Elections.
Challenges to jury. See Civil Practice, Criminal Practice, Jury, and Grand Jury.
Challenge to voter, how made 1731. See Elections.
Challenging or delivering challenge to fight duel, penalty 6423, 6426.
Chambers, functions of district court at 4843, 4922.
Chancery cases may be tried with or without jury 5229.
Change of venue, appeals from orders, notice, court rule xxiii, p. 1425.
Civil action 5014, 5015.

Change of venue—continued.
Costs in 7466, 7467.
Criminal action 7115-7120.
Changing names. See Civil Practice, Names and Emblems.
Of females in actions for divorce, 5844.
Of individuals, procedure 5335-5337.
Of persons, local or special laws for, invalid (Nev. Const. art. iv, sec. 20) 278.
Chaplain of legislature 4119.
Charcoal, act regulating measurement of 4824-4827.
Charge to jury. See Civil Practice, Criminal Practice.
Charitable association or company, state may loan, donate or subscribe to 346.
Charitable corporations, may be exempted from taxation 339.
Sale of property, district court may allow 1368.
Charitable institutions, incorporated, how 1365.
Charitable societies exempt from taxes, when 3621.
Charters. See Corporations.
Of banks, violation of banking law authorizes annulment 626.
Of expiring corporations renewed, how 1208.
Chattel mortgage 1080.
Affidavit to be attached 1080.
Attachment of property, minimum, subject to 1080.
Amount of, limited 1080.
Foreclosure of 5501-5503.
Record of, fees for 1080.
Recorder, book of, to keep 1080.
"Chattels," when included in words "personal property" and "property" 5475.
Cheap transportation lines, corporation for 1341-1345. See Corporations.
Checks, drawing on bank without deposit, penalty 6672.
Parties and liability of in actions on, schedule of sections 2548.
Check list, election 1713. See Elections.
Chief clerk of assembly, election and duties 276, 415-419.
Chief engineer and commissioner of internal improvements, surveyor-general ex officio 4351.
Chief justice of supreme court. See Supreme Court.
For reasonable cause may be removed on two-thirds vote of members elected to each branch of the legislature (Nev. Const. art. vii, sec. 3) 336.
How determined 317, 318, 2775, 4829, 4830.
Is justice with shortest term, but if commissions of two bear same date chief justice shall be determined by lot 318.
Or presiding magistrate to attest certificate of clerk to judicial records of other states 5410.
To preside over senate on trial of impeachment of governor or lieutenant-governor (Nev. Const. art. vii, sec. 1) 334.
Warden of state prison, bond of to approve 7582.
When to certify statement on appeal 5333.
Chief of governor's staff, adjutant-general to be 3993.
Chief of ordnance, adjutant-general ex officio 3993.
Chief of police, appointment under city government act 839.
Prisoners in city jails, to have charge of and to work when ordered 7619.
Children. See Adoption of Children, Civil Practice, Criminal Practice, Estates of Deceased Persons, Guardians, Juvenile Court Law, Minors, Wills.
Abandonment of, penalty 766, 6446.
Adoption of 746, 5825-5834.
Age, falsely representing to procure liquor 6506.
Of majority, males 21 years, females 18 years 431.
Apprentices 482-497, 2919.
Cigarettes or tobacco, sale of to 3874, 3875, 6502.
Contributory dependency and delinquency 757-764.
Crime, under 18 years, charged with, transfer to district court 741.
Custody in divorce proceedings 5840, 5841.
Damages for death by wrongful act 5648-5650.
Delinquent child defined 736.
Expense of maintenance and education, state charge 745.
Neglected or dependent 728, 756.
Person defined 728.
Dependent child, counsel may be appointed for 738.
Defined 728.
Guardian may be ordered to place in hospital 738.
Neglected or delinquent 728-756.
Destitute, care and education by cities 794 (60).
District judge to approve employment in certain cases 6824.
Employments forbidden, penalty 6506-6823.
Failure to support 6481-6483.
Foreign corporations placing, penalty 747.
Guardian, ad litem (see Civil Practice) 4993, 5726, D. C. rules xxix to xxxi, p. 1430.
Bond of, different actions may be maintained upon, parties 6184.
How appointed 4993.
Limitation of action for recovery of estate sold by 4963.
May consent to partition without action and execute release 5573.
May join in partition of real estate of ward 6166.
May sue for death injury or seduction of ward 4996.
Notice to on proceedings in district court to set aside apprenticeship, costs 493.
Of minor or insane person may apply for lot in federal townsite 1963.
Of minor or insane person, when deed to be made to for lot in federal townsite 1986.
Or personal representative may sue for death of adult 4997.
Time within which action may be brought against sureties on bond of 6185.
When may sue for death, injury or seduction of ward 4995.
Guardianship 4096, 6149-6201. See Guardians.

Children—continued.
Illegitimate, abandonment or neglect of, penalty 766.
Legitimatized, when 2351.
Proof of paternity 765.
Support of 765, 766.
Issue legitimate, marriage null or void 6117.
Jails, under 12 years not committed to 742.
Juvenile court law 728-756.
Liability to punishment 6268.
Married woman sole trader, liable for support of 2193.
Neglected child defined 728.
Dependent or delinquent 728-756.
Obscene literature 6461.
Placing by foreign corporations 747.
Pool or billiard rooms, visiting 6506.
Posthumous children, effect of conveyance, right of estate 1058, 1059, 6159, 6217, 6225.
Prostitution, houses of, enticing into 6445.
Rape, notwithstanding consent of female under 16 years 6442.
Saloon, permitting in 6842, 6843.
State to maintain and educate delinquent 745.
Substitution 6371.
Tobacco, sale of to 3874, 3875, 6502.
Under 12 years not committed to jail 742.
Under 14 years, employment of to be approved by judge 6824.
Under 18 years, charged with crime, transfer to district court 741.
Use of firearms by 6610.
Chinese, contracts of servitude not enforcible 6848, 6849.
Employment on reclamation work prohibited 3101.
Marriage with whites prohibited 6514-6516.
Naturalization of, prohibited 2510.
Public work, not to be employed 3483-3485.
Real estate, prohibited from holding 3602.
Slavery of, act concerning 6847-6850.
Christian religion, witness believing in other may be sworn according to peculiar ceremonies 5447.
Church, district court may make order for sale or mortgaging of property of 1369.
Protestant Episcopal, district court may make order for sale of real estate 1431.
Churches, chapels and property used for worship exempt from taxes 3621.
House of prostitution forbidden within four hundred yards 6510.
Incorporated, how 1365.
Injury to property of 6760, 6761.
Churchill County, creation, boundaries and seat 390, 1449, 1451, 1453-1455.
Chutes, eminent domain may be exercised for 5606.
Cigarettes or cigarette paper, selling or giving to minors, penalty 3874-3875, 6502, 6503.
License for sale of 3872, 3876.
Circulating false report as to bank 661.
Citation, by district court or judge or justice of the peace for discovery of personal property on which taxes delinquent 3679.
May issue to garnishee 5177.
Of officer guilty of malfeasance 2852.
To issue in proceedings to restore lost records 5642.

CITIES (General Incorporation Act)
Accounts, inspection of 983.
Acquire and hold property 779.
Actions, how brought 796.
Actions by or against bond not required of 5487.
Actions, summons, how served 5023.
Animals running at large in 794 (71).
Annexation of additional territory 870.
Annual revenue reports 982.
Appointment of officers 784.
Arrests, who may make 800.
AUDITOR—
Accounts to keep 821.
Annual report 821, 982.
Books of account to keep 821.
Bonds, list of to keep 821.
Contracts, book of to keep 821.
Duties of 821-825.
Financial condition, report of 822.
Financial reports to make 821.
Orders and warrants on treasurer to countersign 821.
Recommendations to council concerning bonds 821.
Bank may be fiscal agent 1119.
Bath houses, public 794 (38).
Births, registration of 794 (58).
Blacksmith shops, location and control 794 (54).
Breweries, location and control 794 (54).
Bridges, viaducts and tunnels, control of 794 (29).
Board of health, creation and duties 794 (56).
Bodies politic and corporate 779.
BONDS—
Auditor to keep list of 821.
Issue, restrictions 794 (5).
Issue, when must be submitted to election 794 (5).
Of municipal officers 794 (82).
Refunding issue 794 (6).
Buildings, regulation of 794 (62-64).
Canvassing board, mayor and council 801.
Cash to be counted 784.
Cemeteries, control over 794 (57).
Cemeteries, vacation of 794 (57).
Certificate of election, clerk to issue 801.
Certificate of incorporation, filing and publication 772.
Chain-gang, formation of 799.
CHIEF OF POLICE—
Appointment of 839.
Assistant, may appoint 839.
Policemen, may appoint 839.
Powers and duties 839, 840.
Children, destitute, care and education 794 (60).
City attorney, additional counsel 820 (2).
City attorney, qualifications and duties 820.
City clerk, contracts to countersign 819.
City clerk, duty as auditor 821-825.
City council, powers of 794.
City marshal, powers and duty 839, 840.
City officer, interference with 794 (72).
Cities under special charter may organize under general act 869.
Class, judicial notice 775.
Classification of cities 773.
Classification, higher attained 774.

CLERK—
Certified copies of records 818.
Office and duties 818.
To keep records 789, 793.
Commissioners of election 769, 771.
Commissioners of election, compensation 771.
Compensation of officer, restrictions 814.
Concealed weapons, regulations 794 (76).
Condemnation of property 794 (85).
Contests of election 787, 801 (3).
CONTRACTS—
Book of, open to inspection 821.
Of, void, when 1819.
Officer not to be interested in 811, 812.
Convicts required to labor 799.
Costs, delinquent tax suit 999.
COUNCIL—
Control manner of elections 801.
Final action, when deferred 791.
Journal of, to be kept 789.
May employ counsel 820 (2).
Meetings, general and special 788.
Meetings, public 789.
Quorum 786.
Rules, may adopt 787.
Special meeting, restrictions 790.
To levy tax 841.
Yea and nay vote 789.
COUNCILMEN—
Disorderly conduct of 787.
Disqualified from office created or salary increased 816.
Expulsion of member 787.
How chosen 783.
Number of 781.
Qualifications 782.
County jail may be used 794 (77).
Cruelty to animals, prohibition 794 (70).
Dangerous riding or driving or disturbance upon street, penalty 6589.
Dead, burial of, regulation 794 (58).
Deaths, registration of 794 (58).
Debt in excessive funds unlawful 977.
Decree of incorporation 769.
Delinquent tax suit, cost 999.
Deputy officers, appointment 815.
Disincorporation of 871, 876.
Disorderly conduct specified 794 (75).
District court, appeal from municipal court 837.
District court, to act in incorporation of 768, 769.
Disturbance of the peace 794 (72, 75).
Docket of, how kept 835.
Dog, cock, bull or prize fights, prevention 794 (75).
Dog tax 794 (11).
Duties of officers, additional 817.
Election, contest of 801 (3).
Election of officers 769, 801, 802.
Election returns, filing and canvassing 801.
Electors, who are 801.
Elevators, control of 794 (69).
Embezzlement under fifty dollars 794 (75).
Emergency tax 979.
Eminent domain 794 (85).
Eminent domain, may be exercised for city uses 5606.
Equalization 841.
Explosives and combustibles, control of 794 (67).
False pretenses 794 (75).
Fighting men or animals, prohibition 794 (75).
Financial condition, report of kept on file 822.
FINES—
And forfeitures, mayor may remit 784.
And forfeitures, paid into city treasury 797.
And penalties, how enforced 798.
How enforced 832.
Paid to city treasury 835.
Firearms and fireworks, discharge of, prevention 794 (75).
Fire department, establishment and regulation of 794 (68).
Fire protection 794 (62-69).
Floating-debt tax 981.
Foundries, location and control 794 (54).
FRANCHISES—
For furnishing light 794 (36).
For public utility 794 (30).
For what may be granted 794 (84).
Limitation to fifty years 794 (84).
Funds of not to be used for sectarian purposes 362.
General revenue laws applicable 841.
Hacks and other public vehicles, regulation of charges 794 (11).
Health, board of, creation and duties 794 (56).
Health, regulation of 794 (56).
Higher class attained 774.
Home rule guaranteed 767.
Hospitals, establishment, control, maintenance 794 (57).
Hotel runners, regulation of 794 (11).
Houses and lots, numbering of 794 (79).
Houses of correction and detention 794 (77).
Imprisonment under ordinance, mayor may release from 784.
Improvements, expense of, how provided 844, 868.
INCORPORATION—
Certificate of 772.
Judicial notice taken 772, 775.
Proceedings 768.
When complete 772.
Incorporated, may have recorder's court 316, 324, 4853.
Indebtedness or liability to, local or special law releasing invalid, when 278.
Indigent dead, burial of 794 (59).
Industries, regulation of, within and without limits 794 (54).
Inspection of light and power plants 794 (37).
Inspection of merchants and markets 794 (47, 49).
Interference with officers 794 (72).
Intoxicating liquors, sale of, regulated 794 (78).
Jails 794 (77).
Judicial notice of class 775.
Legislature shall provide for organization of by general laws and restrict their powers except for procuring water 345.
License taxes, levy and collection 794 (8-10).
License taxes, upon what may be levied 794 (10-11).
LICENSES—
Mayor to sign 784.
Paid into city treasury 797.
Regulations 794 (8).
Terms and manner of issuance 794 (9).
Upon what may be imposed 794 (10).

Lien, taxes are, against property assessed 937.
Liens, foreclosure of 833.
Light and power, inspection of 794 (37).
Liquors, inspection of 794 (52).
Livery stables, location and control 794 (54).
Lots, sale of, without plat filed, penalty 959.
Lots, what constitutes for lien 2214.
Lumber yards, location and regulation 794 (66).
Malfeasance or misfeasance in office 808.
Markets, regulation and control of 794 (46-48).
May make grants of lands to railroads 3531, 3532.
MAYOR—
Appointment of officers 803.
Casting votes 784.
Duties of 784.
How chosen 783.
May call on governor for military force 784.
May control militia, when 4058.
Pro tem 784.
Qualifications of 782.
Maps and lots, recording of 965, 966.
Meetings, general and special 788.
Mill privileges, control of 794 (40).
Money, payment of, conditions 784.
Money, power to borrow 794.
Municipal buildings and improvements, how provided for 846.
MUNICIPAL COURTS 830-838—
Appeal from 837.
Contempts of 835.
Entitlement of pleadings, process and papers 830.
Fines, how enforced 832.
Jurisdiction and powers 832-835.
Police judge to preside over 831.
Practice and procedure 832.
Warrants run to whom 838.
Name 779.
Nuisance, abatement of 794 (53).
Nuisances, prevention of 794 (18-31).
OFFENSES—
Against the city 794 (75).
Punishment for 794 (72).
Within, how punished 834.
Offensive, unwholesome or nauseous places of establishment, control of 794 (55).
Office, creation of 794 (83).
OFFICER—
Accepting bribe, penalty 812.
Additional bonds 807.
Appointive, removal 803, 804.
Appointive, term 804.
Bonds and reports 794 (82).
Bond of 805, 806.
Change of class continued 778.
Compensation of, restrictions 814.
Contest of election 787.
Contracts, not to be interested in 811, 812.
Deputies, who may appoint 815.
Duties, additional prescribed 817.
Elections of 769.
Elective 802.
Eligibility 810.
Malfeasance or misfeasance 808.
Oath of 805.
Powers and duties, prescribed 794 (83).
Refusing information to examiner, penalty 983.
Surrender property to successor 809.
Officer—continued.
Term of 802.
To hold but one office 813.
Vacancies, how filled 794 (83).
When to qualify 801.
Opium, control of 794 (78).
ORDINANCES—
Elections regulated by 801.
Evidence of 793.
Form and requisites 792, 793.
For public improvements 847.
How enforced 834.
How passed 792, 793.
Justice of peace has jurisdiction of violation 886.
Powers regulated by 795.
Previous continued 777.
Record of 793.
Regulating payments into treasury 797.
Relative to 841, 843.
Violation of punishment 798, 799.
Organization, how effected 770.
Packing houses, location and control 794 (54).
Parks and public grounds, control of 794 (12).
Perpetual succession 779.
Plat of land by private owner, provisions for 955-966.
Plat of land, vacation of 960-964.
Plumbing trade, regulation of 794 (44).
POLICE JUDGE—
Disqualification of 836.
Election and qualifications 831.
Fines, to pay to city treasurer 835.
Justice of peace may act for, when 836.
Reports to council 835.
Policemen, appointment and salaries 839.
Powers, general 779.
Powers, how carried out 795.
Presenting fraudulent claims for audit or payment 6715.
Prize fights, prevention of 794 (75).
Process, who may serve 800.
Proclamation of class 774.
Property for public purposes 794 (80).
Publication of certificate 772.
Public buildings, provisions for 794 (81).
Public conveyances, regulation of charges 794. (11).
Public improvements, advertisement for 851.
Public improvements, ordinance for 846, 847.
Public improvements, special assessment for 846, 848.
Public libraries 794 (61).
PUBLIC UTILITY—
Establishment of 794 (5).
Use of street, alley and public places 794 (30).
Public utilities, requirement and control of 794 (36-44).
Public utilities, to construct, purchase, lease and maintain 794 (38, 39).
Railroads, control of 794 (30, 33).
Registration of births and deaths 794 (58).
Registration of electors 801.
REVENUE AND TAXES 975-983—
Collection, manner of 841.
Equalization 841.
General revenue laws, applicable 841.
Ordinances, relative to 841, 843.
SPECIAL ASSESSMENTS 844, 868—
Assessment roll 853.

Revenue and taxes—continued.
Basis of frontage 854.
Lien of 853.
Report of assessor 855.
Road fund, commissioners to apportion 842.
Seal 779.
Secretary of state, certification of incorporation filed with 772.
Self-government 767.
Sewers, control of 794 (44).
Sidewalks, control of 794 (12-27).
Slaughterhouses, location and control 794 (54).
Soap factories, location and control 794 (54).
State not to assume debt of city unless created for public defense 351.
Stockholders, city not to become in any corporation except railroad company 347.
SPECIAL ASSESSMENT 844-868—
Assessment roll 853.
Basis of frontage 854.
Corrections in 859.
Council to determine 857.
Division of land after approval, apportionment 863.
Due when 862.
Form of report of assessor 855.
How enforced 867, 868.
Improvement on single lot 856.
Insufficient, city to pay deficit 864.
Invalid, new ordered, payment on 865, 866.
Irregularities, how remedied 868.
Lien of 853.
Lien on property 861.
Notice of, form, publication 858.
Objections to 858.
Report of assessor 855.
Roll evidence of regularity 860, 867.
Special funds, how kept 829.
Special meeting, business limited 788.
Special tax for, basis of 3620, 3637.
Stationary engineers, license and control of 794 (69).
Steam boilers, inspection of 794 (69).
Street improvement, expense of, how provided 844.
Streets and highways, right of eminent domain 5625.
Streets, alleys and public places, dedication of 958.
Streets and alleys, control of 794 (12-37).
Streets and alleys, franchise, may use 2129.
Streets, vagrants and disorderly persons worked on 794 (74).
Suspension of appointive officer 784.
Tanneries, location and control 794 (54).
Taxes, how enforced 833.
Taxes, levy and collection 794 (4).
Taxes, lien against property assessed 937.
Taxes, to be included in suit and judgment for delinquent taxes 878.
Taxation and revenue, collection, manner of, 841-868.
Taxing districts 794 (7).
Tax rate limited 975, 976.
TREASURER—
Bond of 805.
Duties of 823-829.
Money, how kept 827.
Money, how paid out 824, 825.
Receipts to give 826.
Report to council 828.
Treasurer—continued.
Settlement with clerk or auditor 823, 826.
Special fund to keep separate 829.
Vacancies, how filled 785.
Vagrants and disorderly persons, punishments 794 (73, 74, 75).
Vested rights continued 776.
Veto power of mayor 784.
Warrants, how paid 825.
Warrants, mayor to sign 784.
Wards, boundaries and population 780.
Wards, division into 780.
Water rates 794 (42).
Water, supply of, procured 794 (5).
Water-works, control of 794 (38, 39).
Water-works outside the city 794 (39-44).
Weights and measures 794 (50, 51).
Work houses 794 (77).

Citizen of United States, lands of, in this state not to be taxed higher than lands of resident 228.
Male, right of suffrage or office holding not to be withheld from, by reason of color or previous condition of servitude 411.
Citizens, defined, rights of guaranteed 160, 185.
Of different states, when jurisdiction in federal courts (U. S. Const.) 154.
Of one state cannot sue another state (U. S. Const.) 181.
When lost records regarding naturalization may be restored 5640.
Citizenship. See Naturalization.
In proceedings to restore lost records relating to, citation unnecessary 5642.
Procedure to acquire 2506-2544.
Proof of under mining laws 2379.
City, action against on rejected claim must be commenced within one year after rejection thereof 4967.
As a party to action, when not required to give bond or undertaking 5487.
Funds not to be used for sectarian purposes 362.
Incorporated under laws of Territory of Nevada, action by or against, trustees to prosecute or defend on disincorporation 971.
Indebtedness or liability to, local or special law releasing, invalid (Nev. Const. art. iv, sec. 20) 278.
Lots or property, leases of for longer than twenty years forbidden 1092.
May have contract declared void if public officer interested 2829.
Need not give undertaking on appeal 5346.
Property within limits, how listed for taxes 3633.
Recorders may receive fees 325.
City superintendent of schools 3305, 3312, 3315. See Public Schools.
Civil action. See Civil Practice.
Court fee to be advanced, when, in (Nev. Const.) 331, 2030.
Jury, may be waived in, three-fourths may agree on verdict (Nev. Const.) 232.
One form to be for law and equity 329.
Trial by jury secured but may be waived 232.
Civil arrest 5087-5113. See Arrest in Civil Action.
Forbidden on election day (Nev. Const.) 253

Civil arrests—continued.
Member of legislature exempt from, when (Nev. Const.) 269.
Members of militia, when exempt from 4081.
Civil cases, legislature by two-thirds vote may require unanimous verdict 232.
Civil law, controls in computing degrees of kindred in matters of estates 6119.
Civil officers. See Officers Generally.
Disqualifications for 267, 268.
Governor to transact executive business with, may require information from 299.
Impeachment of 6875-6893.
May control militia, when 2839, 2840, 3982, 4058.
Removal otherwise than by impeachment 337, 6894-6907. See Criminal Practice.

CIVIL PRACTICE

Abandonment, child abandoned may be adopted without consent of parent 5831.
Consent of parent adjudged guilty of, when not necessary on adoption of child 5828.
Abatement, action does not abate by death, disability or assignment, when 5004.
Abatement of nuisance, action for by county commissioners 1562.
In unincorporated town 919, 921.
In unincorporated town, action for recovery of expenses 921.
Judgment, damages 5504.
Within county, commissioners to order, district attorney to bring action 1562.
Abbreviations, permissible in court proceedings 4885.
Absence of attorney, any questions may be heard on law day in district court, D. C. rule v, p. 1426.
Of justice of the peace, another may attend in his behalf 5811.
Abstract of judgment in justice's court, filed in recorder's office creates lien on land 5782.
In justice's court may be obtained and entered in docket of district court and execution issued to other counties 5779, 5780, 5781.
Abstract of testimony in statement on appeal, when must be filed in supreme court 5333.
Abstract of title in actions for partition, how made, verified and corrected 5545.
In actions for partition, when notice of must be filed 5544.
Account, copy of as complaint in justice's court 5736.
Copy of may be ordered delivered and filed 5068.
Court may hear evidence or order reference after default 5236.
Of securities and investments in action for partition to be kept for inspection by clerk 5569.
Open for goods, wares or merchandise, action may be brought upon within four years 4967.
Store, action for any article charged may be brought within four years 4967.
When inspection and copy may be ordered in action in justice's court 5769.
When statute of limitations begins to run from last item 4969.
Accounts, contents of numerous may be proved 5417.
Accounting, action for when adverse claim made 5479.
Reference may be ordered 5229, 5231.
Acknowledgment by father, illegitimate child becomes legitimate from birth 5833.
By party making mark must have two witnesses 5475.
Certificate of, to have court seal affixed 4879.
May be taken by judges and clerks of supreme court and district court 4883.
Must be in writing to prevent bar by statute of limitations 4985.
Of consent to adoption of children, how made 5831.
Of satisfaction of judgment 5279.
"Action," when things in are included in words "personal property" and "property" 5475.
Actions, additional parties may be brought in 5008.
Adverse for mining claim on application for patent, what necessary to be shown 5526.
Affecting real property, where tried, change of venue 5011.
Affidavit of payment of taxes on foreclosure of mortgage or lien 3756.
Against assessor for failure to assess property 3625.
Against assessor for underassessing or failure to assess land 3839, 3840.
Against bank examiner for taking possession of closed bank 675.
Against bankrupt, time within which must be brought against trustee 553.
Against, by or between counties 1508, 1513, 1523.
Against county, city or town on rejected claim must be commenced within one year after rejection thereof 4967.
Against county, if taxpayer files objection to claim, commissioners to wait 10 days to permit institution of proceedings to determine validity 1521.
Against county, not to be brought until claim is first presented to commissioners and auditor, costs when recoverable 1523.
Against county recorder for entering satisfaction of mortgage without affidavit that taxes are paid 3755.
Against county treasurer for failure to settle with auditor for taxes 3650.
Against estate of deceased person, costs not recoverable unless more recovered than allowed on claim 5973.
Against estate of deceased person, judgment becomes approved claim, execution not to issue 5974.
Against estate of deceased person not to be maintained unless claim has been filed 5972.
Against estate of deceased person, when executor or administrator liable for costs 5976.
Against executor or administrator on claim to be brought within 30 days after notice of rejection 5968.
Against foreign corporation for doing business without filing certificate 1350.

Actions—continued.
Against joint defendants, liability if only part served 5031.
Against officer for escape of prisoner arrested on civil process may be brought within 2 years 4967.
Against officer for seizure of property may be commenced within one year 4967.
Against partnership, only general partners to be parties, exception 2907.
Against party failing to fence dangerous excavation 3235, 3237.
Against railroad company for baggage, evidence 3553.
Against sheriff, coroner or constable upon liability incurred by official conduct may be commenced within 2 years 4967.
Against sheriff and sureties for failure to pay over money 1652.
Against sheriff for official acts, notice to sureties 4957, 5242.
Against sureties on bond of guardian, time within which may be brought 6185.
Against sureties under guardian's bond to be commenced within 3 years 6185.
Against the state for services or advances authorized by law 5653-5655.
Against the state for services or advances authorized by law, attorney-general to defend, controller to produce evidence and may appeal 5654.
And proceedings for dissolution of corporation, appointment of receiver, powers 1194-1199.
Answer, schedule of sections relating to 5046.
Appeal from justice's court, power of district court, dismissal, damages, costs, judgment 5794.
Appeal not deemed perfected until court fees paid 2031.
Arbitration, schedule of sections 5255.
Arising in another state or foreign country, limitation 4947.
Arrest and bail, schedule of sections 5087.
Arrest in, discharge from, schedule of sections 5114.
At common law in United States courts, right of trial by jury (U. S. Const.) 177.
At law, when district court has jurisdiction (Nev. Const. art. vi, sec. 6) 321.
At law, when supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
Attachment and execution may be levied upon mortgaged personal property, including growing crops 1080.
Attachment or execution not to be levied to enforce claim against bank in hands of bank examiner 671.
Attachment, schedule of sections relating to 5147.
Attorney, fee in action for herding or grazing live stock on lands of another 2336.
Attorney in case not entitled to fees as witness 2038.
Authority, change, death or removal of attorney 507, 510.
Before justice of the peace to set aside covenants of apprenticeship 493.
Begun anew in proceedings under eminent domain where defendant's title defective 5618.
Bringing or instigating false to harass is misdemeanor 6366.
By, against or between counties 5013.
By city for recovery of special assessment 867.
By city on irregular special assessment, court may nevertheless render judgment 868.
By county against person for support of poor kindred 2916, 2917.
By county commissioners for abatement of nuisance 1562.
By county for relief furnished indigent of another county 2922.
By county treasurer against district attorney for failure to pay over moneys 1601.
By husband or wife against other, both may testify 5424.
By mandamus or injunction to enforce order of public service commission 4545.
By mining company or majority owners against minority owners for expenditures 2476-2482.
By or against bankrupt 553.
By or against city or town incorporated under laws of Territory of Nevada, trustees to prosecute or defend on disincorporation 971.
By or against county, district attorney to prosecute or defend 1598.
By or against executor, not necessary to join as parties those who are not qualified 6027.
By or against married woman when husband must be joined 4989.
By or against public service commission, attorney-general to be counsel 4544.
By or against state, municipality or public officer, when undertaking not required 5487.
By or against state or county, district attorney or partner not to appear 1610.
By party injured under act fixing standard weights and measures 4812.
By railroad commission against railroad company to enforce penalty for failure to obey summons, order or subpena for production of books, papers or accounts 4566.
By railroad company against railroad commission to set aside order fixing rates, procedure, injunction, trial, judgment, appeal, burden of proof 4564.
By state, subject to statute of limitations 4971.
By state, when pleadings need not be verified 5064.
By surety to compel one to pay debt due another 5479.
By woodchopper on lien to be brought within 60 days after taking possession 2230.
Cause of action subject to lien for attorney's fees 5376.
Claim and delivery, schedule 5124.
Clerk to disburse money paid for boarding and lodging jurors 2035.

Actions—continued.
Clerk's fees in counties polling over 800 votes 2007.
Clerk's fees when not over 800 votes in county 1995.
Commenced before repeal of law by civil practice act not affected by such repeal 5818.
Commenced with intent to defraud creditors void 1083.
Complaint in, what to contain 5083.
Constable's fees in counties polling over 800 votes 2011.
Constable's fees in counties polling 800 votes or less 1999.
Contesting election, delays in obtaining evidence not to cause contest to fail 1894.
Contesting election for any public office, may be brought by district attorney when any person unlawfully holds 1814.
Contesting election for county or township office, clerk of board of county commissioners to issue certificate in accordance with judgment 1810.
Contesting election for county or township office, fees of clerk, sheriff and witnesses same as in district court 1811.
Contesting election for county or township office, if judgment annuls election and no appeal taken within thirty days certificate becomes void 1812.
Contesting election for county or township offices, issuance and service of subpenas, attachment to compel attendance of witnesses 1809.
Contesting election for county or township office, statement or complaint filing, fixing time of hearing, notice and service 1808.
Contesting election for district judge triable in adjoining district court in like manner as contest for county or township office 1813.
Contesting election for member of the legislature, either party may take depositions under rules of district court, forwarding to secretary of state, delivery to presiding officer 1822.
Contesting election for member of the legislature, how started and conducted, service of notice, depositions, how taken and transmitted 1818-1820.
Contesting election for member of the legislature, presiding officer to notify members of receipt of depositions and papers 1821.
Contesting election of member of the legislature, justice of the peace may issue subpenas for taking depositions, witness may be attached and fined, certification of testimony to county clerk 1819.
Contesting election of member of the legislature, secretary of state to receive depositions and papers and deliver to presiding officer 1818-1820.
Contesting election of state officer, attorney-general to prosecute, supreme court has original jurisdiction, justice may issue process 1823.
Actions—continued.
Contesting election, one may be brought against several persons claiming same office 1817.
Contesting election of state officer, who may contest, how prosecuted 1823.
Contesting election, successful contestant may recover damages 1816.
Contesting election, when district attorney may have person arrested for receiving fees, bail 1815.
Controversy may be submitted and determined without 5252.
County commissioners may remove county treasurer when action commenced on his bond 1685.
Court fee on appeal to supreme court 2032.
Court fee to be paid on appeal from justice's court 2031.
Defense by written instrument, when not deemed denied 5063.
Demurrer to answer, schedule of sections 5053.
Depositions of parties to may be taken 5454.
Depositions taken out of state, schedule of sections 5458.
Different actions may be maintained on guardian's bond, parties 6184.
Disability does not prevent running of statute unless it existed at the time right of action accrued 4982.
Dismissal of for failure of nonresident or foreign corporation to give security for costs 5391.
District court may authorize by nonresident guardian for recovery of property for ward 6200.
Divorce, trial of fact by jury, either party entitled to 5485.
Do not abate by death or disability if cause survive 5004.
Exceptions, schedule of sections 5315.
Execution in justice's court, schedule of sections 5783.
Fees of attorney in action for damages for herding or grazing live stock on lands of another 2336.
Fees of clerk of supreme court 2006.
Fees of constable when not over 800 votes in county 1999.
Fees of constable when over 800 votes in county 2011.
Fees of justice of the peace when not over 800 votes in county 2003.
Fees of justice of peace in counties polling over 800 votes 2015.
Fees of sheriff when not over 800 votes in county 1997.
Fees of sheriff when over 800 votes in county 2009.
Fees paid juror to be deducted from balance due him from county 2013.
Fees, sheriff, constable or coroner serving more than one paper in same case, requiring only one journey, entitled to only one mileage 2037.
Fees to be entered in book under title of proceeding and open to inspection 2020.
For abatement of nuisance in county to be brought by district attorney 1562.

Actions—continued.
For abatement of nuisance, judgment, damages 5504.
For abuse of apprentice, fees of witnesses and jurors 494.
For abuse of apprentice, verdict, judgment, execution, costs 492.
For accounting when adverse claim made 5479.
For annulment of marriage 2357.
For claim and delivery, concealed property may be taken by force 5132.
For claim and delivery in justice's court 5124, 5135, 5753.
For claim and delivery of personal property 5124.
For claim and delivery, requirements, affidavit 5125.
For collection of municipal taxes or assessments, jurisdiction of municipal court 833.
For collection of taxes not exceeding $300, justice's court has jurisdiction 5714.
For collection of taxes to include city taxes 878.
For condemnation, for mining purposes, of improvements on lands sold by the state 2456.
For condemnation of land for mines 2459.
For county or township office, jurisdiction in district court 1806.
For county or township office, when not to be dismissed for want of form in proceedings 1807.
For cutting or injuring trees, treble damages 5506.
For damages against common carrier, mill or mine operator for death or injury of employees 5650.
For damages for death or personal injury, common carrier, mill or mine operator liable for gross negligence notwithstanding slight negligence of employee 5651.
For damages may be brought within one year after ouster in quo warranto of director of corporation 5669.
For death by wrongful act 5647, 5648.
For death by wrongful act, jury may give pecuniary and exemplary damages 5648.
For death by wrongful act to be brought in name of representative of deceased person 5648.
For death or injury to minor 4996.
For death or personal injury, contract of insurance, indemnity or relief benefit will not bar recovery for injury to employee 5652.
For delinquent taxes, costs and penalty to be included in complaint, summons and judgment 3660.
For delinquent taxes, costs not to be charged against city or town 999.
For delinquent taxes, deed derived from sale of real property conclusive evidence of title, possession recoverable in justice's court 3666.
For delinquent taxes, delinquent list or certified copy is evidence of matters stated 3658.
For delinquent taxes exceeding $300 to be brought by district attorney 3659.
Actions—continued.
For delinquent taxes, fee of district attorney 3677.
For delinquent taxes, fees of officers and costs, how taxed, when payable 3673.
For delinquent taxes, form of complaint 3661.
For delinquent taxes, judgment and how entered, costs and penalties to be included, is lien on same and other property, default, redemption money, how paid, receipt of district attorney, evidence, execution 3665.
For delinquent taxes, money from redemption and from rental or sale of property bid in by county treasurer, how distributed, no fees from county 3671.
For delinquent taxes, more certain description may be included in summons and complaint and proved 3662.
For delinquent taxes, officer selling to embrace in one certificate of sale all property bid in by county treasurer, recording 3669.
For delinquent taxes on proceeds of mines, district attorney to begin, when and where, damages, penalties, form of complaint, answer 3707-3709.
For delinquent taxes, only smallest portion of property that will pay judgment and costs to be sold, redemption, how made 3666.
For delinquent taxes, summons, what to contain and require, publication, posting and filing notice, fees 3663.
For delinquent taxes, treasurer to buy in property if no other bidders, when county commissioners may order redemption 3667.
For delinquent taxes, what answer may set up 3664.
For delinquent taxes, when and where begun, jurisdiction 3659.
For delinquent taxes, when judgment and execution to contain more certain description than included in assessment roll 3662.
For delinquent taxes, when process may be served upon executor, administrator, father, mother or guardian of minor or insane person 3666.
For disincorporation of city in district court 872, 873.
For disincorporation of city, notice and presentation of claims 872, 873.
For divorce, court may direct trial of issue of fact to be private 4863.
For divorce, schedule of sections relating to 5838.
For enforcement of mechanic's lien where amount, exclusive of interest, does not exceed $300, justice's court does not have jurisdiction 5714.
For equitable relief when adverse claim made 5479.
For forcible entry and unlawful detainer, district court has jurisdiction (Nev. Const. art. vi, sec. 6) 321.
For forcible entry or unlawful detainer, continuance, when may be had and for how long, bond 5597.

Actions—continued.
For forcible entry or unlawful detainer, appeal, undertaking, stay 5601.
For forcible entry or unlawful detainer, district court has jurisdiction 4840.
For forcible entry or unlawful detainer, form of writ of restitution 5605.
For forcible entry or unlawful detainer, judgment, restitution, rent, treble damages, stay of execution, when tenant may remain in possession on payment of judgment 5599.
For forcible entry or unlawful detainer, matter of excuse, justification or avoidance may be given in evidence 5602.
For forcible entry or unlawful detainer, no continuance when admission that evidence would be given 5598.
For forcible entry or unlawful detainer, other provisions relative to civil actions, appeals and new trials applicable 5603.
For forcible entry or unlawful detainer, pleadings to be verified 5600.
For forcible entry or unlawful detainer, schedule of sections 5585.
For forcible entry or unlawful detainer, when not to quash proceedings for want of form 5602.
For foreclosure of mortgage or lien, affidavit of payment of taxes to be attached to complaint 3756.
For improper working of mine, damages, how assessed 5509.
For libel, slander, assault, battery, false imprisonment or seduction may be brought within 2 years 4967.
For libel, truth may be given in evidence (Nev. Const. art. i, sec. 9) 238.
For lien to mechanics, materialmen and others 2222-2228.
For mines and recovery of ore, injunction, notice to intending purchaser 2489.
For money paid tax collector under protest may be commenced within one year 4967.
For partition, all rights may be determined, proof, judgment 5534.
For partition, answer, what to contain 5533.
For partition, apportionment of expense previously incurred by cotenant 5543.
For partition, conveyances must be recorded and are bar against parties 5565.
For partition, costs of lien on shares of parceners, specification in judgment 5574.
For partition, court may appoint single referee on consent of parties 5575.
For partition, court may fix time for division of mining claims 5577.
For partition, court may order referee to divide mining claims 5576.
For partition, court must direct terms of sale or credit, may direct investment of purchase money, when 5554.
For partition, court must secure value of future interests 5559.
For partition, disposition of proceeds belonging to unknown owners 5566, 5567.
For partition, division, how to be made by referees 5578, 5579.
Actions—continued.
For partition, duties of clerk concerning investments 5569.
For partition, estate for life or years, how set off 5548.
For partition, expenses of referees to be apportioned among parties 5583.
For partition, further pleading and testimony before court or referee may be had after sale 5552.
For partition, how abstract of title made, verified and corrected 5545.
For partition, how referees may divide property 5539.
For partition, if sale confirmed, conveyance must be executed, order for disposition of proceeds 5563.
For partition, interest allowed on disbursements, when 5546.
For partition, judgment does not affect tenant for less than ten years 5542.
For partition, lien claimant may be required to first exhaust other securities 5550.
For partition, lien on individual interest, charge on owner's part 5547.
For partition, lienholders not of record need not be made parties 5529.
For partition, lienholders to be made parties or referee to be appointed to determine regarding liens 5536.
For partition, lienholders to be notified to appear before referee 5537.
For partition, marking off of part to party accepting smallest portion of mining claim 5580.
For partition, of mining claim, remainder of bids after first bidder, how marked off 5581.
For partition, plaintiff must file lis pendens, deemed notice to all persons 5530.
For partition, plaintiff to produce certificate of recorder showing no liens 5535.
For partition, proceeding if lienholder becomes purchaser 5564.
For partition, proceeds of sale, how distributed 5551, 5552.
For partition, proceeds of sale of encumbered property, how applied 5549.
For partition, referees may take securities for purchase money on sale 5555.
For partition, referees must make report of sale to court 5562.
For partition, report of referees, what to be returned with 5582.
For partition, sales by referee, how made 5553.
For partition, schedule of sections 5527.
For partition, securities taken by referees to be in name of parties when ascertained by agreement or order of court 5568.
For partition, share of infant paid to guardian 5571.
For partition, share of insane person to be received by guardian 5572.
For partition, summons to be directed to all parties interested 5531.
For partition, tenants whose estate is sold to receive compensation 5556, 5557.

Actions—continued.
For partition, terms and manner of sale must be made known and distinct lots must be sold separately 5560.
For partition, unknown parties served by publication 5532.
For partition, unknown tenants to be protected 5558.
For partition, what complaint to set forth 5528.
For partition, when cost of abstract of title allowed, notice, abstract must be filed 5544.
For partition, when court may order sale or appoint referees 5538.
For partition, when unequal partition, compensation to equalize 5570.
For partition, who may bring, partial partition 5527.
For partition, who may not be purchasers 5561.
For penalty against foreign corporation for failure to file annual statement 1354.
For percentage of receipts and forfeiture of franchise of toll road 3757.
For personal injuries 5649.
For personal injuries, schedule of sections 5649.
For personal property or injury thereto may be commenced within 3 years, when exception in regard to live stock 4967.
For possession of land unlawfully obtained or withheld, justice's court has jurisdiction 5714.
For possession of land where relation of landlord and tenant exists, justice's court has jurisdiction 5714.
For possession of public lands 5847.
For possession, what deemed public lands, what entry unlawful and fraudulent 5855.
For possession where relation of landlord and tenant exists or possession unlawfully withheld, justice of the peace has jurisdiction concurrent with district court 5604.
For recovery of expense of abating nuisance in unincorporated town 921.
For recovery of license money 3737.
For recovery of mining claims, limitation 4951.
For recovery of money, tender and deposit, when costs not recoverable 5384.
For recovery of ore, gold dust or bullion, when and how to be commenced 2489, when failure to make entry or loss of books by purchaser no defense 2486. See Mines and Mining.
For recovery of real property, adverse possession under written instrument 4956.
For recovery of real property if plaintiff's right terminates during pendency, judgment according to fact, damages 5516.
For recovery of real property not prejudiced by alienation pending suit 5521.
For recovery of real property, value of improvements made in good faith as offset to damages 5517.
For recovery of real property when patent has been declared void, limitation seven years 4949.
Actions—continued.
For recovery of real property, holder of legal title, when presumed to be in possession 4955.
For recovery of specific personal property, verdict 5224.
For recovery of tax for improvement of streets in unincorporated town 934.
For relief on the ground of fraud or mistake may be commenced within 3 years after discovery of facts 4967.
For removal of county commissioners authorizing contract when money not in treasury 3830, 3834.
For removal of county commissioners contracting floating indebtedness 3834.
For removal of county commissioners voting for levy of excess taxes 3828.
For removal of officer for malfeasance 2851.
For restoration of lost records affecting real property, schedule of sections 5630.
For seduction of unmarried female 4994, 4995.
For taxes, not to be begun by district attorney after being served with receipt 3655.
For unlawful detainer, not to abate by omission of party 5592.
For unlawful detainer, proof required of respective parties, what possession a bar 5595.
For unlawful enclosure of public lands 3174.
For waste, when may be brought, treble damages 5505.
For waste, or trespass on real property may be commenced within three years, but if in underground mines within three years after discovery of facts 4967.
Foreclosure of mortgage on mines, holder entitled to recover expenditure made to prevent forfeiture 1091.
Foreign corporations may have benefit of statute of limitations 1355.
Garnishment, schedule of sections 5169.
General rules of pleading, schedule of sections 5065.
Grounds for change of venue 5015.
How commenced in district court 5016.
How commenced in justice's court 5722.
How process may be served on corporations 1188.
In certiorari, schedule of sections 5683.
In district court for damages under act relating to railroad companies 3581.
In eminent domain, schedule of sections 5606.
In equity, district court has jurisdiction (Nev. Const. art. vi, sec. 6) 321.
In equity, supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
In justice's court, abstract of judgment filed in recorder's office creates lien on land 5782.
Adjournment not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
Alias summons may issue, time for appearance 5729, 5730.

Actions, justice's court—continued.
Amendment to complaint or answer may be allowed 5741.
Amendment to pleadings, adjournment, costs, relief from judgment by default 5742.
Answer and what to contain 5735, 5738.
Answer or demurrer allowed to amended pleadings 5743.
Appeal to district court, when may be dismissed, D. C. rule xxxvii, p. 1430.
Arrest of defendant, must give undertaking before applying for postponement 5759.
Certain sections made applicable 5752.
Certificate of county clerk to writ of attachment for service in another county 5751.
Complaint defined and what to contain 5736.
Contempt and general provisions, schedule of sections 5795.
Copy of note or instrument admitted unless denied by verified answer 5770.
Court to try issue of law 5764.
Defendant may appear and waive summons 5724.
Demurrer to complaint 5735, 5737.
Deposit may be made in lieu of undertaking 5816.
Entry of judgment after demurrer and failure to answer 5755.
Entry to be made in docket of date of trial or hearing and mailing notice 5733.
Execution, duty of officer receiving 5786.
May be renewed or alias issued 5785.
To issue by county clerk to other counties on abstract of judgment docketed in district court 5781.
Failure of either party to appear, trial may proceed 5767.
Fees of attorney recoverable as costs 5814.
For recovery of money or damages, when defendant may be arrested 5744.
How guardian appointed when necessary 5726.
How judgment entered 5775.
How jury waived 5766.
If amount found due exceeds jurisdiction, party may remit excess 5776.
If defendant fail to set up counter-claim he cannot afterwards sue 5739.
Issuance and stay of execution 5783.
Issue of fact to be tried by jury unless waived 5765.
Judgment of dismissal may be entered without prejudice in certain cases 5772.
Taken by mistake, inadvertence or excusable neglect may be set aside 5742.
To be entered at close of trial if no jury 5774.
To be entered at once in conformity to verdict 5773.
Upon default 5754, 5755.
Jury, how summoned and challenged 5768.
Limitation of service of summons 5731.
Actions, justice's court—continued.
No statement required on appeal to district court on questions of fact or both law and fact 5790.
Notice of hearing after service of summons or appearance 5733.
Offer to allow judgment, when further costs not recoverable 5777.
Ordered transferred to district court, when will be dismissed, D. C. rule xxxviii, p. 1430.
Parties entitled to one hour in which to appear after time fixed in notice 5733.
Parties may appear in person or by attorney 5725.
Place of trial 5715.
Place of trial may be changed in certain cases or another justice called 5716, 5718.
Pleadings and form of 5734, 5735.
Pleadings, issues of law and fact defined 5761-5763.
Postponement of trial by consent 5758.
Postponement of trial on application of party, grounds procedure 5759.
Proceedings after order changing place of trial 5719.
Proceedings on demurrer to complaint or answer 5741.
Schedule of sections relating to pleadings 5734.
Summons, by whom and how served and returned 5732.
How issued, directed and what to contain 5727.
How served by publication 5732.
To be served out of town to have certificate and seal of county clerk attached 5732.
Time for appearance of defendant to be specified in summons 5728.
Undertaking on appeal, requirements with or without stay, deposit, justification of sureties 5792.
Voluntary appearance and pleading without summons 1715.
Waiver of objection that it is in wrong township 5772.
What entries to be made in docket 5800.
What execution must contain 5784.
What notice of appeal from judgment must contain 5788.
What papers to be transmitted on appeal to district court 5791.
What provisions of civil practice act are applicable 5815.
What statement on appeal on questions of law alone must contain, amendments and settlement 5789.
When admission that evidence would be given avoids postponement 5759.
When attachment to issue 5749, 5750.
When consent to taking of testimony or admission that it would be given avoids postponement 5759.
When court may postpone 5757.
When defendant may be arrested 5744.
When order for inspection of written instrument may be made 5769.
When place of trial cannot be changed more than once on motion of same party 5717.

Actions—continued.
When plaintiff may demur to answer 5740.
When postponement discharges defendant from arrest 5759.
When trial must be commenced and how continued 5756.
Who entitled to costs 5813.
In municipal court 832, 833.
In municipal court, appeal 837.
In name of another without authority is gross misdemeanor 6372.
In quo warranto, claimants to public office to be made defendants 5662.
For usurpation of public office, bond 5660.
For usurpation of public office, contents of complaint, judgment 5661.
In name of state, against whom 5656, 5657.
Schedule of sections 5656.
Take precedence of civil business 5680.
To collect arrearages and forfeit franchise of toll road 3757.
To determine whether toll road franchise has been forfeited 3049.
Upon whose relation begun, security for costs 5659.
When summons issued, when unnecessary 5665.
In which attachment may issue 5147.
Infant, insane or incompetent person to appear by general guardian or guardian ad litem 4992, 4993.
Institution of against party claiming property of judgment debtor or denying debt 5313.
Involving title to real property or legality of tax, impost, assessment, toll or municipal fine not to be tried in justice's court 5721.
Issue of fact in matters of an estate to be disposed of in same manner as in common-law action 6109.
Issues, mode of trial and postponement, schedule of sections 5195.
Joint debtor released of his proportion not necessary party 5847.
Judgment and costs on removal of officer for malfeasance 2852.
Judgment by confession may be entered in justice's court 3771.
Judgment in general, schedule of sections 5238.
Jurors, expense of keeping together to be paid before verdict or judgment 2035.
Justice's court may require deposit or undertaking as security for costs before issuing summons 5812.
To which transferred has same jurisdiction 5719, 5720.
Justice of the peace may issue execution or other process on docket of predecessor 5805.
May issue subpena and final process to any part of county 5808.
To receive all moneys collected by sheriff or constable and pay the same to parties entitled 5810.
Limitation 4946.
Continues to run under this act as if former act had not been repealed 5819.
Actions—continued.
Limitation, does not run in favor of person out of the state 4975.
For commencement of by state for real property 4950.
For recovery of estate sold by executor or administrator or to set aside sale 4964.
For recovery of estate sold by guardian 4963.
For recovery of penalty or forfeiture against corporation 4984.
Of for real property or rents 4952, 4953.
Of time for bringing suit against estate of deceased person 5968, 5969.
Limitations 4989-4991.
Manner of commencing, schedule of sections 5016.
Manner of commencing in justice's court, schedule of sections 5722.
Manner of giving and entering judgment, schedule of sections 5266.
Married woman as sole trader may sue or be sued alone 2192.
May be brought by any person injured on official bond given to State of Nevada 2870.
By or against corporation same as individual (Nev. Const. art viii, sec. 5) 342.
By public administrator for protection of estates 1622.
In district court on appeal from order of public service commission 4540.
On bond of trustee appointed on dissolution of corporation in quo warranto 5673.
May be dismissed in what cases 5237.
May be instituted by attorney-general against certain mining companies failing to file statements 1338.
May be maintained by mutual fire insurance companies against members 1296.
May be maintained for recovery of cost of removal of nuisance 921.
May be prosecuted by executor, administrator or trustee, or person authorized by statute without joining beneficiary 4987.
May be prosecuted or defended by either husband or wife in case of desertion of either by the other 4991.
Must be commenced within four years when no other time is provided 4970.
Must be prosecuted in name of real party in interest except as specified 4986, 4987.
New promise to prevent bar must be in writing 4985.
New trials, schedule of sections 5319.
And appeals in justice's court, schedule of sections 5788.
No limitation for recovery of money on deposit with bank or trust company 4974.
Not included in general provisions of law and equity, supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
Not maintainable when barred in another state or foreign country 4947.
Not to be affected by vacancy in office of judge or failure of term 4884.

Actions—continued.
Not to be brought against county unless demand first presented 1523.
Not to be brought or defended by foreign corporation unless certificate filed with secretary of state 1350.
Not to be maintained or defended by certain mining companies failing to file statements 1338.
Notices, serving and filing of papers, schedule of sections 5367.
Offer of compromise, notice, acceptance, affidavit, result 5265.
On adverse claim on application for patent for mine 2384.
To lot in federal townsite to be certified to district court 1984.
On appeal from order of public service commission to have precedence in district court 4540.
On appeal to district court, provisions relating to change of place of trial applicable 5794.
On complaint for abuse of apprentices 490.
On negotiable instrument, parties and liability of, schedule of sections 2548.
On negotiable paper, consideration, assignment before due 4988.
On open account for goods, wares or merchandise, any article in store account, and for contract or liability not founded upon writing may be commenced within four years 4967.
On thing assigned, set-off, defense, notice of assignment 4988.
Other than for recovery of real property, limitation of 4967.
Parties aggrieved may bring to set aside damages awarded by viewers on opening of highway 3015.
Parties in interest to be joined 5001.
Parties not originally summoned, schedule of sections 5243.
Penalty for failure of district attorney to bring action against mining company failing to file statement 1338, 1340.
Pending by or against corporations consolidated, new corporation may be substituted 1148.
Per diem and mileage of jurors in counties polling over 425 votes 2013.
Personal may be brought notwithstanding lien for labor and materials 2226.
Place of trial, schedule of sections relating to 5011.
In justice's court, schedule of sections 5715.
Possessory on public lands, jurisdiction of justice of the peace 5855.
Occupant may pay fee and absent himself when absence forfeits right 5853.
When possessory right extends to boundaries of survey 5854.
Proceedings supplementary to execution, schedule of sections 5307.
Process may be served on land ceded to the United States 1949, 1951.
Provision may be made by general law for bringing against the state (Nev. Const. art. iv, sec. 22) 280.
Provisional remedies in justice's court, schedule of sections 5744.
Actions—continued.
Provisions relating to are applicable to writs of certiorari, mandamus and prohibition 5712.
Provisions relative to apply to proceedings in eminent domain 5624.
Publication of process or paper, officer to be paid cost in advance 2026.
Railroad to give notice of live stock killed 3600.
References and trials by referees, schedule of sections 5230.
Regarding real property, unknown heirs may be brought in 5009, 5010.
Register to be kept by clerk 5480.
Relating to nuisance and waste, schedule of sections 5504.
Relating to partners, members of limited partnerships same rights and liabilities as general partners 2909.
Right of against railroad companies not affected by act relating to railroad commission 4582.
Right of, for damages, for causing workman by misrepresentation to change place of employment 1938.
Right to maintain or defend, residence defined and how gained or lost 3609-3616.
Schedule of sections relating to affidavits 5450.
Schedule of sections relating to appeals 5325.
Schedule of sections relating to contempt 5394.
Schedule of sections relating to costs 5376.
Schedule of sections relating to definitions of common-law and miscellaneous provisions 5474.
Schedule of sections relating to executions 5280.
Schedule of sections relating to injunction 5136.
Schedule of sections relating to mandamus 5694.
Schedule of sections relating to motions and orders 5362.
Schedule of sections relating to parties 4986.
Schedule of sections relating to perpetuation of testimony 5464.
Schedule of sections relating to proof of public writings 5408.
Schedule of sections relating to various mistakes in pleadings and amendments 5080.
Schedule of sections relating to verdict 5221.
Schedule of sections relating to witnesses 5419.
Several on same instrument when costs allowed for only one 5378.
Sheriff's fees in counties polling over 800 votes 2009.
State prison commissioners may bring for labor of convicts or articles sold 7564.
Testimony, pleadings, orders, depositions, and practice in divorce proceedings, same as in civil action 5842.
There shall be but one form, and law and equity shall be administered in same action (Nev. Const. art. vi, sec. 14) 329, 4943.

Actions—continued.
Time during which commencement of is stayed not part of limitation 4981.
Time within which may be commenced by or against representative of deceased person 4977.
To contest election to city office, how brought and determined 801.
To contest election to county office, what sufficient for complaint to allege 1806.
To contest election to office, time for commencement of 4972, 4973.
To contest probate of will 5874.
To determine adverse claim to real property, by whom and how brought 5522.
To determine adverse claim to real property, notice of pendency to be filed in office of county recorder 5522.
To determine adverse claim to real property, remedy cumulative 5525.
To determine adverse claim to real property, summons, what to contain, how served personally and by publication 5523.
To determine adverse claim to real property, when and how rendered and effect 5524.
To determine adverse claims and by sureties 5479.
To determine paternity of illegitimate child 765.
To enforce lien for charges upon animals 5499.
To foreclose lien for labor or material, limitation of time for commencing 2220.
To quiet title, by whom may be brought 5514.
To quiet title, costs not recoverable if defendant disclaims interest 5515.
To quiet title, schedule of sections 5514.
To recover damages for death by wrongful act may be brought within two years 4967.
To restore lost record, time for bringing 5632.
To restore lost records 5632.
To restore will or deed, parties 5633.
To what causes of action, judicial power of United States extends (U. S. Const.) 153-155.
Transfer of from justice's court to district court 5721.
Trial by court, schedule of sections 5226.
Trial by jury, schedule of sections 5204.
Trial by jury secured, but may be waived (Nev. Const. art i, sec. 3) 232.
Trial not to be delayed by prosecution of cross-complaint 5052.
Trials and judgments in justice's court, schedule of sections 5754.
Upon claim against bank rejected by bank examiner, limitation three months 671.
Upon judgment, decree, contract or liability founded upon writing can be commenced within six years 4967.
Upon liability created by statute other than penalty or forfeiture, may be commenced within three years 4967.
Upon statute for penalty or forfeiture, when may be brought within two years, exception 4967.
Actions—continued.
Verification, schedule of sections 5060.
When cannot be brought by grantee from state 4948.
When due incorporation of company cannot be attacked collaterally except by the state 1154.
When may be brought against an executor or administrator 4977, 4978.
When may be commenced by minors, married women, insane and imprisoned persons 4965, 4966, 4976.
When may be commenced within one year after reversal on appeal of judgment for plaintiff 4980.
When may be consolidated 5478.
When may be postponed if judge or juror called as witness 5429.
When must be commenced to make peaceable entry upon real estate a valid claim 4954.
When reporter's fees may be taxed as costs 4913.
When statute of limitations does not run during term of public official 2866.
When successive may be maintained on same contract 5477.
When time for commencement of begins to run 4968, 4969.
When to be brought by county treasurer against district attorney for failure to account 1601.
Wife living separate and apart from husband may sue or be sued alone 4989.
Witness fees in counties polling over 450 votes 2012.
Witness immune from arrest, when 5445.
Witness need not testify unless paid fee if demanded 2012.
Acts of legislature, authentication of under act of Congress 526.
Relating to civil practice applicable to suits for delinquent taxes 3666.
Repealed by civil practice act, schedule 5821.
Adjournment, entry regarding to be made in justice's court docket 5800.
In justice's court, not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
May be had on hearing in contempt proceedings 5402.
Not granted in action for forcible entry or unlawful detainer when admission that evidence would be given 5598.
Of court, when may be made by sheriff or clerk 4872.
On amendment of pleadings in justice's court if necessity for be shown under oath, costs 5742.
When civil action to be continued without in justice's court 5756.
Adjutant-general, papers or records certified by are evidence 4080.
Administration, community property not subject to if wife pays or secures indebtedness 2165.
Judgment rendered after death of party payable in course of 5212.
Of estates of deceased persons, payment of court fee upon commencement of proceedings 2030.

Administration—continued.
Special letters may be granted by district judge in vacation 4850.
Administrator, action against on rejected claim to be brought within 30 days after notice 5968.
Action for death by wrongful act 5648.
Action not to be maintained on claim against estate of deceased person unless claim has been filed 5972.
Allegation of as a legal conclusion, when sufficient 5078.
Costs in action by or against and how chargeable 5385.
Duty to commence action to set aside fraudulent conveyance made by decedent, application and payment of costs by creditors 6029, 6030.
Limitation of action to recover estate sold by or to set aside sale 4964.
May have execution issued on judgment after death of party 5285.
May make conveyance under contract of decedent 6147.
May sue without joining beneficiary 4987.
Time within which action may be brought by or against 4977, 4978.
When may have execution stayed on appeal without giving stay bond 5352.
Admission, of counter-claim by failure to demur or reply 5058.
Of genuineness of instrument copied into complaint if no verified denial 5062.
Of making of note or instrument in justice's court unless denied by verified answer 5770.
Of service of summons 5032.
That evidence alleged in affidavit on motion for continuance would be given allows trial to proceed 5202.
That evidence would be given in action for forcible entry or unlawful detainer avoids continuance 5598.
That evidence would be given, when avoids postponement in civil action in justice's court 5759.
Adoption of children, act relating to does not apply to Mongolians 5834.
Child adopted entitled to protection, support and inheritance 5826, 5829.
Child adopted may take name of persons adopting 5830.
Children adopted and persons adopting bear legal relation of parent and child 5830.
Consent, how given, agreement, how executed, procedure 5826.
Consent of child over 12 years required on adoption 5828.
How consent of nonresident parent to be executed and acknowledged 5831.
Husband or wife not lawfully separated cannot adopt without consent of other 5827.
Judge to file papers, have order entered in court minutes and recorded in office of county recorder, notice to the world 5832.
Proceedings before district judge, order and rights of adopted child 5829-5831.
Requirements 5825.
Schedule of sections 5825.
Adoption of children—continued.
When consent of absent parent must be obtained or need not be obtained 5831.
When consent of parent of abandoned child not necessary, custodian or next friend to be cited and examined 5831.
When illegitimate child deemed adopted by conduct of father 5833.
When not to be had without consent of parents, child over 12 years must consent in writing 5828.
Adultery, as affecting division of community property upon decree of divorce 2166.
Consent of parent adjudged guilty of or divorced for, when not necessary on adoption of child 5828.
Of husband, what disposition of property may be made if wife obtains divorce 5843.
Since marriage unforgiven is ground for divorce 5838.
Adverse action, for mining claim on application for patent, what necessary to be shown 5526.
Adverse claims, actions to determine 5479.
To land under right of way for railroad, payment into court 3541.
To real property, actions to determine, how and by whom brought 5522.
To real property, service of summons in action to determine 5523.
Adverse claimant, to mine on application for patent to bring suit 2384.
Adverse possession not established unless taxes are paid 4960.
Of one lot, not deemed possession of other lots of same tract 4956.
Of real property for fifteen years as ground for action 5522.
Of real property under written instrument, effect 4956.
Under claim of title without written instrument 4958, 4960.
What constitutes 4957.
Affidavit, and justification of sureties, to undertaking on appeal 5354.
Before judge out of state, genuineness of signature to be certified by clerk under seal 5453.
Before justice of the peace or district judge for examination of books of assayer, mill or purchaser of ore, gold dust or bullion 2484.
By execution creditor that homestead exceeds $5,000 in value 2144.
Denying genuineness of instrument copied in answer 5063.
Filed with testimony taken for perpetuation, prima facie evidence of facts 5469.
For appointment of elisor 5495.
For arrest of debtor on proceedings supplementary to execution 5308.
For arrest of defendant in civil action in justice's court 5745.
For attachment in civil action in justice's court 5747, 5749.
For change of place of trial in justice's court 5716.
For citation by district court or judge or justice of the peace for discovery of personal property on which taxes delinquent 3679.

Affidavit—continued.
For contest for nomination under primary election law 1764.
For continuance in district court, counter-affidavits, service, D. C. rule xii, p. 1427.
For continuance on amendment in action for forcible entry or unlawful detainer 5596, 5597.
For continuance to show materiality of evidence and due diligence 5202.
For examination of debtor in proceedings supplementary to execution 5308.
For examination of party owing or having property of debtor when execution unsatisfied 5310.
For execution in officer's own name for unpaid fees 2027.
For exemption of witness from arrest in civil action 5446.
For institution of suit for unlawful enclosure of public lands 3174.
For issuance of writ of mandamus 5696.
For order for publication of summons in action to determine adverse claim to real property 5523.
For restoration of lost record, what to state 5641.
For taking deposition in state 5455.
For use in this state, before whom made 5450.
For writ of attachment 5148.
For writ of attachment, amendment of 5167.
For writ of attachment on nonjudicial day, what to state 4870.
For writ of certiorari 5685.
In action for claim and delivery of personal property 5125.
Indorsing and filing on hearing of motion in district court, D. C. rule xi, p. 1424.
Laying foundation for introduction of deposition on trial 5456.
Made in foreign country, by whom taken 5452.
Made out of state, how taken in other state or territory 5451.
Matters within may be reviewed upon appeal 5340.
May be read on hearing of objections to appointment of referee 5234.
Of amount of wages as preferred claim against execution or attachment 5494.
Of annual work on mine, recorded or certified copy, when prima facie evidence 2431.
Of claimant of possession of public lands 5851.
Of evidence expected to be obtained on application for postponement of civil action in justice's court 5759.
Of lien in action for partition 5537.
Of notice of acceptance of offer of compromise 5265.
Of other person claiming property in action for claim and delivery to be served on sheriff 5134.
Of payment of taxes to be attached to complaint in action for foreclosure or lien, stay 3756.
Of publication of notice in delinquent tax suit 3663.
Affidavit—continued.
Of publication of notice relating to partnership is prima facie evidence 2914.
Of redemptioner, to be served on redemption of real property sold under execution 5302, 5303.
Of service of notice for presentation of claims against bank in hands of bank examiner 671.
Of service of notice upon persons holding claims against closed bank 671.
Of sureties to undertakings 5484.
Of sureties to undertakings for payment of costs by nonresident or foreign corporations 5390.
Of value of premises in proceedings under eminent domain 5615.
Of witness fees for taxing costs in civil action 2012.
On application for taking deposition in district court, D. C. rule xv, p. 1428.
On application for underground survey of mine 5511.
On application for writ of prohibition 5709.
On arrest in civil action 5090.
On motion for continuance of trial 5202.
On proceedings for contempt not committed in presence of court or judge 5396.
Punishment of witness for refusal to make 5438.
Regarding nonpayment for annual work on mine by delinquent coowner, when prima facie evidence 2432.
Replying to answer of garnishee 5178.
Showing cause for setting aside judgment in justice's court 5742.
Showing gross receipts of toll road, failure to make, action to be brought for arrearage and to forfeit franchise 3757.
Showing materiality of testimony of prisoner 5443.
Taken before notary public may be used before any court, judge or notary public 2750.
That controversy is real when submitted without action 5252.
That district judge is absent from state or unable to act as ground for having another district judge extend time, D. C. rule xliii, p. 1431.
That person is 65 years of age exempts from jury 4941.
To accompany summons against parties served after judgment in action on joint contract 5245.
To statement for contest of county office 1805.
To statement or complaint on contest for members of the legislature 1818.
Verified of amount due on mortgage or lien in actions for partition 5549.
When copy to be attached to order appealed from 5339.
Without title or with defective title, when valid 5476.
Affidavits, and counter-affidavits, on motion for new trial, service 5320, 5324.
Counter in contest in proceedings to restore lost records 5644.
In civil actions, schedule of sections 5450.

Affidavits—continued.
May be taken by judges and clerks of supreme and district courts 4883.
Motion to discharge attachment may be made upon and opposed by 5166.
On motion for new trial in district court, if time enlarged adverse party to have same extension for filing amendments or counter-affidavits, D. C. rule xxiv, p. 1429.
On motion to dissolve injunction 5133.
"Affinity," when signifies connection existing in consequence of marriage between each of the married persons and blood relative of the other 5475.
Affirmation, false deemed perjury 5448.
Included in oath 5475.
May be taken by witnesses instead of oath, form 5448.
Oath, form of, to jury 5208.
Who may administer 5483.
Age of consent, action for annulment of marriage of person under 2357.
Agreement, between parties or attorneys in district court to be disregarded unless in writing and signed, D. C. rule xxvii, p. 1429.
Allegation, in complaint controverted by answer and allegation of new matter in answer, when raises issue of fact in justice's court 5763.
Not controverted, taken as true, exception 5075, 5083.
Of corporation, partnership or representative capacity as a legal conclusion, when sufficient 5078.
What sufficient in complaint for contest for county office 1806.
Alleys, eminent domain, may be exercised for 5606.
Alias execution in justice's court 5785.
Alias summons in civil action in justice's court may issue, time for appearance 5729, 5730.
Alias venire for jurors in civil action in justice's court 5768.
Alienation pending suit does not prejudice action for recovery of real property 5521.
Aliens, how may become citizens of United States 2517.
May be naturalized by United States courts and state district court 2516.
Not to be naturalized within 30 days prior to general election 2519.
When lost record relating to naturalization may be restored 5640.
Alimony pendente lite, husband may be ordered to pay 5843.
Alphabetical index to docket in justice's court required to be kept 5802.
Amendment, after decision on demurrer in district court, time in which to make, D. C. rule viii, p. 1427.
After demurrer, in district court, time in which to make, D. C. rule viii, p. 1427.
Costs upon making 5081, 5083.
Court may order in case of variance 5081.
Error on appeal on terms 5358.
Failure to make after sustaining demurrer to complaint in justice's court, action may be dismissed 5772.
For bringing in additional parties 5008.
May be allowed to complaint or answer in justice's court 5741.
Amendment—continued.
May be made to meet variance 5080, 5084.
Of affidavit or undertaking on attachment 5167.
Of complaint, in action for forcible entry or unlawful detainer 5596.
Of judgment, order or proceeding in district court not to be made unless upon notice within six months, D. C. rule 45, p. 1431.
Of pleadings, in civil action in justice's court 5742.
Of pleadings in district court, if not of course notice and copy of amendment to be served, what to state, when to be verified, D. C. rule xvii, p. 1428.
Of pleadings in justice's court, answer or demurrer allowed to 5743.
Of pleadings, when postponement allowed in action in justice's court 5757.
Of statement on appeal 5331.
Time for answering after service 5083.
Time for runs from service of notice; exception 5086.
To be allowed to cure error in attachment papers in district court, D. C. rule xx. p. 1428.
To complaint, answer or summons may be allowed in action for forcible entry or unlawful detainer 5602.
To show the true name when discovered 5085.
To statement on appeal on questions of law alone, when to be filed in justice's court 5789.
Amendments, as of course 5083.
In civil action 5083, 5084.
To be liberally allowed in garnishment proceedings 5190.
To proposed statement on appeal, when testimony to be reduced to narrative form 5333.
To statement on appeal, time for filing may be enlarged 5336.
To statement on appeal, when waived 5335.
Animals, lien on for charges, suit, sale, fees 5499.
Lien on for charges when taken away from ranchman or persons boarding same 2332.
Sale of under lien and judgment for charges, owner to be paid surplus 5500.
Annual labor on mines, when affidavit recorded of performance or certified copy is prima facie evidence 2431.
Annulment of marriage, for fraud or want of consent 2355.
Answer, affirmative denial of corporate existence required 5079.
Allegation of new matter not controverted taken as true, exception 5075.
Allowed to amend pleadings in justice's court 5743.
And demurrer may be filed to part of complaint or at same time 5042.
Certain objections not taken by demurrer or answer waived 5045.
Compulsory process to obtain in action for divorce, if necessary to disposition of property of children 5839.
Deemed appearance 5374.
Demurrer to, what facts deemed denied 5083.

Answer—continued.
Disclaiming interest in action to quiet title, costs not recoverable 5515.
Failure to make verified denial admits execution of instrument copied into complaint 5062.
Grounds of demurrer 5053.
In action for delinquent taxes, what may set up, to be verified 3664.
In civil action 5037, 5046.
In civil action in justice's court, what to contain 5735, 5738.
In civil action schedule of sections relating to 5046.
In civil action, what to contain 5046.
In intervention 5006.
In mandamus proceeding 5704.
In mandamus proceeding, applicant may object to sufficiency or introduce proof 5701.
In quo warranto, same in supreme court as in district court 5681.
In quo warranto shall be as in other cases 5666.
In state land contest, time for filing and serving, D. C. rule 44, p. 1431.
Matter in avoidance may be proven under in action for forcible entry or unlawful detainer 5602.
May allege truth as defense in action for libel or slander 5074.
May be amended in action for forcible entry or unlawful detainer 5602.
May be made after time limited, or time for may be enlarged 5084.
May be stricken out for disobedience or refusal of party to answer as witness or to subscribe affidavit or deposition 5438.
New matter in, raises issue of fact in justice's court in absence of demurrer 5763.
Objections not apparent on face of complaint taken by 5044.
Of debtor, in proceedings supplementary to execution 5307, 5308.
Of defendant summoned after judgment in action on joint contract, when to be filed, what to contain 5246.
Of garnishee 5174, 5178.
Of garnishee disclosing third person as claimant 5180.
Of party who refuses to testify or give deposition may be stricken out 5421.
Of person arrested in contempt proceedings 5402, 5403.
Refusal of witness to make, punishment 5438.
Summons in justice's court to contain direction that defendant appear and answer 5727.
Time for, after service of amendment 5083.
Time for by additional parties ordered brought in by the court 5008.
Time for may be enlarged 5084.
Time for to amendments 5083.
To be verified in action for forcible entry or unlawful detainer 5600.
To complaint in action for delinquent taxes on proceeds of mines 3709.
To complaint, may be filed after demurrer overruled 5083.
To merits, may be allowed after judgment taken by mistake or neglect 5084.
Answer—continued.
To statement of facts of parties coming in under notice in action to enforce liens, D. C. rule xxxv, p. 1430.
To supplemental complaint 5076.
To writ of mandamus, may show cause, how made 5699.
Verification of 5060, 5064.
Verified in justice's court showing title of real property or legality of tax, impost, assessment, toll or municipal fine involved, case to be transferred to district court 5721.
Waives summons 5016, 5034.
What to contain in action for partition 5533.
When construed in relation to default judgments to include any pleading which raises an issue of law or fact 5236.
When required under summons in civil action 5019.
With verified denial required in justice's court or written instrument will be admitted 5770.
Witness required to 5436, 5437.
Witness must give as to previous conviction of felony 5437.
Appeal, affidavits and counter-affidavits, on motion for new trial 5324.
Allowed in proceedings in eminent domain 5624.
And notice of appeal from judgment in justice's court, what must contain 5788.
Appellate court may make restitution of property and rights lost by erroneous judgment or order 5359.
Appellate court may reverse, affirm or modify judgment or order appealed from or may set aside or modify subsequent proceedings, order new trial or make other order 5259.
Argument on, how limited, S. C. rule xi, sec. 3, p. 1424.
Bill of exceptions may be taken and settled at time of decision, order or ruling, only pertinent facts to be stated 5343.
Cause may be remanded for new trial or for further action or proceedings 5259.
Civil practice in regard to applicable to certiorari, mandamus and prohibition 5713.
Clerk of trial court to attach certificate to judgment roll and enter minute of judgment of supreme court 5360.
Copy of statement to be annexed to copy of judgment roll 5338.
Copy of written opinion to be furnished appellate court 5356.
Costs on review other than by, how may be collected 5386.
Costs on, when in discretion of court 5381.
Court may dispense with undertaking when appellant is executor, administrator, trustee or person acting in another's right 5352.
Effect of testimony may be stated preferably 5333.
Execution for costs to be issued when remittitur filed in lower court 5361.
Fees of clerk of supreme court 2006.
For failure to prosecute, district court after notice may order dismissal with costs and damages 5794.

Appeal—continued.
From agreed statement of facts, how taken 5341.
From decision of court modifying award of arbitrators 5263.
From findings of appraiser's valuation, land for ditch or flume 4711. See Water.
From final judgment or order, transcript, of what to consist 5356.
From judgment and order denying new trial, one statement for both and what to contain 5332, 5333.
From judgment and order granting or denying new trial, one undertaking sufficient to stay execution 5348.
From judgment directing delivery of documents or personal property, bond 5349.
From judgment in action for forcible entry or unlawful detainer 5601.
From judgment in controversy submitted without action 5254.
From judgment of ouster in quo warranto does not stay execution 5682.
From judgment of removal of officer for malfeasance, during pendency, office to be filled as in case of vacancy 2854.
From judgment or order directing execution of conveyance stayed by execution of conveyance and deposit with clerk 5350.
From judgment or order directing sale or delivery of property does not stay execution unless undertaking given, form 5351.
From judgment and order granting or denying new trial may be taken at same time on one notice and undertaking 5348.
From judgment or order in estates. See Estates of Deceased persons.
From justice's court, court fee to be paid 2031.
From justice's court dismissed, when, D. C. rule xxxvii, p. 1430.
From justice's court, disregarded upon failure of sureties to justify 5792.
From justice's court, in district court either party may have benefit of objections 5791.
From justice's court, legislature may prescribe regarding (Nev. Const. art. vi, sec. 8) 323.
From justice's court, money transmitted to clerk in lieu of undertaking to be paid out on order of district court 5792.
From justice's court, on questions of fact or on both law and fact, no statement but trial anew 5790.
From justice's court, schedule of sections 5788.
From justice's court, undertaking on, requirement with or without stay, deposit, justification of sureties 5792.
From justice's court, what papers to be transmitted to district court 5791.
From justice's court, when stay of execution to be ordered, when officer to relinquish property 5793.
From order, entry in trial court relating to judgment in supreme court 5360.
From order, what appellant to furnish appellate court 5356.
How taken in proceedings in certiorari 5693.
If appellant fail to furnish requisite papers, may be dismissed 5356.
Appeal—continued.
If for delay court may add costs and damages 5359.
If judge or referee refuses to settle statement, same may be settled by supreme court 5333.
In action of railroad company against railroad commission to set aside rate 4564.
In civil action, special court fee to be advanced to clerk by party taking and applied to judge's compensation (Nev. Const. art. vi, sec. 16) 331.
In civil actions, schedule of sections 5325.
In contest for county or township office, if not taken within thirty days, and judgment annuls election certificate, becomes void 1812.
In what cases party aggrieved may appeal 5327.
Judge or referee may correct statement 5335.
Judgment on, how certified and entered 5360.
Judgment rendered on, has same force as other judgments in district court 5794.
Made from order based on affidavit must have copy annexed 5339.
May be taken by controller in actions against the state for service or advances authorized by law 5654.
May be taken from judgment of district court reviewing order of public service commission 4540 (d).
May be taken from municipal court to district court 837.
May be taken from order of district court authorizing sale of homestead when wife insane 2148.
May be taken to court from refusal of board of medical examiners to grant certificate 2366.
May be taken to supreme court in action on adverse claim to lot in federal townsite 1985.
May be taken to supreme court under juvenile court law 753.
New trial allowed in garnishment proceedings 5191.
Not deemed perfected until court fee paid 2031.
Not to be dismissed for irregularity not affecting jurisdiction or substantial rights, and amendment allowable 5358.
Not to be dismissed for insufficiency of notice, except for substantial error 5358.
Not to be dismissed for insufficiency of undertaking, if good undertaking approved and filed before hearing motion 5358.
Notice and bond on, entry in justice's court docket 5800.
Notice of appellant declining to admit amendment to statement 5331.
On error of law from order granting or refusing new trial, only exceptions in verified memorandum to be considered 5322.
On ground that judgment is contrary to findings, may be taken upon certified copy of judgment roll which includes findings 5342.
On judgment roll alone 5338.
On questions of law alone from judgment in justice's court, what statement must contain, amendments and settlement 5789.

Appeal—continued.
One notice of, sufficient on appeal from judgment and from order denying new trial 5330.
Order of service of notice and undertaking immaterial 5330.
Party failing to embody in statement fair portion of testimony essential for presentation of exception, costs allowed opposite party 5333.
Party setting out more of the testimony or proceedings than necessary to present exceptions taken not to recover costs for surplusage 5333.
Perfected, stays execution 5352.
Power of supreme court on 4835.
Printing or typewriting of statement on, costs not allowed for surplusage 5333.
Proceedings subsequent to judgment may be set aside, affirmed or modified 5259.
Respondent may move for disposition of motion to dismiss 5358.
Reversal of judgment taken on overruling of objection that action in justice's court is in wrong township 5772.
Right of, upon bill of exceptions settled at time of making decision, order or ruling 5343.
State and municipalities need not give undertaking 5346.
Statement on, how prepared, served, filed, amended and settled 5331.
Statement on, may be certified by respective attorneys or by the clerk 5356.
Time during which execution stayed omitted from duration of judgment lien 5274, 5277.
Time for brief or argument may be shortened or extended, S. R. xi, sec. 7, p. 1424.
Time for filing statement, amendments or papers may be enlarged 5336.
Time within which may be taken 5328.
To district court from award for damages for condemnation for highway 3008.
To district court from order of public service commission 4540 (d).
To district court, provisions relating to change of place of trial applicable 5794.
To supreme court, correction of error or defect in transcript, S. C. rule vii, p. 1423.
To supreme court, costs, settlement, indorsement on remittitur, S. C. rule vi, p. 1422.
To supreme court, fee 2082.
To supreme court, from order granting or denying change of venue, notice and time for hearing, S. C. rule xxiii, p. 1425.
To supreme court, how cases to be set and submitted, S. C. rule x, sec. 3, p. 1423.
To supreme court, how transcripts to be printed or prepared, S. C. rules iv, v, p. 1422.
To supreme court, number of copies to be filed, S. C. rule xiii, p. 1424.
To supreme court, objections to transcript or papers, how must be noted, diminution of record, S. C. rule viii, p. 1423.
To supreme court, payment of advance fee required before filing, S. C. rule xxvi, p. 1425.
To supreme court, printing of documents on similar paper, S. C. rule xii, p. 1424.
Appeal—continued.
To supreme court, rehearing, when remittitur may issue, reply, time may be shortened or extended, S. C. rule xv, p. 1424.
To supreme court, substitution in case of death, S. C. rule ix, p. 1423.
To supreme court, time for briefs, S. C. rule xi, sec. 1 p. 1423.
To supreme court, transcripts and briefs may be typewritten, copies to be served, S. C. rule xxv, p. 1425.
To supreme court, transcript of record on, when to be filed, S. C. rule ii, p. 1421.
To supreme court, what cases to be placed on calendar, S. C. rule x, sec. 1, p. 1423.
To supreme court, when may be dismissed for failure to file transcript, restoration, S. C. rule iii, p. 1421.
Transcript may be either printed or typewritten, rule of costs 5357.
Ultimate facts may be specified in statement instead of testimony by question and answer 5333.
Undertaking for from judgment or order for money or dissolving attachment 5347.
Undertaking on may be waived 5330.
Undertaking on to be filed or deposit made with clerk 5330.
Undertaking or deposit required 5346.
Want or insufficiency of finding not ground for unless exceptions be made in lower court 5345.
What court may review upon 5340.
What entry to be made by clerk of trial court referring to action of supreme court 5360.
When abstract of testimony must be filed in supreme court 5333.
When and how execution stayed in district court pending, D. C. rule xxii, p. 1429.
When court below may proceed upon in matter not affected by judgment or order appealed from 5352.
When findings contrary to judgment or order, record 5342.
When judgment may be reversed for want or insufficiency of finding 5345.
When may be taken without statement and on transcript of the pleadings, judgment and bill of exceptions 5343.
When motion for new trial must be made before, when not necessary 5328.
When on ground that evidence does not support verdict or decision, testimony may be inserted in statement at cost of losing party 5333.
When original or copy of exhibits certified by clerk may be brought up on 5344.
When original exhibits not to be sent up upon without order of supreme court 5344.
When party may have all testimony inserted in statement at his own expense unless in narrative form 5333.
When presumption that the evidence supports the verdict and decision and when insertion of testimony unnecessary 5333.
When right to make statement or amendments is deemed waived 5335.
When statement and amendment to be delivered by clerk to judge 5331.

Appeal—continued.
When statement may be settled and certified by judge, referee or attorneys and filed 5337.
When statement may be settled as directed by supreme court 5334.
When statement to be settled by judge or referee before or after he ceases to act 5334.
When stays proceedings except sale of perishable property 5355.
When testimony to be reduced to narrative form in statement or amendments to proposed statement and when complete transcript may be furnished 5333.
When undertaking may be in one or several instruments 5353.
When waives motion for new trial 5328.
Appearance, compulsory process to obtain in action for divorce if necessary to disposition of property or children 5839.
Consent and agreement before district judge on adoption of children 5826.
Defendant may appear in justice's court and waive summons 5724.
Defendant or his attorney entitled to notice of subsequent proceedings 5374.
Failure of defendant to make within one hour ground for dismissal of action in justice's court 5772.
Failure of either party to make in justice's court, trial may proceed 5767.
Failure to make in justice's court waives jury 5766.
If defendant appear notice or papers need not be served, when 5374.
In action to restore lost records 5634.
Of persons required when court held at another place 4874.
Time for of defendant to be specified in alias summons in justice's court 5729, 5730.
Time of to be entered in justice's court docket 5800.
Voluntary without summons in justice's court 5715.
Waives summons in civil action 5016, 5034.
What deemed 5374.
When summons unnecessary in quo warranto 5665.
Written notice of 5374.
Appellant, failure to furnish requisite papers, appeal may be dismissed 5356.
To furnish court with transcript, notice and statement on appeal if there be one 5356.
When may give undertaking on appeal in one or several instruments 5353.
Appellant and respondent, defined 5327.
Appellate jurisdiction, district court has final in cases appealed from justice's court (Nev. Const. art. vi, sec. 6) 321.
Of supreme court 4832, 4833.
Application, for discharge from arrest in civil action, hearing 5117.
For discharge from arrest in civil action, renewal of 5120.
For order, refused not to be made again except to judge of higher court, violation a contempt, order may be vacated 4881, 4882.
Application—continued.
For rule or order made to one district judge not to be made to another unless upon written consent, D. C. rule 42, p. 1431.
For taking deposition in district court, D. C. rule xv, p. 1428.
For underground survey of mine, how made and served 5511.
To file complaint in quo warranto, notice to defendant 5664.
Appointment, by governor or county commissioners of successor to officer removed for malfeasance 2853.
Of another to perform duties of suspended revenue officer 3753.
Of executor, administrator or guardian, to have court seal affixed 4879.
Of receiver, when may be made 5193.
Apportionment, in action for partition of expenses previously incurred paid by tenant in common for benefit of property 5543.
Of costs, in proceedings under eminent domain 5623.
Appraisers, district judge may appoint in vacation 4850.
How to be selected on condemnation of land for toll road 3052.
May be appointed to estimate value of homestead under execution 2144.
May determine value of attached property to be released by undertaking 5164.
Or arbitrators may be appointed by district court 4849.
Apprentice, action for abuse of 490.
Action for abuse of, fees of witness and jurors 494.
Action for abuse of, verdict, judgment, execution, costs 492.
May recover damages from master or mistress for breach of contract of apprenticeship 491.
Apprenticeship, proceeding before justice of the peace to set aside covenants of 493.
Arbitration, appeal from decision of court modifying award of arbitrators 5263.
Arbitrators may be compelled by court to make award which may be enforced as judgment 5257.
Arbitrators must be sworn, majority may determine 5259.
Arbitrators to appoint time and place for hearing, oath to witnesses, allegations, evidence, award 5258.
Award to be in writing, judgment when to be entered 5260.
If submission be revoked and action brought, only costs and damages recoverable 5264.
Of charges and damages caused by hogs found trespassing 2257.
Proceedings of board of, for voluntary settlement of disputes between employer and employee 1930-1932.
Proceedings under employers' liability act 1922.
Schedule of sections relating to 5255.
Submission may be made in writing to one or more persons 5256.
Submission may stipulate that it be entered as an order of the court, and filed with the clerk 5257.

Arbitration—continued.
Submission not ordered by court may be revoked before award 5257.
Voluntary for settlement of disputes between employer and employee 1930.
When court may modify or correct award 5262.
What may be submitted to 5255.
When award may be vacated 5261.
When submission entered not to be revoked without consent of both parties 5257.
Arbitrators, failure of, to agree under employers' liability act either party may have adjudication by court 1923.
Fees and expenses on voluntary submission of dispute between employer and employee 1935.
If decision of unanimous, under employers' liability act to be final and binding 1922.
Insolent behavior toward is contempt 5394.
Majority of may act 5488.
On voluntary submission of dispute between employer and employee may subpena witnesses and administer oaths 1932.
Statement of facts by, on proceedings for contempt 5396.
Argument, in mandamus proceedings 5703.
In mandamus proceedings, how heard 5704.
Judgment may be deferred for 5266.
May be brought on by either party 5267.
On appeal, how limited, S. C. rule xi, sec. 3, p. 1424.
Order of, on trial by jury 5210.
Arrest, and bail in civil action 5088.
And bail, in civil action, schedule of sections 5087.
Children under, may be taken directly to juvenile court or ordered transferred by magistrate 741.
Civil, when members of militia, exempt from 4081.
How sheriff or party in civil action brought by him arrested and confined 5497.
In civil action, affidavit, what to contain 5090.
In civil action, allowance of bail exonerates officer 5105.
In civil action, bail may arrest defendant who has been released after arrest 5098.
In civil action, bail may surrender defendant 5097.
In civil action, bond of sheriff liable for escape of defendant 5111.
In civil action, copy of affidavit and order to be delivered to sheriff and defendant 5093.
In civil action, defendant discharged if costs not paid jailer 5123.
In civil action, defendant discharged not liable to further arrest 5122.
In civil action, defendant may be discharged upon giving bail or making deposit 5095.
In civil action, defendant may move to vacate arrest or reduce bail 5112.
In civil action, deposit in lieu of bail, certificate, discharge 5106.
In civil action, discharge from 5114.
In civil action, discharge from, schedule of sections 5114.
In civil action, discharge, oath to be taken, form 5118.
Arrest—continued.
In civil action, discharge of defendant 5114.
In civil action, disposition of deposit 5109.
In civil action, elector exempt on election day (Nev. Const. art. ii, sec. 4) 253.
In civil action, excessive bail, release on habeas corpus 5113.
In civil action, exemption from further arrest, judgment to remain in force 5121.
In civil action, form and requirements of undertaking by defendant 5096.
In civil action, hearing of application for discharge 5117.
In civil action, justification of bail 5104, 5108.
In civil action, new undertaking 5102.
In civil action, notice of application for discharge 5115.
In civil action, order for may be vacated 5113.
In civil action, order for reduction of bail or discharge of defendant 5113.
In civil action, order for, requirements 5089, 5092.
In civil action, order of discharge 5119.
In civil action, plaintiff may order discharge of defendant 5122.
In civil action, plaintiff to advance jailer's costs 5123.
In civil action, qualifications of bail 5103.
In civil action, renewal of application for discharge 5120.
In civil action, sheriff liable as bail 5110.
In civil action, sheriff must pay deposit into court, liability on sheriff's bond 5107.
In civil action, undertaking before arrest, requirements, justification, sureties 5091.
In civil action, undertaking may be substituted for deposit 5108.
In civil action, void and arresting officer liable for arresting witness subpenaed 5446.
In civil action, when bail exonerated 5100.
In civil action, when bail may be charged on undertaking 5098.
In civil action, when bail may be sued 5099.
In civil action, when members of militia exempt from 4081.
In civil action, when plaintiff may except to bail 5101.
In civil action, when sheriff shall file order of arrest, undertaking and copy with clerk 5101.
In contempt proceedings, how defendant to be held in custody 5407.
In contempt proceedings, if defendant fails to appear on return day 5406.
Of defendant in certain civil actions in justice's court 5744.
Of defendant in civil action in justice's court, affidavit and undertaking 5745.
Of defendant in civil action in justice's court, must give undertaking before applying for postponement 5759.
Of defendant in civil action in justice's court, officer must give notice to plaintiff, return 5747.
Of defendant in civil action in justice's court, to be detained until discharged by justice 5748.
Of defendant in civil action in justice's court, to be stated in judgment 5775.

Arrest—continued.
Of defendant in civil action in justice's court, to be taken before justice, when to be taken before another justice 5746.
Of defendant in civil action in justice's court, when postponement discharges from 5759.
Of defendant in civil action in justice's court, when subject to on execution 5759.
Of elector on civil process not to be made on election day (Nev. Const. art. ii, sec. 4) 253.
Of person charged with contempt by justice's court 5797.
Of person in election contest, for receiving fees, bail 1815.
Of witness, for disobedience, to be under warrant to and executed by sheriff 5441.
On civil process, members of legislature exempt from during session and for 15 days before (Nev. Const. art. iv, sec. 11) 269.
Order of, in civil action to be entered in justice's court docket 5800.
Release from, by bail, in contempt proceedings 5398.
Return of warrant and undertaking in contempt proceedings 5401.
Sheriff to file affidavit and order with clerk of district court, D. C. rule xxxiii, p. 1430.
Art curiosities, exempt from execution 5822, 5823.
Artesian wells, machinery for sinking exempt from execution 5288.
Assault, action for may be brought within two years 4967.
Assay, when ore extracted from mine presumed to be twice the value 5509.
Assembly, has sole power of impeachment, majority of all members necessary (Nev. Const. art. vii, sec. 1) 334.
Assessment, and collection of state, county and township taxes, local or special law invalid (Nev. Const. art. iv, sec. 20) 278.
District court has jurisdiction of cases involving legality (Nev. Const. art. vi, sec. 6) 321.
If legality of involved in justice's court, case to be transferred to district court for trial 5721.
In action involving legality, supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
Municipal, jurisdiction of municipal court 833.
Special, action by city for recovery of 867.
Special by city, if irregular, court may nevertheless render judgment for expense 868.
Special by city, roll and ordinance certified are prima facie evidence 867.
Suit may be maintained for by mutual fire insurance company against members 1296.
Assessor, and sureties, action against for underassessing or failure to assess land 3839-3840.
Failing to assess property liable for taxes 3625.
Failure to make settlement for taxes, district attorney to bring suit against him and sureties, no credit for delinquent 3704.
Assessor—continued.
May be removed or suspended and another appointed to perform duties pending charges 3753.
May force collection of taxes by sale of personal property, may give absolute title, fees 3700.
Neglect to make monthly statements of collections on personal property, proceedings to be commenced against 3681.
Property not assessed prima facie evidence of neglect 3625.
Assignee, cannot sue on counter claim not set up in justice's court 5739.
May have execution issued on judgment after death of party 5285.
To pay preferred claim for wages 5493.
Assignment by vendor in possession of goods without delivery conclusive evidence of fraud 1078.
Making of, claim under employers' liability act operates as of assignable cause of action in tort 1927.
Mortgage or debt, county recorder to certify copy as evidence 3789.
Of negotiable paper before due, right of action without set-off 4988.
Subject to preferred claim for wages 5493, 5494.
Unless in good faith fees and salaries of public officers are subject to attachment and execution 2864.
When void in bankruptcy proceedings 609.
Assignor, not to testify when other party to transaction is dead 5419, 5423.
Assistance, writ of, may be ordered at chambers 4843.
Association, associates may be used by common name, summons, judgment 5007.
District court may order for sale or mortgaging of property of 1369.
Included in word "person" 5475.
Attachment, actions in which may issue 5147.
Additional bond may be required 5149.
Affidavit for 5148.
Amendments to be liberally allowed in garnishment proceedings 5190.
Answer of claimant in garnishment proceedings 5180.
Answer of garnishee, reply 5178.
Attached property may be ordered sold by court or judge 5158.
Clerk to issue upon filing affidavit and undertaking 5148, 5149.
Costs in garnishment proceeding, garnishee when entitled to fees 5189.
Court may direct to make order effectual regarding children in action for divorce 5840.
Credits or property in possession of another, how atached 5153, 5169.
Debts owing by municipal or other corporations may be garnished 5154.
Debts to be collected, sheriff to give receipt 5157.
Discharge of garnishee does not bar action by defendant 5183.
Disposal of property received by sheriff from garnishee after payment or performance 5187.

Attachment—continued.
Fees and salaries of persons holding office or positions under state subject to 2864.
For contempt, when to issue 5397.
For license, 3737.
Form of garnishment writ 5171.
Garnishee may be cited, examined and sued 5177.
Garnishee may be ordered to appear before the court 5170.
Garnishee may be required to deliver property to sheriff 5155, 5175.
Garnishee may deduct sums due him by either party, record of judgment, counterclaim 5181.
Garnishee may deliver property or money, release, return 5175.
Garnishee may pay indebtedness or deliver property and be discharged 5180.
Garnishee to deliver property to sheriff, sale, judgment against garnishee 5175.
Garnishee to file answer under oath, fee, interrogatories 5174.
Garnishment issuable with or afterward 5169.
Garnishment proceedings may be had after judgment 5190.
How executed 5150-5157, 5168-9, 5173.
How levied upon mortgaged personal property 1080.
If properly issued may be discharged unless affidavit or undertaking amended 5167.
If attached property insufficient, deficiency to be satisfied by execution 5160.
In civil action in justice's court, undertaking, exception to sureties, justification, waiver 5750.
In civil action in justice's court, undertaking for release of 5751.
In district court, additional undertaking may be required or attachment dissolved, D. C. rule xx, p. 1428.
In district court, not to be dissolved for defect in papers that can be amended without affecting substantial rights, D. C. rule xx, p. 1428.
In justice's court, certain sections made applicable 5752.
Inventory of property attached to be made by sheriff 5156.
Judgment acquits garnishee for amounts paid and demands 5182.
Judgment against garnishee 5177.
Judgment against garnishee for debt not due, execution deferred 5184.
Judgment against garnishee on failure to answer 5175.
Judgment, when answer of garnishee and no reply 5178.
Justification of sureties on undertaking for release 5164.
Liability of sheriff for failure to execute 1651.
Lien against upon ore sold at reduction works 5492.
Lien on bullion 5492.
Material furnished for building exempt from 2225.
May be levied upon live stock herded or grazed upon land of another, preferred lien 2336.
Attachment—continued.
May be levied upon mortgaged personal property, including growing crops 1080.
May issue on nonjudicial day, what affidavit to state 4870.
May issue to compel attendance of witness in contest for county or township office 1809.
Motion to discharge writ for irregularity 5165.
New matter in plaintiff's reply to answer of garnishee deemed denied, trial, judgment, costs 5179.
New trials and appeals allowed in garnishment proceedings as in other cases 5191.
Not to be levied in action on claims against bank in hands of bank examiner 671.
Not to be levied on benefit from insurance on assessment plan 1318.
Of fee or salary of public officer, auditor, treasurer or disbursing officer may pay into court 2865.
Of witness, district court may compel obedience to subpena of railroad commission by 4561.
Party refusing to give memoranda, may be required to pay costs of obtaining information 5156.
Person owing defendant may be examined under oath 5155, 5170, 5174.
Personal property to be sold 5157.
Proceeds of attached property to be applied in satisfaction of judgment 5159.
Property held under, subject to execution 5287.
Property pledged to garnishee to deliver on payment or performance 5185, 5186.
Release of by giving undertaking 5163, 5164.
Schedule of sections relating to 5147.
Service of garnishment gives court jurisdiction to proceed against garnishee 5173.
Several writs may be issued to sheriffs of different counties 5150.
Sheriff to give receipt for debt garnished 5157.
Third person may be interpleaded, notice, proceedings, judgment 5180.
Time for appealing from order dissolving or refusing to dissolve 5329.
Undertaking and order for release of, justification of sureties, notice 5150, 5163, 5164.
Undertaking and property to be delivered to defendant if he recovers judgment 5162.
Undertaking for release of, may be enforced 5161.
Undertaking for release, value of property may be determined by appraisers 5164.
Undertaking for, sureties, amount 5149.
Wages, preferred claims against 5494.
What property subject to 5150.
When garnishee liable for contempt for failure to deliver 5188.
When garnishee may be released from liability 5175.
When issued in civil action in justice's court 5749, 5750.
When not to be issued on claim against closed bank 671.
Witnesses may be subpenaed to testify against garnishee 5177.
Writ of garnishment, service, return, alias writs 5172.

Attachment—continued.
Writ of, in civil action in justice's court, substance of, several may be issued, to different sheriffs 5751.
Writ of, in justice's court, for service in another county, to have certificate under seal of county clerk 5751.
Writ of, issuance of to be noted in justice's court docket 5800.
Writ of, to be directed to sheriff, how executed 5150.
Writ of, when to be returned 5168.
Attendance of prisoner as witness, how obtained 5342, 5343, 5344.
Attestation of instrument, statute relating to competency of witnesses does not apply 5419.
Attorney. See Counsel, under Civil Practice, Criminal Practice, Estates of Deceased Persons.
Absence of, when questions may be heard on law day in district court, D. C. rule v, p. 1426.
Admission of 499-505.
Advertising for divorce business 6462.
Any person except constable may appear as in justice's court 5725.
Appointed to defend criminal prosecution, compensation 7540, 7541.
Authority, change, notice, death, removal 507, 510.
City attorney to be 820.
Clerk of, may verify cost bill 5387.
Clerk of, when not to testify 5425.
Conviction of, effect 512.
Counselors 498.
Disbarment or suspension 511-524.
District attorney must be 525.
Entitled to notice of proceedings after appearance 5374.
Estates of deceased persons, appointments in. See Estates of Deceased Persons.
Examination, time, place and subjects, S.C. rule i, secs. 1-5, p. 1421, 500-504.
Fee, fixed by court in action on bond for construction of railroad fence under eminent domain 5619.
Fee for admission, S. C. rule i, sec. 5, p. 1421, 500, 503, 2006, 3953.
Female may be 499.
For absent heirs 5872, 6047.
In case, not entitled to fee as witness 2038.
Judge, must be 525.
Not to act as unless party 4866.
Not to have partner in practice 4857.
Judgment, disbarment or suspension 523.
Library and certain property of exempt from execution 5288.
License 501, 503, 506.
May acknowledge satisfaction of judgment 5279.
May apply to clerk to open deposition in district court, D. C. rule xvi, p. 1428.
May be appointed for child under juvenile court law 742.
May bring action in quo warranto for usurpation of public office 5660.
May certify to statement and papers on appeal 5356.
May give written notice of appearance 5374.
Attorney—continued.
May make affidavit to accompany summons against parties served after judgment in action on joint contract 5245.
May move for speedy trial in quo warranto 5680.
May receive money and enter satisfaction of judgment 507.
May subscribe to pleading 5060.
May use instructions in addressing jury, D. C. rule xl, p. 1431.
Name of plaintiffs to be indorsed on summons in justice's court 5727.
Not to be partner of judge or justice of the peace 4867.
Not to be received as surety in district court, D. C. rule xiv, p. 1428.
Not to testify regarding communication of client, when 5425.
Notice of hearing in justice's court, when to be given to 5733.
Oath (S. C. rule i, sec. 6, p. 1421) 500, 503.
Obtaining order or judgment in district court to furnish form to clerk, D. C. rule xxxii, p. 1430.
Or clerk may verify cost bill 5387.
Partner of district attorney, when not to appear in action by or against state or county 1610.
Pleadings subsequent to complaint to be served upon 5077.
Practicing without license 506.
Proceedings and judgment for disbarment 513-523.
Roll of 502, 505.
Secretary, when not to testify 5425.
Service of papers upon 5367-5369.
Sheriff not to practice as 1646.
Suspension 511-524.
To verify memorandum of exceptions on error of law occurring at trial 5322.
What papers may be served upon 5375.
When judge not to act as 4866.
When may be appointed guardian ad litem, compensation, D. C. rules xxix and xxx, p. 1430.
When may certify to statement on appeal 5337.
When may verify pleadings 5064.
When not to be witness in district court, not to comment on own testimony, D. C. rule xiii, p. 1428.
When service may be made upon for nonresident 5375.
Witness fees, not entitled to 2038.
Attorney's fee, fixed by court in action on bond for construction of railroad fence under eminent domain 5619.
Governed by agreement, lien for 5376.
In action for damages for herding or grazing live stock on lands of another 2336.
Recoverable as costs in justice's court 5814.
Recoverable by prevailing party in action by workman caused to change place of employment by misrepresentation 1938.
Recoverable by prevailing party under employers' liability act 1923.
Attorney's secretary or clerk, when not to testify 5425.

Attorney-general, duty to proceed against district attorney for failure to bring action against mining company failing to file statement 1338.
May bring action for penalty against foreign corporation failing to file annual statement 1354.
May move for speedy trial in quo warranto 5680.
May request district attorney to bring action for removal of county commissioners authorizing contract when money not in treasury 3830, 3834.
May request district attorney to bring action for removal of county commissioners voting for excess taxes 3828.
Need not verify pleadings in action by state 5064.
To be counsel in action or proceeding by or against public service commission 4544.
To contest application for patent if land contains mineral 4143.
To defend in actions against the state for services or advances authorized by law, controller to produce evidence and may appeal 5654.
To direct action brought to remove county commissioners 3830-3834.
To prosecute contest for state office 1823.
When shall commence action in quo warranto 5658.
When to bring action against foreign corporation for doing business without filing certificate 1350, 1354.
Attorney in fact, to be recognized by referees in action for partition 5579.
Auctioneer, or constable to sell baggage left at hotel or lodging-house 2153.
Auction sale, of goods, when memorandum of auctioneer is contract of sale 1077.
Auditor, if fee or salary of public officer garnished, may pay into court 2865.
May be removed or suspended and another appointed to perform duties pending charges 3753.
Authenticated copy location notice evidence, when 2424. See Mines and Mining.
Authentication, of copy of record or document, how seal to be attached 5481.
Of copy of record to have court seal affixed 4879.
Of records under act of Congress 526-529.
Award, of arbitrators 5258.
Judgment, when to be entered 5260.
May be compelled and may be enforced as judgment 5257.
On voluntary submission of dispute between employer and employee 1930.
Under employers' liability act 1922, 1923.
When court may modify or correct 5262.
When may be vacated 5261.
Baggage, left at hotel or lodging-house may be sold 2152, 2153.
Refusal to issue check, failure to deliver, damages, evidence, liability 3553.
Wilfully or carelessly injured by railroad employee 6755.
Bail, allowance of on arrest in civil action exonerates officer 5105.
Bond in contempt proceedings, form and conditions 5400.
Bail—continued.
Exonerated on commitment for insanity of accused person 7391.
If defendant in prison for want of, entitled to notice, when 5374.
In civil action, may be charged on undertaking if defendant not arrested or surrendered 5098.
In civil action, when exonerated 5100.
Justification of on arrest in civil action 5104, 5108.
May arrest defendant who has been released from arrest in civil action 5098.
May be forfeited in contempt proceedings if defendant fails to appear on return day, measure of damages 5406.
May be given by person arrested in contempt proceedings 5398.
May surrender defendant who has been released from arrest in civil action 5097.
Notice of justification of on undertaking on arrest in civil action 5102.
On arrest in civil action 5091.
On arrest in civil action, deposit in lieu of, certificate, discharge 5106.
On arrest in civil action, may be reduced on habeas corpus 5112, 5113.
On arrest in civil action may be sued 5099.
On arrest in civil action, to be specified in order 5092.
Qualifications of on arrest in civil action 5103.
Upon giving, defendant may be discharged from arrest in civil action 5095.
When party receiving fees may be held to in election contest 1815.
Bailiff, duties of 4916, 4919.
Of supreme court, sheriff of Ormsby County 4888.
Bailment, sales of unclaimed property 530-542.
Bank, cannot plead statute of limitations in action to recover deposit 4974.
Closed by bank examiner, action on rejected claims against to be brought within three months after notice 671.
If in hands of bank examiner, attachment or execution not to be levied to enforce claim 671.
In hands of bank examiner, notice, presentation and proof of claims 671.
Liability of stockholders to creditors 627.
May apply to district court to enjoin proceedings of bank examiner 675.
Violation of banking law authorizes annulment of charter 626.
When bank examiner may be enjoined from taking possession 675.
When deemed insolvent 629.
Bank examiner, to give notice and how to act on claims against closed bank 671.
Bankrupt, action by or against 553.
Bankruptcy, Congress has power to establish uniform rules relating to (U. S. Const.) 114.
Evidence 563.
Exemptions allowed bankrupt under state law 548.
Jurisdiction of United States and state courts 565.
Jury trial may be had 561.

Bankruptcy—continued.
Liens preferred claims, when assignments void 609.
Person against whom involuntary petition filed may have jury 561.
Time within which action must be brought against trustee 553.
When assignments within three months previous to filing petition void 609.
Battery, action for may be brought within two years 4967.
Beet sugar, eminent domain may be exercised for pipe lines 5606.
Bill, copy of as complaint in justice's court 5736.
Bill of exceptions, may be settled by judge after expiration of term 5489.
May be taken and settled at time of decision, order or ruling, only pertinent facts to be stated 5343.
Signed by judge after expiration of term has legal effect 5490, 5491.
Bill of particulars, may be required 5067.
Bills of exchange, or other instruments, when admitted in justice's court unless denied by verified answer 5770.
Parties and liability of in actions on, schedule of sections 2548.
Blanks, must be filled in all papers except subpenas before issuance by justice of the peace 5809.
Board of county commissioners, may instruct district attorney to bring suit against assessor for failure to make settlement for taxes 3704.
May order sale of property bid in by county treasurer for delinquent taxes 3667.
May revoke licenses 3868.
To appoint successor to officer removed for malfeasance 2853.
When to pay fees and costs from sale of property bid in by county treasurer in action for delinquent taxes 3673.
Board of examiners, when action may be brought on claim rejected by 5653.
Boilermakers, lien of 2231.
Bond, action upon, justice's court has jurisdiction if amount does not exceed $300 5714.
Additional may be required on attachment 5149.
Affidavit and justification of sureties generally 5484, 5485.
Attorney not to be received as surety in district court, D. C. rule xiv, p. 1428.
Copy of as complaint in justice's court 5736.
For bail in contempt proceedings, form and conditions 5400.
For obedience to order regarding children in action for divorce 5840.
For payment of judgment when adjournment for more than ten days in justice's court 5760.
In action in quo warranto for usurpation of public office 5660.
In justice's court, deposit may be made in lieu of in all cases 5816.
Not required of state, municipality or public officer as party to action 5487.
Bond—continued.
Of assessor, action on for underassessing or failure to assess land 3839, 3840.
Of county recorder, action on for entering satisfaction of mortgage without affidavit that taxes are paid 3755.
Of guardian ad litem, D. C. rule xxxi, p. 1430.
Of guardian, different actions may be maintained upon 6184.
Of guardian of insane person for payment of expenses in advance to secretary of state 2201.
Of guardian, time within which action may be brought against sureties 6185.
Of sheriff, liable for deposit on arrest in civil action 5107.
Of sheriff, liable for escape of defendant arrested in civil action 5111.
Of trustee appointed on dissolution of corporation in quo warranto, suit may be brought on 5673.
Official, may be furnished by surety company 2888.
Official or statutory, how sureties may be released, liability 2888.
Official, to State of Nevada, action may be brought on in his own name by any person injured 2870.
On appeal, affidavit of sureties, waiver, deposit in lieu of, exception to sureties 5354.
On appeal and stay of execution in action for forcible entry or unlawful detainer 5601.
On appeal, entry of in justice's court docket 5806.
On appeal, from justice's court, requirements with or without stay, deposit, justification of sureties 5792.
On appointment of elisor 5495.
On motion for continuance by defendant in action for forcible entry or unlawful detainer 5597.
Surety company may act as sole surety 695.
Surety company or cash may be accepted in place of personal sureties 5486.
To be executed by railroad company for building of fences in proceeding under eminent domain 5619.
To defendant when plaintiff occupies premises pending proceedings in eminent domain 5615.
To stay execution of judgment or order pending appeal 5351.
Books, bringing of by witness may be required 5431.
Judgment for delivery of in quo warranto 5667.
Of corporation may be ordered delivered to trustee on dissolution in quo warranto 5675.
Of public utility, public service commission may require production of 4529, 4531.
Witness may be compelled to produce 5416.
Breach of peace, when punishable as contempt in justice's court 5795.
Bribery, conviction of excludes from jury unless restored to civil rights (Nev. Const. art. iv, sec. 27) 285.

Bribery—continued.
In relation to election or procurement of office disqualifies from holding office (Nev. Const. art. iv, sec. 10) 268.
Bridges, eminent domain may be exercised for 5606.
Measure of damages for cutting timber for repair of 5507.
Briefs, on appeal to supreme court, how may be typewritten, filed and served, S. C. rule xxv, p. 1425.
On appeal to supreme court, time for may be shortened or extended, S. C. rule xi, sec. 7, p. 1424.
Brother, when entitled to damages for death by wrongful act 5648.
Bullion and gold dust, to be returned as money and not sold under execution 5287.
Lien and attachment 5492.
Preferred lien upon, when sold at reduction works 5492.
Burden of proof, in action of railroad company against railroad commission to set aside rate 4564.
In action to review order of public service commission 4540(e).
Cabinets, specimen mineral, geological, art or paleontological exempt from execution 5822-5824.
Calendar, of court, how made up 5200.
Of district court, D. C. rule ii, p. 1425.
Of district court, calling, order, disposal of business, D. C. rule iv, p. 1426.
Of district court, showing business to be delivered by clerk to judge, D. C. rule ii, sec. 3, p. 1426.
Of supreme court, to be called on first day of term, what cases to be set, how to be submitted, S. C. rule x, sec. 3, p. 1423.
Of supreme court, what cases to be placed on, S. C. rule x, sec. 1, p. 1423.
"Calendar month," when means word month unless otherwise expressed 5475.
Canals, eminent domain may be exercised for 5606.
Canyon, right of way through for road and railroad 5628.
Capitol, terms of supreme court to be held at (Nev. Const. art. vi, sec. 7) 322.
Catalogues to be kept of specimens, ores or curiosities exempt from execution 5824.
Cattle guards, recovery of cost under bond for construction of railroad fences in proceedings under eminent domain 5619.
Cause of action, joinder 5039.
When successive actions may be maintained on 5477.
Cause or controversy, may be submitted and determined without action 5252.
Cemeteries, eminent domain may be exercised for 5606.
Certificate, and seal of county clerk to be attached to summons in action in justice's court to be served out of town 5732.
And seal, to prove records of other states 5410.
Filing of paper includes 2036.
Certificate—continued.
For authentication of records under act of Congress 526-529.
How seal to be attached 5481.
Of acknowledgment, to have court seal affixed 4879.
Of clerk for stay of execution pending motion for new trial in district court, D. C. rule xxvi, p. 1429.
Of clerk of district court that appeal is perfected, when to stay execution, D. C. rule xxii, p. 1429.
Of clerk or judge, consul, minister or embassador to judicial record of foreign country 5411.
Of clerk, to signature of judge taking affidavit out of state 5453.
Of county surveyor or deputy may be submitted as evidence, 1667.
Of district judge as to which justice of the peace is successor when two equally entitled, to be filed with county clerk 5807.
Of election, becomes void if no appeal taken within thirty days from judgment of district court annulling election 1812.
Of election, to be issued by clerk of board of county commissioners in accordance with judgment 1810.
Of foreign corporation, if not filed with secretary of state action not to be brought or defended 1350.
Of incorporation certificate, when is evidence 1221.
Of foreign corporation not filed, other proof 1347.
Of indebtedness, against county not presented within six months after notice that it is payable, funds may be paid for other purposes, but demand becomes due on re-presentation 1563.
Of judge or referee, to settlement of statement on appeal and filing 5337.
Of judgment of supreme court, to be entered in trial court 5360.
Of redemption of real property sold under execution, to be acknowledged and recorded 5301.
Of sale of real estate under execution, what to state, duplicate to be filed with county recorder 5298.
Of sale, to include all property sold for taxes bid in by county treasurer, recording 3669.
Of sale under execution, conveys all right debtor had in property on day execution levied 5296, 5297.
Of secretary of state to qualifications of surety company, evidence 698.
Of stock of corporation, district court may order new issued in lieu of one lost 1165.
Of survey of mine by licensed surveyor, when prima facie evidence 2429.
Physician's on commitment of insane person to be transmitted to asylum 2204.
To purchaser on sale by assessor of personal property for delinquent taxes 3679.
When to be issued by district judge to new officers on removal of officers of corporation 1182.

Certified copy, of affidavit filed with testimony taken for perpetuation prima facie evidence of facts 5469.
Of delinquent tax list is evidence 3658.
Of incorporation of athletic, historic, scientific or literary societies prima facie evidence 1384.
Of incorporation of W. C. T. U. prima facie evidence 1437.
Of instrument affecting real property, when may be read in evidence 5414.
Of judicial record of this state or the United States is evidence 5408.
Of order of railroad commission prima facie evidence 4565.
Of record in office of county recorder may be read in evidence 1094.
Of record of instrument recorded in office of county recorder may be read in evidence 1094.
Of record of notary public or predecessor, when prima facie evidence 2754, 2759.
Of record of this state or the United States other than judicial in custody of public officer or certified or verified copy may be read in evidence 5409.
Of record relating to naturalization is evidence 2541.
Of restored records validated 5639.
Of will admissible in evidence 5877.
Or record of United States or state patent, when admissible in evidence 5415.
Certiorari, amendment of return, hearing, judgment 5691.
Application for writ on affidavit, when court may grant 5685.
District court or judge may issue 4840.
District judge may try and determine at chambers 4843.
Extent of review under 5690.
In issuance of writ, words requiring stay may be omitted 5688.
Manner of service of writ 5689.
New trial and appeal may be had as in civil cases 5713.
Not to issue by supreme court except upon order after showing, S. C. rule xviii, p. 1424.
Order to show cause why writ should not be granted 5685.
Provisions relating to civil actions are applicable 5712.
Return and hearing may be had at any time 5711.
Return of writ 5684, 5686.
Schedule of sections relating to 5683.
Supreme court or justice thereof may issue (Nev. Const.) 319, 4834, S. C. rule xviii, p. 1424.
To whom writ may be directed 5684, 5686.
Transcript of record to be returned in proceeding 5687.
Transmission of copy of judgment to inferior tribunal or officer 5692.
What constitutes judgment-roll, appeal, how taken 5693.
What to command 5687.
When writ may be granted and how returnable 5684.
Writ of denominated writ of review 5683.
Writ of, district court or judge may issue (Nev. Const. art. vi, sec. 6) 321.
Certiorari—continued.
Writ of, supreme court empowered to issue (Nev. Const. art. vi, sec. 4) 319.
Challenges, peremptory to jurors 5205.
To jurors, how tried 5207.
To jurors in civil action in justice's court, grounds and number 5678.
To jurors for cause 5206.
Chambers, what business district judge may transact at 4843, 4922.
Chancery cases, may be tried with or without jury 5229.
Changing name, of female in action for divorce 5844.
Of person, local or special law for, invalid (Nev. Const. art. iv, sec. 20) 278.
Of person, notice, what to state, publication 5836.
Of person, notice of hearing, determination of objections, order and judgment 5837.
Of person, petition for, what to state, filing 5835.
Charter, of bank, violation of banking law authorizes annulment 626.
"Chattels," when is included in words "personal property" and "property" 5475.
Checks, parties and liability of in actions on, schedule of sections 2548.
Chief justice, for reasonable cause may be removed on two-thirds vote of members elected to each branch of the legislature (Nev. Const. art. vii, sec. 3) 336.
Or presiding magistrate to attest certificate of clerk to judicial records of other states 5410.
To preside over senate on trial of impeachment of governor or lieutenant-governor (Nev. Const. art vii, sec. 1) 334.
When to certify statement on appeal 5333.
Children, age of majority, males 21, females 18 years 431. (See Children, Guardians 4096, 6149-6201.)
Adoption of, act relating to does not apply to Mongolians 5834.
Child adopted may take name of persons adopting 5830.
Children adopted and persons adopting bear legal relation of parent and child 5830.
Consent, how given, agreement, how executed, procedure 5826.
Guardian may consent 746.
How consent of nonresident parent to be executed and acknowledged 5831.
Husband or wife not lawfully separated cannot adopt without consent of other 5827.
Judge to file papers, have order entered in court minutes and recorded in office of county recorder, notice to the world 5832.
Proceedings before district judge, order and rights of adopted child 5829-5831.
Requirements 5825.
Schedule of sections 5825.
When consent of absent parent must be obtained or need not be obtained 5831.
When consent of parent of abandoned child not necessary, custodian or next friend to be cited and examined 5831.

Children, adoption of—continued.
When illegitimate child deemed adopted by conduct of father 5833.
When not to be had without consent of parents, child over 12 years must consent in writing 5828.
Adopted entitled to protection, support and inheritance 5826, 5829.
Appeal may be taken under juvenile court law to supreme court 753.
Appear in action, how 4992.
Arrested may be taken directly to juvenile court or ordered transferred by magistrate 741.
Assessment of damages in action for abuse of apprentices 491.
Bond may be given for appearance under juvenile court law 742.
Counsel may be appointed for under juvenile court law 742.
County commissioners to have notice of proceedings before justice of the peace to set aside apprenticeship 493.
Court may change custody of pending or after action for divorce 5840.
Custody of when not regulated by order of court is vested in parent at whose instance divorce is granted 5841.
Disposition of pending and after action for divorce, order for production of, enforcement 5840.
District court may appoint probation committee 734.
District court to appoint probation officer 733.
District judge to approve employment, if under fourteen 6824.
Employments forbidden 6506, 6823.
Failure to support 6481-6483.
Foreign corporation, placing by 747.
Guardian of appointed under juvenile court law not to have charge of estate 752.
Guardian, ad litem. See Civil Practice, 4993, 5726, D. C. rules xxix to xxxi, p. 1430.
Guardian, ad litem, how appointed 4992.
Bond of, different actions may be maintained upon, parties 6184.
Limitation of action for recovery of estate sold by 4963.
May consent to partition without action and execute release 5573.
May join in partition of real estate of ward 6166.
May sue for death, injury or seduction of ward 4996.
Notice to on proceedings in district court to set aside apprenticeship, costs 493.
Of minor or insane person may apply for lot in federal townsite 1963.
Of minor or insane person, when deed to be made to, for lot in federal townsite 1986.
Or personal representative may sue for death of adult 4997.
Of under juvenile law to report to judge 740.
Time within which action may be brought against sureties on bond of 6185.
When may sue for death, injury or seduction of ward 4995.
Children—continued.
Guardianship. See Guardians 4096, 6149-6201.
Guardianship of, juvenile court law 739.
If necessary to obtain disposition of property of, compulsory process may be had to obtain appearance or answer in action for divorce 5839.
Illegitimate, action to determine paternity 765.
Judgment that putative father stand charged with maintenance, refusal to obey contempt 766.
Interference with order of juvenile court punishable as contempt 754.
Issue legitimate, marriage null or void 6117.
Juvenile court law, schedule of sections 728, 757.
Juvenile court may dismiss petition and permit prosecution under criminal laws or make other order 737.
May order guardian to place in hospital 738.
May release from custody or suspend sentence 758.
Summons, publication, contempt, proceedings 732.
Married woman as sole trader liable for maintenance of 2193.
May recover damages from master or mistress for breach of contract of apprenticeship 491.
Of deceased child, when entitled to damages for death by wrongful act 5648.
Order relating to in action for divorce may be enforced by attachment, commitment or requiring security 5840.
Paternity, proof of 765.
Petition to juvenile court, what to state 731.
Posthumous children, effect of conveyance, right of estate 1058-9, 6159, 6217.
Support of 765, 766.
What considerations determine disposition of and how affected when not mentioned in divorce action 5841.
When entitled to damages for death by negligence of common carrier, mill or mine operator 5650.
When entitled to damages for death of parent by wrongful act 5648.
Christian religion, witness believing in other may be sworn according to peculiar ceremonies 5447.
Church, district court may make order for sale or mortgaging of property of 1369.
Protestant Episcopal, district court may make order for sale of real estate 1431.
Chutes, eminent domain may be exercised for 5606.
Citation, by district court or judge or justice of the peace for discovery of personal property on which taxes delinquent 3679.
May issue to garnishee 5177.
Of officer guilty of malfeasance 2852.
To issue in proceedings to restore lost records 5642.
Cities, rights of, for street or highway purposes, when affected by eminent domain 5625.
Cities and towns, district court to act in incorporation of 768-769.

Citizen, of one state cannot sue another state (U. S. Const.) 181.
When lost record regarding naturalization may be restored 5640.
Citizens of different states, when jurisdiction in federal courts (U. S. Const.) 154.
Citizenship, in proceedings to restore lost records relating to, citation unnecessary 5642.
City, action against on rejected claim must be commenced within one year after rejection thereof 4967.
As party to action, when not required to give bond or undertaking 5487.
Expense of disincorporation, how paid 876.
Incorporated under laws of Territory of Nevada, action by or against, trustees to prosecute or defend on disincorporation 971.
Indebtedness or liability to, local or special law releasing invalid (Nev. Const. art. iv, sec. 20) 278.
Judgment may be rendered in favor of, on irregular special assessment 868.
May bring action for recovery of special assessment 867.
May have contract declared void if public officer interested 2829.
Need not give undertaking on appeal 5346.
On disincorporation district court and clerk to give notice 875.
Proceedings for disincorporation in district court 872, 873.
City office, action to contest, how brought and determined 801.
City ordinances, justice of the peace has jurisdiction of violation of 886.
City taxes, lien against property assessed 937.
City taxes, to be included in suit and judgment for delinquent taxes 878.
City uses, eminent domain may be exercised 5606.
Civil action, affidavit for exemption of witness from arrest 5446.
Against partnership, only general partners to be parties, exception 2907.
Answer, schedule of sections relating to 5046.
Appeal from justice's court, power of district court, dismissal, damages, costs, judgment 5794.
Appeal not deemed effective until court fee paid 2031.
Appearance, answer or demurrer by defendant waives summons 5016, 5034.
Arbitration, schedule of sections 5255.
Arrest and bail 5088, 5092, 5094.
Arrest and bail, schedule of sections 5087.
Attachment, schedule of sections relating to 5147.
Claim and delivery, schedule of sections 5124.
Clerk's fees when not over 800 votes in county 1995.
Clerk's fees when over 800 votes in county 2007.
Commenced before repeal of law by civil practice act not affected by such repeal 5818.
Complaint and summons 5016, 5039.
Costs to be allowed as in for removal of officer for malfeasance 2852.
Civil action—continued.
Court fee (Nev. Const. 331) 2030.
Court fee on appeal from justice's court 2031.
Court fee on appeal to supreme court 2032.
Demurrer to answer, schedule of sections relating to 5053.
Demurrer to complaint, schedule of sections relating to 5040.
Depositions taken out of state, schedule of sections 5458.
Depositions taken within state, schedule of sections 5454.
Designation of parties to 4944.
Discharge from arrest 5114.
Discharge from arrest, schedule of sections 5114.
Either party in divorce proceedings entitled to have issue of fact tried by jury as in 5845.
Entries in justice's court docket are prima facie evidence 5801.
Exceptions, schedule of sections 5315.
Execution in justice court, schedule of sections 5783.
Fee, court (Nev. Const. 331) 2030.
Fees 1994-2047.
Fees of jurors 2001-2013.
Fees of justice of the peace in counties polling over 800 votes 2015.
Fees of justice of the peace in counties polling not over 800 votes 2003.
Fees of witness when not over 450 votes in county 2000.
Fees of witness when over 450 votes in county 2012.
Fees, sheriff, constable or coroner serving more than one paper in same case requiring only one journey, entitled to only one mileage 2037.
Fees to be entered in book under title of proceeding and open to inspection 2020.
For claim and delivery in justice's court 5124, 5135, 5753.
For delinquent taxes, judgment and how entered, costs and penalties to be included, is lien on same and other property, default, redemption money, how paid, receipt of district attorney, evidence, execution 3665.
For delinquent taxes on proceeds of mines, district attorney to begin, when and where, damages, penalties, form of complaint, answer 3707-3709.
For forcible entry and detainer, schedule 5585.
For liens to mechanics, materialmen and others 2222-2228.
For partition, schedule of sections 5527.
For personal injuries, schedule of sections 5649.
For restoration of lost records affecting real property, schedule of sections 5630.
Garnishment, schedule of sections relating to 5169.
General rules of pleading, schedule of sections relating to 5065.
Grounds for change of venue 5015.
How commenced, 5016.
How commenced in justice's court 5722.
In certiorari, schedule of sections 5683.
In eminent domain, schedule of sections 5606.

Civil action in justice's court, abstract of judgment filed in recorder's office creates lien on land 5782.
Adjournment not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
Alias summons may issue, time for appearance 5729, 5730.
Amendment to complaint or answer may be allowed 5741.
Amendment to pleadings, adjournment, costs, relief from judgment by denial 5742.
Answer and what to contain 5735, 5738.
Answer or demurrer allowed to amended pleadings 5743.
Arrest of defendant, must give undertaking before applying for postponement 5759.
Attorney's fees recoverable as costs 5814.
Certain sections made applicable 5752.
Certificate of county clerk to writ of attachment for service in another county 5751.
Complaint defined and what to contain 5736.
Contempts and general provisions, schedule of sections 5795.
Copy of note or instrument admitted unless denied by verified answer 5770.
Defendant may appear and waive summons 5724.
Demurrer to complaint 5735, 5737.
Deposit may be made in lieu of undertaking 5816.
Entry to be made in docket of date of hearing and mailing notice 5733.
Execution, duty of officer receiving 5786.
Execution, may be renewed or alias issued 5785.
Execution, to issue by county clerk on abstract of judgment docketed in district court 5781.
Failure of either party to appear, trial may proceed 5767
Hearing after service of summons or appearance 5733.
How guardian appointed, when necessary 5726.
How judgment entered 5775.
How jury waived 5766.
How summons issued, directed and what to contain 5727.
If amount found due exceeds jurisdiction, party may remit excess 5776.
If defendant fails to set up counter-claim he cannot afterward sue 5739.
Issuance and stay of execution 5783.
Issue of fact to be tried by jury unless waived 5765.
Judgment of dismissal may be entered without prejudice in certain cases 5772.
Judgment to be entered at close of trial if no jury 5774.
Judgment to be entered at once in conformity to verdict 5773.
Judgment taken by mistake, inadvertence or excusable neglect may be set aside 5742.
Jury, how summoned and challenged 5768.
Limitation of service of summons 5731.
No statement required on appeal to district court on questions of fact or both law and fact 5790.
Offer to allow judgment, when further costs not recoverable 5777.
Civil action in justice's court—continued.
Parties may appear in person or by attorney 5725.
Pleadings, form of 5734, 5735.
Pleadings, issues of law and fact defined 5761-5763.
Postponement by consent 5758.
Postponement of trial on application of party, grounds, procedure 5759.
Proceedings on demurrer to complaint or answer 5741.
Summons, by whom and how served and returned 5732.
Time for appearance of defendant to be specified in summons 5728.
Undertaking on appeal, requirements with or without stay, deposit, justification of sureties, 5792.
Waiver of objection that it is in wrong township 5772.
What entries to be made in docket 5800.
What execution must contain 5784.
What notice of appeal from judgment must contain 5788.
What papers to be transmitted on appeal to district court 5791.
What provisions of civil practice act are applicable 5815.
What statement on appeal on questions of law alone must contain, amendments and settlement 5789.
When admission that evidence would be given avoids postponement 5759.
When attachment to issue 5749, 5750.
When consent to taking of testimony, or admission that it would be given, avoids postponement 5759.
When court may postpone 5757.
When defendant may be arrested 5744.
When defendant may demur to answer 5740.
When order for inspection of written instrument may be made 5769.
When postponement discharges defendant from arrest 5759.
When trial must be commenced and how continued 5756.
Who entitled to costs 5813.
Civil action, in mandamus, schedule of sections 5694.
Issues, mode of trial and postponement, schedule of sections 5195.
Joinder of causes 5039.
Joint debtor released of his proportion, not necessary party 5847.
Judgment by confession may be entered in justice's court 5771.
Judgment in general, schedule of sections 5238.
Justice of the peace may issue execution or other process upon docket of predecessor 5805.
Justice of the peace may issue subpena and final process to any part of county 5808.
Justice of the peace to receive all moneys collected by sheriff or constable and pay same to parties entitled 5810.
Justice's court may require deposit or undertaking as security for costs before issuing summons 5812.

Civil action—continued.
Justice's court to fix time for trial 5733.
Justice's court to try issue of law 5764.
Justice's court to which transferred has same jurisdiction, 5719, 5720.
Limitation continues to run under civil practice act as if former act had not been repealed 5819.
Manner of commencing, schedule of sections relating to 5016.
Manner of commencing in justice's court, schedule of sections 5722.
Manner of giving and entering judgment, schedule of sections 5266.
Married woman as sole trader may sue or be sued alone 2192.
May be maintained for recovery of cost of removal of nuisance 921.
New trial and appeal in justice's court, schedule of sections 5788.
New trials, schedule of sections 5319.
Not included in general provisions of law and equity, supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
Notices, filing and serving papers, schedule of sections 5367.
One form, 4943.
Parties not originally summoned, schedule of sections 5243.
Place of trial, schedule of sections relating to 5011.
Place of trial in justice's court, 5715.
Place of trial in justice's court, schedule of sections 5715.
Pleadings, 5035, 5036.
Pleadings in justice court, schedule of sections 5734.
Proceedings supplementary to execution, schedule of sections 5307.
Provisional remedies in justice court, schedule of sections 5744.
Provisions relative to apply to proceedings in eminent domain 5624.
Provisions relative to apply to certiorari, mandamus and prohibition 5712.
Publication of process or paper, officer to be paid cost in advance 2026.
Quo warranto, schedule of sections 5656.
References and trials by referees, schedule of sections 5230.
Relating to nuisance and waste, schedule of sections 5504.
Civil action, schedule of sections relating to affidavits 5450.
Relating to appeals 5325.
Relating to contempt 5394.
Relating to costs 5376.
Relating to definitions of common law and miscellaneous provisions 5474.
Relating to execution 5280.
Relating to injunction 5136.
Relating to motions and orders 5362.
Relating to parties 4986.
Relating to perpetuation of testimony 5464.
Relating to proof of public writings 5408.
Relating to trial by court 5226.
Relating to variance, mistakes in pleadings and amendments 5080.
Relating to verdict 5221.
Relating to witnesses 5419.
Civil action, special court fee to be advanced to clerk by party bringing or taking appeal and applied to judge's compensation (Nev. Const. art. vi, sec. 16) 331.
Testimony, pleadings, orders and practice in divorce proceedings same as 5842.
There shall be but one form, and law and equity may be administered in same action (Nev. Const. art. vi, sec. 14) 329.
To quiet title, schedule of sections 5514.
Transfer of from justice's court to district court 5721.
Trial by jury secured but may be waived (Nev. Const. art. i, sec. 3) 232.
Trial by jury, schedule of sections 5204.
Trials and judgments in justice's court, schedule of sections 5754.
Venue and change of venue 5011-5015.
Verification in, schedule of sections relating to 5060.
What summons required to state 5018-5020.
When due, incorporation of company cannot be attacked collaterally except by state 1154.
When witness immune from arrest 5445.
Wife living separate and apart from husband may sue and be sued alone 2179.
Witness fees to be taxed as costs upon affidavit 2012.
Witness need not testify unless paid fee if demanded 2012.
Civil arrest. See Arrest in Civil Action.
Civil practice, local or special laws relating to, are invalid (Nev. Const. art. iv, sec. 20) 278.
Provisions relating to, applicable to tax suits 3666.
Schedule of acts 4943, p. 1432.
Civil practice act, became effective January 1, 1912, 5820.
Limitations continue to run under as if old statute had not been repealed 5819.
Proceedings regarding, applicable to estates of deceased persons 6138.
Repeal of law by, does not affect act, right or proceedings commenced before repeal 5818.
When provisions of, to be construed as a continuation of existing statutes and not as new enactments 5817.
Civil process, elector not to be arrested under on election day (Nev. Const. art. ii, sec. 4) 253.
May be served on land ceded to the U. S. 1949, 1951.
Members of legislature exempt from arrest under, during session and for 15 days before (Nev. Const. art. iv, sec. 11) 269.
Member of militia, when exempt from arrest 4081.
Civil rights, consent of parent deprived of, not required on adoption of children 5828.
Restoration allows person convicted of crime to serve as juror (Nev. Const. art. iv, sec. 27) 285.
Claim against county, action not to be brought unless demand first presented 1523.
Action not to be brought until demand has been presented to commissioners and auditor, costs when recoverable 1523.

Claim against county—continued.
District attorney not to advocate payment of 1520, 1605.
Funds assigned to payment, if not collected within 2 years, payable on other claims, new demand and reallowance necessary or claim barred 1536.
If taxpayer objects, commissioners to defer action at least 10 days to allow institution of proceedings to determine validity 1521.
Resident taxpayer may file objections against 1521.
Claim against estate of deceased person, action to be brought within 30 days after notice of rejection 5968.
Barred by statute of limitations at time of death 5968, 5969.
Claims, adverse, actions to determine 5479.
Against bank closed by bank examiner, notice, presentation and force of 671.
Against estates, district judge may approve in vacation 4850.
Against the state, for services or advances authorized by law, when action may be brought 5653.
Presentation of on disincorporation of city 872, 873.
Under employers' liability act may be compromised 1928.
Claimant, may be interpleaded in garnishment proceedings 5180.
Procedure to obtain title to lot in federal townsite 1983-1986.
To lot in federal townsite to sign statement in writing 1983.
Claim and delivery, action for in district court 5124-5135, 5194.
Action for in justice's court 5124, 5135, 5753.
Building may be broken open to take property 5132.
Claim of other person not valid against sheriff unless supported by affidavit 5134.
Concealed property may be taken by force 5132.
Exception to defendant's sureties 5130.
If defendant excepts to sureties cannot claim property 5128.
Justification of sureties 5131.
Justification of sureties on indemnifying bond to officer 5134.
Of personal property 5124.
Of personal property, copies how served by sheriff 5127.
Of personal property, exception to sureties, notice, justification, waiver 5128.
Of personal property, order to sheriff 5126.
Of personal property, undertaking in action for 5127.
Other person claiming property to serve affidavit on sheriff 5134.
Property claimed by other person, plaintiff to indemnify officer 5134.
Re-delivery to defendant on giving bond 5129.
Schedule of sections 5124.
Sheriff to deliver property to plaintiff if defendant's sureties fail to justify 5130.
Sheriff to file notice, undertaking and affidavit 5135.
Claim and delivery—continued.
Sheriff to keep and deliver property on payment of fees 5133.
When property to be delivered to plaintiff 5129.
Clerk, has preferred claim for wages 5493, 5494.
Of attorney, when not to testify regarding communication 5425.
Clerk of court. See County Clerk.
Any may administer oath or affirmation 5483.
Certificate and duty of on stay of execution pending motion for new trial in district court, D. C. rule xxvi, p. 1429.
Compensations from corporation removal proceedings 1182.
Certificate that appeal is perfected, when to stay execution, D. C. rule xxii, p. 1429.
Deposition of witnesses for perpetuation of testimony to be filed with 5468.
Deposition taken out of state to be forwarded to 5461
Deposition to be sealed and forwarded to 5456.
Duties of concerning investments in action for partition 5569.
Duties of in relation to judgment-roll in certiorari proceedings 5693.
Duties of on application for naturalization 2518, 2525.
Execution to be returned to 5283.
Fees of in contested election for county or township office same as in district court 1811.
Fees of in counties polling not over 800 votes 1995.
Fees of in counties polling over 800 votes 2007.
Fees of in proceedings for removal of directors or officers of corporation 1182.
Fees upon naturalization, half to be transmitted 2526.
Fees, when not over 800 votes in county 1995.
Filing of certificate of district judge as to which of two justices of the peace entitled is successor 5807.
How to indorse, file and open deposition in district court, D. C. rule xvi, p. 1428.
How to make up court calendar 5200.
In absence of district judge may commit insane person to asylum 2210.
May attest copy of records of other states 5410.
May be required to take down testimony 5473.
May certify to certificate of incorporation 1221.
May certify to statement and papers on appeal 5356.
May certify transcript of judgment for filing as lien in another county 5277.
May file and enter consent of tenant in action for partition 5556.
May issue execution in action for delinquent taxes 3665.
May issue execution on judgment for deficiency after sale on foreclosure 5501.
May take affidavit to be used in this state 5450.

Clerk of court—continued.
Mortgage or security may be taken in name of on sale in partition 5555.
Must include interest and costs in judgment and docket 5388.
On removal of officer for malfeasance, to transmit copy of judgment to governor or county commissioners 2853.
Pleadings and transcript to be certified to on transfer of case from justice's court to district court 5721.
Security or investment of proceeds on sale in partition to be invested in name of 5567.
Service of notices and papers may be made upon when party has no office at county-seat 5369.
Service upon of notice of taking testimony for perpetuation 5466.
Service upon of notice of motion to permit plaintiff to occupy premises pending action under eminent domain 5615.
Sheriff to file affidavit and order of arrest with, D. C. rule xxxiii, p. 1430.
To accept deposit in lieu of bond or undertaking 5486.
To add his costs to judgment, although not in cost bill 5387.
To annex examination to undertaking on justification of bail in civil action 5105.
To arrange judgment docket to facilitate inspection 5276.
To ask jury if they have agreed upon verdict 5218.
To attach certificate to judgment roll and enter a minute of the judgment of the supreme court on appeal 5360.
To be furnished with copy of order or judgment by attorney in district court, D. C. rule xxxii, p. 1430.
To certify copies of judicial records of this state or the United States 5408.
To certify to genuineness of signature of judge taking affidavit out of state 5453.
To certify to writ of attachment in justice's court for service in another country 5751.
To certify under seal to summons in justice's court for service in another county 5732.
To collect fee upon commencement of action or proceeding 2030.
To deduct fees paid juror in civil case from amount due him from county 2013.
To deliver statement and amendments on appeal 5331.
To deliver to district judge calendar showing business, D. C. rule ii, sec. 3, p. 1426.
To enter certificate of judgment of supreme court when appeal taken from order 5360.
To enter judgment 5266.
To enter judgment in judgment book 5270.
To enter judgment upon acceptance of offer of compromise 5265.
To enter name of minister of gospel authorized to solemnize marriage 2340.
To enter proceedings for right of way for railroad 3550.
To enter satisfaction of judgment 5279.
To enter verdict and judgment or order on special verdict 5225.
To file and docket abstract of judgment from justice's court 5780.

Clerk of court—continued.
To file and enter submission to arbitration 5257.
To file complaint and may issue summons in civil action 5016, 5034.
To file decision of arbitrators in voluntary submission of dispute between employer and employee 1930, 1931.
To file petition for changing name of person 5835.
To file receipt from parties to referees in action in partition 5568.
To file statement and enter judgment on confession of judgment, costs 5251.
To give receipt to garnishee 5180.
To give notice of application of alien for naturalization 2518.
To give notice of disincorporation of city 875.
To give notice of time of holding district court, D. C. rule iii, p. 1426.
To give receipt for court fees upon demand 2033.
To include interest and costs in judgment and docket 5278.
To inform judge and give notice of election contest 1808.
To issue commission to justice of the peace to take depositions on contest for member of the legislature 1818.
To issue copy of order of guardianship under juvenile court law 739.
To issue execution 5281.
To issue execution for costs when remittitur of supreme court filed 5361.
To issue execution to other counties on abstract of judgment from justice's court, docketed in district court 5781.
To issue subpena requiring attendance before public service commission 4532.
To issue subpenas and subpenas ducem tecum in contest for county or township office 1809.
To issue writ of attachment 5148, 5149.
To keep register of actions and make entries 5480.
To make entries in docket for judgment lien 5274, 5275.
To make up judgment roll 5273.
To notify persons appointed on probation committee 734.
To pay on order of court money transmitted in lieu of undertaking on appeal from justice's court 5792.
To procure seal 4876.
To publish notice of application of corporation for its own dissolution 1240.
To receive and disburse money paid for boarding and lodging jurors 2035.
To receive depositions in contest for member of the legislature and indorse and transmit to secretary of state 1819, 1820.
To receive docket and papers on death or removal of justice of the peace 5804.
To record verdict, jury to assent 5220.
To take deposition of witness on continuance 5203.
To transmit copy of judgment in certiorari proceedings to inferior tribunal or officer 5692.
To transmit verdict in mandamus proceedings, argument, notice 5703.

Clerk of court—continued.
To withdraw name of excused juror from box, D. C. rule xxviii, p. 1429.
When may adjourn court 4872.
When may make order for inspection of mine by stockholder, registration, oath, fee 2492, 2495.
When service may be made upon for non-resident 5375.
When to enter default and judgment 5236.
When to file and enter award of arbitrators and judgment 5260.
When to file statement on appeal 5337.
When to pay to county treasurer surplus money in action on lien for charges on animals 5500.
When to refund money deposited on arrest in civil action 5108.
Clerk of supreme court, court fee to collect 331.
Court fees, to pay state treasurer 2034.
Costs taxed by endorsed on remittitur, S. C. rule vi, sec. 4, p. 1423.
Fees of 2006, 2032.
Fees, when payable to state treasury 4894.
Habeas corpus, writ to deliver 6231.
Has same power to issue process in quo warranto as clerk of district court 5681.
Receipt, duty to give for fees 2033.
Report, to make to legislature 4896.
To certify judgment on appeal to clerk of lower court 5360.
To file complaint or specification of grounds on contest for state office 1825.
To file statement settled on appeal in supreme court 5333.
Client, communication with not to be testified to by attorney, secretary, stenographer or clerk of attorney without consent 5425.
Cloud upon title, action to remove, how and by whom brought 5522.
Club, district court may make order for sale or mortgaging of property of 1369.
Co-defendants, cross-complaint against and how served and answered 5052.
"Codicil," when included in word "will" 5475.
Collateral attack, when not all on corporation 1154.
Collector of taxes, action for money paid under protest may be commenced against within one year 4967.
Commission, for taking deposition out of state may have interrogatories attached unless parties otherwise agree 5460.
To take deposition out of state 5459, 5460, 5461.
To take testimony, when to have court seal affixed 4879.
Commissioner, appointed by governor may take affidavits and depositions in other states or territories 5451, 5459.
How subpena issued for the taking of testimony 5432.
Commissioners, may hear testimony in proceedings under eminent domain 5616.
To be appointed by the court to determine value of right of way for railroad 3539.
Commitment, and physician's certificate, copies of to be transmitted with insane person to asylum 2204.
Commitment—continued.
Court may direct to make order effectual regarding children in action for divorce 5840.
Of insane person to be transmitted to asylum 2204.
Warrant of in contempt proceedings to specify act to be performed 5404.
Warrant of not to issue in contempt proceedings without previous attachment to answer or notice or order to show cause 5397.
Common carrier, liable for death or personal injury if caused by gross negligence notwithstanding slight negligence of employee 5651.
When may sell unclaimed property 541.
Common law, facts which would exclude witnesses at may be shown to affect credibility 5419.
Common-law action, right of trial by jury in U. S. courts (U. S. Const.) 177.
Common law of England, rule of decision when not repugnant to our laws 5474.
Community property, how divided upon decree of divorce 2166.
Not subject to administration if wife pays or secures indebtedness 2165.
Subject to debts, family allowance and expense of administration on death of husband 2165.
Company, included in word "person" 5475.
Compensation, and fees of county and township officers, legislature may regulate (Nev. Const. art iv, sec. 20) 278.
Of receiver of insolvent corporation 1199.
Of trustee of corporation dissolved in quo warranto 5671.
Complaint, allegations not controverted taken as true 5075.
Amended, may be served upon defendant or attorney 5043.
Amendment of in action for forcible entry or unlawful detainer, continuance 5596.
And proceedings before public service commission 4531-4533.
And summons in action for unlawful detainer, what to state, service 5593.
And what to contain in civil action in justice's court 5734, 5735, 5736.
Containing copy of written instrument, admission if no verified denial 5062.
Contents of under eminent domain 5612.
Counter-claim set forth in answer deemed when defendant applies for provisional remedies 5194.
Defendant may be designated by any name if true name unknown 5085.
Description of real property by metes and bounds 5069.
Filing of in justice's court 5722, 5723.
For divorce to be verified 5838.
For removal of officer for malfeasance to be verified 2852.
For revocation of license, proceedings 3868.
Form of in action for delinquent taxes 3661.
Form of in action for delinquent taxes on proceeds of mines 3708.
If amended defendant may have time to answer 5043.

Complaint—continued.
If not personally served defendant may answer to merits after judgment 5084.
Complaint in action, for delinquent taxes to demand costs and penalties and not to be satisfied until they are paid 3660.
For delinquent taxes more certain description may be included 3662.
For foreclosure of mortgage or lien to have affidavit of payment of taxes attached 3756.
For partition may or may not show that property cannot be divided without prejudice 5538.
To determine paternity of illegitimate child 765.
To restore lost record, what to allege 5634.
Complaint, in civil action 5016, 5017, 5037, 5038.
In civil action in justice's court to be indorsed with date of filing 5723.
In contest for county or township office, when not to be dismissed for want of form 1807.
In intervention 5006.
In justice's court, copy of note or instrument admitted unless denied by verified answer 5770.
In quo warranto for usurpation of public office 5661.
In quo warranto same in supreme court as in district court 5681.
In quo warranto shall be as in other cases 5666.
In state land contest, time for filing and serving, D. C. rule xliv, p. 1431.
Insufficient statement of facts not waived by failure to demur or answer 5045.
May be amended in action for forcible entry or unlawful detainer 5602.
May be dismissed for disobedience or refusal of party to answer as witness or to subscribe affidavit or deposition 5438.
May be subscribed by party or attorney 5060.
New not necessary against parties summoned after judgment in action on joint contract 5244.
Notice of application to file in quo warranto 5664.
Objections not apparent taken by answer 5044.
Objections to not taken by demurrer disregarded 5041.
Of assessment before board of equalization 3638.
Of party who refuses to testify or give deposition may be stricken out 5421.
On application for commitment of insane person 2204.
On what grounds demurrable 5040.
Or specification of grounds in contest for state office, filing and verification 1823.
Or statement in contest for member of the legislature, how to be forwarded 1820, 1821.
Or statement in contest for member of the legislature to be verified 1818.
Service of amendment may be required 5043.
Complaint—continued.
Service of upon garnishee 5177.
Supplemental, answer and reply 5075.
To be verified in action for forcible entry or unlawful detainer 5600.
To be verified in action to determine adverse claim to real property 5522.
To be verified in proceedings under eminent domain 5611.
Verification of 5060, 5064.
What to contain 5037, 5038, 5039.
What to set forth in actions for partition 5528.
When copy to be served with summons 5022.
Who to be included as defendants in action to determine adverse claim to real property 5522.
Compromise, of claims under employers' liability act 1928.
Offer of, notice, acceptance, affidavit, result 5265, 5777.
Computation of time, how made, what days included and excluded 5482.
Compulsory process, in action for divorce if necessary to disposition of property of children 5839.
Conclusions of law, deemed excepted to 5318.
From special verdict 5221.
Condemnation, by cities 794 (85).
By railroad companies under eminent domain, what may be condemned, procedure 5627.
By towns 877 (5, 15).
Estates and rights subject to under eminent domain 5607.
Final order made upon payment, recording 5621.
For ditch or flume, 4712, 4714.
For railroad, telegraph or telephone 2138, 3535-3550.
For reclamation purposes 3104.
For mining purposes or improvements on lands sold by the state 2456, 2462.
Of land for mines, basis for determining value 2462.
Of land for mines, proceedings 2459.
Of private land for toll road, proceedings 3052.
Of property for highway, viewers, damages, appeal to district court 3008.
Of railroad property for right of way 2138.
On opening of highway, party aggrieved may bring action to set aside damages awarded by viewers 3015.
Property shall not be taken for public use without just compensation having been first made or secured, exception (Nev. Const. art. i, sec. 8) 237.
Property subject to under eminent domain 5608.
Right of way not to be appropriated to use of corporation until compensation is made or secured 344.
Schedule of sections 5606.
Under eminent domain by foreign corporation 5629.
Under eminent domain, conditions precedent 5609.
Conditions precedent, how pleaded 5071.

Confession, judgment by may be entered in district court 5249-5251; in justice's court 5771.
Judgment may be entered upon in justice's court if amount does not exceed $300 exclusive of interest 5714.
To clergyman, testimony regarding not to be given without consent 5426.
Congress, has power to constitute tribunals inferior to supreme court (U. S. Const.) 119, 153.
Has power to make uniform laws relating to naturalization and bankruptcy (U. S. Const.) 114.
Consent, necessary to allow testimony of communication between attorney and client 5425.
Of child over 12 years required on adoption 5828.
Of nonresident parent to adoption of children, how executed and acknowledged 5831.
Of parents on adoption of children 5828.
Of patient necessary to enable physician to testify regarding communication 5427.
Of parties, to not more than twelve nor less than four jurors in justice's court in civil action 5768.
Of parties to taking of testimony in civil action in justice's court on postponement 5759.
Consideration, conveyance shall not be adjudged fraudulent solely for want of valuable 1086.
Consolidation of actions 5478.
Constable, action against for official misconduct may be commenced within two years 4967.
Baggage, unclaimed, may sell, when 2153.
Buying or inducing action 2821, 6367.
Deed, may make for real estate sold by predecessor 1662, 1663.
Duties generally 1692; on receiving execution 5786.
Duties imposed on sheriff extend to in action for claim and delivery in justice's court 5763.
Duties of on receiving execution from justice's court 5786.
Duty of in regard to abatement of nuisances in unincorporated towns 920.
Duty to serve subpena requiring attendance before public service commission 4532.
Entitled to only one mileage for serving more than one process in same action requiring only one journey 2037.
Estray animals, to impound 2261-2265, 2229-2331.
Fee book, to keep 2020.
Fees for selling animals on execution under judgment for charges 5499.
Fees, in counties polling less than 800 votes 1999.
In counties polling over 800 votes 2011.
In proceeding relating to apprentices 494.
In relation to hogs found trespassing 2258.
Monthly statement to make 2021.
On returns, none to charge 2041.
Constable, fees—continued.
Payable in advance 2027.
Quarterly statement of to commissioners 2021.
Table of, to post 2025.
Violation of law governing, penalty 2023, 2024.
Local or special laws relating to jurisdiction and duties of, invalid (Nev. Const. art iv, sec. 20) 278.
May make deed for real estate sold by predecessor 1662, 1663.
May serve summons in action in justice's court 5732.
Mileage payable in advance, computed for actual distance traveled 2037, 2040.
Not to charge for written return 2401.
Nuisances, to abate 920.
Purchasing judgment, misdemeanor 2821.
Stock, trespassing and unlawful duties and liabilities concerning 2251-2260.
To be substituted for "sheriff" in proceedings supplementary to execution in justice's court 5787.
To detain defendant arrested in civil action in justice's court until discharged by justice 5748.
To give notice and make return on arrest of defendant in civil action in justice's court 5747.
To pay moneys collected on execution of process to justice of the peace 5810.
To pay wages as preferred claim against attachment or execution 5494.
To serve process issued by justice of the peace, duties 1692.
To summon jury to determine whether breach of contract of apprenticeship 491.
Unlawful to be interested in purchase at sale made officially 2828.
Unlawful to purchase judgment 2821.
When liable for arresting, in civil action, witness subpenaed 5446.
When may arrest defendant in civil action in justice's court 5744.
When not to act as attorney in justice's court 5725.
When substituted for "sheriff" in sections relating to attachment 5752.
When to relinquish property on stay of execution on appeal from justice's court 5793.
When to select arbitrators to fix charges and damages for hogs found trespassing 2257.
When to sell baggage left at hotel or lodging house 2153.
When to sell hogs found trespassing, notice 2256.
When to take defendant arrested in civil action in justice's court before another justice 5746.
Construction, reference in statutes to provisions of law revised and reenacted in civil practice act to be construed as applying to these provisions 5817.
When provisions of civil practice act to be construed as a continuation of existing statutes and not as new enactments 5817.

Consul of United States, may take affidavit in foreign country 5442.
To certify to judicial record of foreign country 5411.
Contagion, damages recoverable for, when spread by diseased live stock 2268. See Live Stock.
Contempt, attachment for, when issued, notice to show cause 5397.
Attorney practicing without license 506.
Bail may be given by person arrested 5398.
By failure to obey subpena issued by railroad commission 4561.
Citation, failure to obey in personal property tax suit 3679.
Conviction of for entering land after ouster unless judgment, alias process may issue 5394, 5395.
Conviction of in justice's court to be entered in docket 5799.
Corporations, failure to obey order for election of directors 1130.
Disobedience of order of district judge for removal of officer of corporation 1223.
District judge, application to other, when constitutes 4882.
Executor or administrator, commitment for 6102.
Failure to attend under subpena for taking of testimony 5432.
Failure to obey citation in estate proceeding 5954.
Failure to obey order for election of directors 1130.
Failure to obey order of court in quo warranto deemed 5679.
Failure to obey order of district court for delivery to officers elect of books and papers of corporation 1182.
Failure to obey order of justice or judge for correction of error or omission relating to primary election 1763.
Failure to obey subpena of coroner 7548.
Failure to obey subpena to appear before public service commission 4532.
Failure to produce child in juvenile court 732.
For interference with order of juvenile court 754.
For refusal of witness to obey subpena, to be sworn or testify or subscribe to affidavit or deposition 5438.
For refusal to produce book or writing for inspection 5416.
General provisions in district court, schedule of sections 5394.
General provisions in justice's court, schedule of sections 5795.
Imprisonment for omission of act 5404.
In cases where witness may be punished for disobedience, not subject to civil arrest 5445.
In civil action, schedule of sections 5394.
Indictment for contemptuous conduct, sentence 5405.
In immediate view and presence of justice's court, proceedings for 5796.
In justice's court 5795.
Legislature, either house may punish for (Nev. Const.) 265.
Contempt—continued.
Municipal court may punish for same as justice of the peace 835.
Not in immediate view and presence of justice's court, proceedings for 5797.
Officer taking acknowledgment may commit witness for refusal to testify 1034.
On refusal of putative father to obey order or judgment for support of illegitimate child 766.
Party may be adjudged guilty of and fined for failure to obey writ of mandamus 5707.
Party may be punished for removing ore during postponement of trial to allow development of mining claim 5203.
Penalty for 5403.
Person failing to appear as interpreter when summoned may be punished 5430.
Proceedings may be taken against party refusing to testify or give deposition 5421.
Process, resistance of 2833, 2834.
Punished as crime, effect 6299, 6305.
Referee in bankruptcy, proceeding before 583.
Service of notice and papers not applicable in certain cases 5368.
To apply for order after application for same has been refused except to judge of higher court 4882.
What acts punishable as in justice's court 5795.
What deemed 5394.
What punishments may be imposed for by justice's court 5798.
When garnishee liable for on failure to deliver to sheriff 5188.
When papers must be served upon party instead of attorney 5375.
When punished summarily and when not 5396.
Will, failure to produce 5865.
Contempt proceedings, bail may be given by person arrested 5398.
Bail upon, form and conditions 5400.
Defendant may be arrested if he does not appear on return day or undertaking may be prosecuted 5406.
Hearing 5402, 5403.
How defendant to be held in custody 5407.
Illness sufficient cause for nonappearance of party arrested, confinement 5407.
Return of warrant of arrest and undertaking 5401.
Sheriff must detain person until discharged 5399.
Warrant of commitment to specify act to be performed 5404.
When defendant does not appear 5406.
Contest, before U. S. land office as to mineral or agricultural character of land 2397.
For county or township office, complaint or proceedings, when not to be dismissed for want of form 1807.
For nomination under primary election law 1764.
For office, time for commencement of 4972, 4973.
For state lands to be determined by district court 3208.

Contest—continued.
In proceedings to restore lost records, how made 5644.
Of election for city office, how brought and determined 801.
Of election for county or township office, jurisdiction of district court, may require documentary evidence by mandamus 1806.
Of election for county or township office, when and how elector may contest, statement, what to contain 1805, 1806.
Of election, when time begins to run 1894, 1895.
Contested election, action may be brought by district attorney when any person unlawfully holds any public office 1814.
For county or township office, clerk of board of county commissioners to issue certificate in accordance with judgment 1810.
For county or township office, fees of clerk, sheriff and witnesses same as in district court 1811.
For county or township office, if judgment annuls election and no appeal taken within thirty days, certificate becomes void 1812.
For county or township office, issuance and service of subpenas, attachment to compel attendance, witnesses 1809.
For county or township office, statement or complaint, filing, fixing time of hearing, notice and service 1808.
For district judge triable in adjoining district court in like manner as contest for county or township office 1813.
For member of legislature, either party may take depositions under rules of district court, forwarding to secretary of state, delivery to presiding officer 1822.
For members of legislature, how started and conducted, service of notice, depositions, how taken and transmitted 1818-1820.
For member of legislature, justice of the peace to issue subpenas for taking depositions, witness may be attached and fined, certification of testimony to county clerk 1819.
For member of the legislature, presiding officer to notify members of receipt of depositions and papers 1821.
For member of the legislature, secretary of state to receive depositions and papers and deliver to presiding officer 1820-1822.
For state office, attorney-general to prosecute, supreme court has original jurisdiction, justice may issue process 1823.
One action may be brought against several persons claiming same office 1817.
Sheriff to serve papers 1808-1809, 1811, 1818-1820.
Successful contestant may recover damages 1816.
When district attorney may have person arrested for receiving fees, bail 1815.
Contestee, for nomination under primary election law, when required to appear and abide order 1764.
Contingent interest, to be secured by court in action for partition 5559.
Continuance, in action for forcible entry or unlawful detainer, when may be had and for how long, bond 5597.
In justice's court, not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
In justice's court, on application of party 5759.
May be granted, to allow further development of mining claim 5203.
Motion for in district court, affidavits and counter-affidavits, service, rule xii, p. 1427.
Not granted in action for forcible entry or unlawful detainer when admission that evidence would be given 5598.
Of trial, avoided by admission that evidence alleged in affidavit would be given 5202.
Of trial, consent that testimony of witnesses be taken, may be required 5203.
Of trial for absence of evidence 5202.
Upon amendment in action for forcible entry or unlawful detainer 5596.
Contract, entry of judgment upon by default in justice's court 5754.
In name of another, suit by other as trustee 4987.
In writing, action upon may be commenced within six years 4967.
Justice's court has jurisdiction of amount not exceeding $300 exclusive of interest 5714.
Law imparing obligation of not to be passed (Nev. Const. art. i, sec. 15) 244.
Not founded upon instrument in writing, action may be brought within four years 4967.
Obligation of two or more persons in different counties, limitation of service of summons in justice's court 5731.
Of state or municipality may be declared void if public officer interested 2829.
Party jointly liable, how may be released from his proportion, effect 5846.
Township, in which action for to be brought in justice's court 5715.
When successive actions may be maintained on 5477.
Contractor; or subcontractor, when liable to workman and owner under employers' liability act 1924.
Controller. See State Controller.
Action, to direct, for money due state, 4160, 4162.
Action, when debtor of state deceased, costs 4164.
Action, when to direct attorney-general to bring 3685, 4160, 4162.
County auditor, suits against, to control 3685.
Defendant sued by state, when to pay costs 4164, 4165.
Fee or salary of public officer garnished, may pay into court 2865.
May instruct district attorney to bring suit against assessor for failure to make settlement for taxes 3704.
Prima facie evidence, copy of account 4163.

Controller—continued.
Summons to be served upon in action against the state for services or advances authorized by law 5653.
To draw warrant for amount of judgment against state on presentation of certified copy 5655.
To summon witnesses and may appeal in actions against the state for services or advances authorized by law 5654.
When action may be brought on claim rejected by 5653.
Witnesses, and documentary evidence, may examine 4158.
Controversy, may be submitted without action 5252.
Conveyance, evidence of may be rebutted 1045, 1046.
If acknowledged and recorded, subsequent purchasers and mortgagees deemed to take with notice 1039.
Judgment or order for execution of, not stayed unless executed and deposited with clerk 5350.
Mortgage of real property not deemed without foreclosure 5518.
Notice of record of mortgage 1038, 1040.
Not to be adjudged void solely for want of valuable consideration 1086.
Of lot in federal townsite, execution of after trial of adverse claims in district court 1984.
Of mines, before 1863 proved by local rules, regulations or customs of miners 1102.
Proof of execution, how made 1027-1034.
When acknowledged or proved and certified may be read in evidence 1043.
Conveyances, in action for partition must be recorded and are bar against parties 5565.
Recorded in office of county recorder, certified copies may be read in evidence 1044, 1046, 1094.
Recorded in office of county recorder impart notice 1038, 1039, 1093.
Seal or L. S. unnecessary 1095.
Specific performance 1073.
Subject to lis pendens 5021.
Conviction, of bribery or embezzlement of public funds disqualifies from holding office (Nev. Const. art. iv, sec. 10) 268.
Of certain crimes excludes elector from jury unless restored to civil rights (Nev. Const. art. iv, sec. 27) 285.
Of contempt in justice's court to be entered in docket 5799.
Of felony or infamous crime is ground for divorce 5838.
Convicts, when statute of limitations does not run in civil actions 4976.
Cooperative association, dissolution of, how effected 1258.
Copy, as evidence of lost writing 5417.
Certified, of affidavit filed with testimony taken for perpetuation, prima facie evidence of facts 5469.
Certified, of land patent, when admissible in evidence 5415.
Certified, of record of evidence regarding real property, when may be read in evidence 5414.
Certified, of restored records validated 5639.
Copy—continued.
Of foreign record, when admissible as evidence 5412.
Of judicial records of this state or the United States certified is evidence 5408.
Of record of this state or the United States other than judicial in custody of public officer, when certified or verified may be read 5409.
Of record or document, how seal to be attached to authentication 5481.
Of record, to have court seal affixed 4879.
Coroner, action against for official misconduct may be commenced within 2 years 4967. See also Coroners and references thereto.
Entitled to only one mileage for serving more than one process in same action requiring only one journey 2037.
Fees of, when acting as sheriff 2010.
Schedule of sections relating to duties of 7542.
When to deliver property or money of deceased person to county treasurer 7553.
When to return and stay execution pending appeal in district court, rule xxii, p. 1429.
Corporate authorities, may act in case of death or disability of trustee in federal townsite 1991.
Corporation. See Corporations.
Action by or against when consolidated, new corporation may be substituted 1148.
Action for damages may be brought within one year after ouster in quo warranto of director 5669.
Allegation of as a legal conclusion, when sufficient 5078.
Bank may be resident agent 1119.
Bond of trustee appointed on dissolution of in quo warranto 5672.
Certificate, lost, proceeding to obtain new 1165.
Certified copy of certificate of incorporation is prima facie evidence, when 1110, 1221; as to historic and literary societies 1384.
Claiming property or denying debt due judgment debtor, suit may be ordered and transfer forbidden 5313.
Collateral attack, when not allowed 1154.
County clerk, compensation for services at proceedings for removal of director or officer 1223.
County clerk, compensation, removal proceedings 1182.
Court may appoint on dissolution of, compensation 5671.
Court may order books and effects delivered to trustee on dissolution of corporation in quo warranto 5675.
Court may order sale of property and franchise in lieu of dissolution, acceptance of claims in payment 1197.
Deposition of certain officers may be taken 5454.
Directors and officers liable in damages for making false report 1175.
Disobedience of order of district judge in proceedings for removal of director or officer, contempt 1182, 1223.

Corporation—continued.
Dissolution of cooperative association 1258, of other corporations 1190.
Dissolution of, when receiver to file certified copy of appointment and decree with secretary of state 1196.
Dissolution proceedings may be set aside by creditor 1193.
District court may order issued new certificate of stock in lieu of one lost 1165.
District judge vested with summary power directing stockholders entitled to vote for removal of director or officer 1223.
Evidence of incorporation 1221, of ownership of stock 1172.
Execution against for fine 7410.
Existence of, need not be proved unless affirmatively denied 5079.
Failure to maintain agent or office, when certificate void 1120.
For insurance on assessment plan, benefit not to be attached or seized 1318.
Foreign, action against for penalty for failure to file annual statement 1354.
Foreign, certificate of incorporation certified by county recorder is evidence 1346.
Foreign, how may have benefit of statute of limitations 1355.
Foreign, not to bring or defend action without filing certificate with secretary of state 1350.
Foreign, proof of existence when certificate not filed 1347.
Foreign, requirement of security for costs, stay of proceedings 5389.
Foreign, to appoint resident agent upon whom process may be served 5024.
Foreign, summons served on, how 5023-5026.
Foreign, summons, service on secretary of state, when 1273, 1276, 1316, 1325, 5023-5026.
Forfeiture of franchise for term of two years, judgment for dissolution 5670.
Franchise and property, sale by receiver 1197.
Included in word "person" 5475, 5479.
Insolvent, compensation of receiver 1199.
Insolvent, wages of employee preferred lien 1187.
Insolvent, when court may order receiver to sell deteriorating property 1198.
Judgment against for dissolution or restraint 5670.
Judgment against in quo warranto 5667.
Judgment in quo warranto ousting director 5668.
Liabilities, limited 1246.
Liability of directors when judgment of ouster rendered in quo warranto 5678.
Limitation of actions to recover penalty or forfeiture 4984.
May apply to district court to enjoin proceedings of bank examiner 675.
May be enjoined from exercising its powers or doing business 1195.
May dissolve itself on application to district judge 1240.
Mining, failure to designate kind of stock sold and penalties 1337-1338, 1340.
Mutual fire insurance company may begin suit, when 1296.
Corporation—continued.
Ordinary business of not to be restrained, notice and hearing except when state a party 5142.
Organization of new on sale of franchise, manner of sale 1151.
Owing debtor or having property of debtor may be examined on proceedings supplementary to execution 5310.
Proceedings for inspection of mine by stockholder 2492, 2495.
Proceedings in quo warranto may be brought against 5656, 5657.
Publication of decree appointing receiver 1196.
Real estate of church or society, court may make order for sale 1369; of Protestant Episcopal Church 1431.
Receiver may be appointed on dissolution of 1194, 1195.
Receiver, appointment and duty 1196, compensation 1199, when may sell franchise and property 1197.
Removal of officer, proceedings 1180-1181.
Resident agent 1118-1120.
Resident agent, bank may be 1119.
Sale of deteriorating property 1198.
Service of process on, how made 1188.
Shares of, may be taken under execution 5287.
Stock delinquent sale 1134.
Stockholders may petition district court to remove officer 1180.
Stock of, may be taken under execution 5287.
Stock of, subject to attachment 5151, 5152.
Stock prima facie evidence of ownership 1172.
Suit may be brought on bond of trustee appointed on dissolution of corporation 5673.
Surety companies, liabilities 1244, 1246.
Trustee appointed on dissolution in quo warranto to collect debts and divide surplus 5674.
Trustee appointed on dissolution in quo warranto to sue for debts, responsibility 5677.
Trustee to file sworn inventory with clerk on dissolution in quo warranto 5676.
Violation of banking law authorizes annulment of charter 626.
Voluntary dissolution, action of district judge 1240.
When directors or trustees have the right to be preferred in appointment of receiver 1195.
When due incorporation of cannot be attacked collaterally except by the state 1154.
When liable for death by wrongful act 5647.
When liable for personal injuries 5649.
When receiver may be appointed 5193.
Writ of garnishment may issue against 5172.
Corporations, appointment of receivers, dissolution 1194, 1196.
Attorney-general may institute suit against certain mining failing to file statements 1338.
District judge may act in relation to removal and election of directors and officers 1179-1182.
Dues may be secured as prescribed by law, but corporators not individually liable for debts (Nev. Const. art. viii, sec. 3) 340.

Corporations—continued.
Foreign, may exercise right of eminent domain 5629.
Foreign, to comply with laws before entitled to act under eminent domain 5629.
May sue and be sued same as individuals (Nev. Const. art. viii, sec. 5) 342.
Owing defendant may be garnished 5154.
Rates of certain, may be regulated by the legislature (Nev. Const. art. iv, sec. 20) 278.
Revisory power of district court over election of officers, may order new election 1130.
Right of way not to be appropriated to use of, until compensation is made or secured 344.
Corporators, not individually liable (Nev. Const.) 340.
Correction of judgment, order or proceeding in district court not to be made unless upon notice within six months, rule xlv, p. 1431.
Cost, of boarding and lodging jury kept together, how paid and charged, verdict not to be entered until paid 4942.
Of publication of process or paper, officer to be paid in advance 2026.
Of removal of nuisance, civil action may be maintained for 921.
Cost bill, may be verified by party, his attorney or agent, or clerk of attorney, when and how to be filed 5387.
Costs, affidavit of sureties on undertaking by nonresident or foreign corporation for payment of 5390.
Against garnishee 5177.
Allowance, settlement, indorsement on remittitur, on appeal to supreme court, S. C. rule vi, p. 1422.
Allowed defendant when he recovers 5379.
Allowed for bond obtained from surety company 699.
Allowed opposite party when there is failure to embody in statement on appeal fair portion of testimony essential to presentation of exception 5333.
And alimony pendente lite may be ordered paid by husband in action for divorce 5843.
And damages, when appeal taken for delay, 5359.
And damages, when may be ordered on dismissal of appeal to district court 5794.
And fees in action for delinquent taxes, when payable, how entered and taxed 3673.
And interest must be included by clerk in judgment and docket 5388.
And judgment on official bond, liability of surety 2886.
And penalty in action for delinquent taxes to be included in complaint, summons and judgment 3660.
Apportionment of in proceedings in eminent domain 5623.
Before trial not allowed in controversy submitted without action 5253.
Court may direct manner of collection on review other than by appeal 5386.
Court or judge may settle at chambers 5387.
Delinquent taxpayer liable for if receipt not served on district attorney 3655.
Costs—continued.
Dismissal of action for failure of nonresident or foreign corporation as plaintiff to give undertaking for payment of 5391.
Due officer enforcing tax on property bid in by county, when treasurer to pay from rental or sale 3671.
Execution for, to be issued when remittitur filed in lower court 5361.
Expense for board and lodging of jurors when kept together taxed in favor of prevailing party 2035.
Expense of disincorporation of city, how paid 876.
Failure to pay as ground for dismissal of case appealed from justice court to district court, rule xxxvii, p. 1430.
Fees for not more than two witnesses to be allowed for same facts 2000.
Fees not to be allowed for more than two witnesses to same fact 2012.
Fees of attorney recoverable as as in justice's court 5814.
Fees of attorney to be taxed as in favor of prevailing party in action for damages for causing workman to change place of employment by misrepresentation 1938.
Fees of clerk need not be included in cost bill 5387.
Fees of jurors recoverable as from losing party 2001.
Filing and service of verified cost bill, retaxing 5387.
How taxed in proceedings to restore lost records 5646.
In action against estate of deceased persons not recoverable unless more recovered than allowed on claim 5973.
In action against railroad company for refusal to transport passenger or property 3559.
In action by or against executor, administrator or trustee and how chargeable 5385.
In action by woodchopper on lien 2230.
In action for abuse of apprentice 492, 493.
In action for percentage of receipts and forfeiture of franchise of toll road 3757.
In action for removal of nuisance 1562.
In action on lien for labor and material 2222, 2427.
In action on wages disputed as preferred claim 5494.
In action to determine whether breach of articles of apprenticeship 492.
In adverse claim for mine when either party establishes right 2384.
In civil action, schedule of sections 5376.
In garnishment proceedings, how allowed or apportioned 5179, 5189.
In justice's court to be included in judgment 5778.
In matters of an estate to be determined by court and execution may issue therefor 6109.
In proceedings for erection of partition fences 3606.
In proceedings regarding partition fence 3605.
In proceedings to obtain right of way for railroad 3544.

Costs—continued.
In suit on lien for charges on animals 5499.
Judgment for in actions for removal of officer for malfeasance 2852.
Judgment for in quo warranto 5667.
Judgment to be entered against county commissioners for on proceedings to set aside covenants of apprenticeship 493.
Jurors' fees to be paid temporarily by plaintiff if no verdict 2001.
Justice's court may require deposit or undertaking as security before issuing summons 5812.
Liability for in undertaking on appeal 5347.
Limited for sale of unclaimed property by jeweler 533.
May be imposed as a condition of postponement 5383.
May be recovered for witness fees although not actually paid 5387.
Must be entered in judgment after they are taxed 5278.
Not allowed for typewriting or printing of surplusage in statement on appeal 5333.
Not chargeable against garnishee unless his answer is successfully controverted 5175.
Not payable by county in action for abuse of apprentice 493.
Not recoverable if plaintiff does not recover more favorable judgment than offered as compromise 5265.
Not recoverable in actions to quiet title if defendant does not make claim 5515.
Not to be charged against city or town in action for delinquent taxes 999.
Of partition lien on shares of parceners 5574.
Of publication, posting and filing notice in delinquent tax suit 3663.
Of suit, attachment lien in action for damages for herding or grazing live stock on lands of another 2336.
Of officers for enforcement of taxes, paid by county treasurer, how and when 3671.
On appeal, when in discretion of court 5381.
On forfeiture of bail in contempt proceedings 5406.
On order for delivery of property stolen or embezzled 7446.
On order for underground survey of mine 5511.
On review other than by appeal 5386.
On sale of property on foreclosure if mortgage or lien payable in installments 5503.
Party against whom judgment is entered has five days after service of cost bill in which to move to retax, rule xxxiv, p. 1430
Party prevailing entitled to recover 5376, 5377.
Payable out of county treasury when county losing party 5393.
Payable out of state treasury when state losing party 5392.
Payment of may be required upon granting relief from mistake 5084.
Costs—continued.
Payment of on adjournment made necessary by amendment of pleadings in justice's court 5742.
Payment of on change of place of trial of action in justice's court 5719.
Payment of on setting aside judgment by default in justice's court 5742.
Per diem paid jurors recoverable from losing party 2013.
Preference of payment in actions for partition, property sold 5549.
Previously incurred by cotenant for protecting property, when apportioned in partition proceedings 5543.
Purchaser under execution sale refusing to pay bid liable for 5293.
Recoverable in action after revocation of submission to arbitration 5264.
Recoverable in mandamus proceeding 5705.
Security for in action in quo warranto 5659.
To be advanced jailer on arrest in civil action 5123.
To be included in entry of judgment in justice's court docket 5800.
To be included in judgment 5278.
To be paid from proceeds of sale on foreclosure of mortgage or lien 5501.
To be recovered by prevailing party under employers' liability act 1923.
Townsite lot proceeding to be paid in advance 1984.
Undertaking for in action in quo warranto for usurpation of public office 5660.
Upon making amendment 5081, 5083.
What appellant allowed for printed transcript on appeal 5357.
When allowed in one action if several actions on same instrument 5378.
When appeal is on ground that evidence does not support verdict or decision, testimony may be inserted at expense of party losing on this ground 5333.
When awarded execution may issue therefor as upon a judgment 5361.
When chargeable against executor, administrator or trustee, for mismanagement 5385.
When defendant nonresident or foreign corporation, security may be required for, stay of proceedings 5388.
When executor or administrator liable for in action against estate of deceased person 5976.
When fees of court reporter may be taxed as 4913.
When in discretion of court 5380.
When may be allowed plaintiff, although he recover only $300 in district court 5380.
When may be entered against sureties in judgment against sheriff for official acts 5242.
When not recoverable after offer to allow judgment in justice's court, recovery against party refusing offer 5777.
When not recoverable if tender in action for recovery of money 5384.
When recoverable by defendant if tender and deposit in action for recovery of money 5384.

Costs—continued.
When recoverable in action against county 1523.
When several defendants make separate defenses 5380.
When to be entered in default judgment 5236.
When to be paid by intervener 5006.
Who entitled to in justice's court 5813.
Witness fees to be allowed in civil cases 2000, 2012.
Counsel, fees previously incurred, when not apportioned in action for partition 5543.
May be appointed for child under juvenile court law 742.
May use instructions in addressing jury, rule xl, p. 1431.
Obtaining order or judgment in district court to furnish form to clerk, rule xxxii, p. 1430.
When judge not to act as 4866.
Counter affidavits, in contest in proceeding to restore lost record 5644.
Counterclaim, admitted by failure to demur or reply 5058.
Counterclaim, allowance of in garnishment proceedings 5181.
Deemed complaint when defendant applies for provisional remedies 5194.
Failure to set up waives right to later maintain action 5048.
Grounds of demurrer 5054.
If not set up in action in justice's court defendant or assignee cannot afterwards sue 5739.
In civil action 5047.
In civil action in justice's court 5738.
Judgment may be given on in favor of defendant 5268.
New party may be made or may be left for new action 5051.
Reply to, must be filed and served 5057.
Reply to part of, demurrer to part of 5055.
Reply to, what to contain 5057.
Subject to lien for attorneys' fees 5376.
Verdict on 5223.
Counties, actions by, against or between 5013.
Change in boundaries, justice of the peace successor of predecessor 5805.
How mortgaged property situated in two or more to be sold on foreclosure 5501.
County, abatement of nuisance in to be ordered by commissioners, district attorney to bring action 1562.
Action against on rejected claim must be commenced within one year after rejection thereof 4967.
Action by or against, district attorney to prosecute or defend 1598.
Action not to be brought against until claim is first presented to commissioners and auditor, costs, when recoverable 1523.
As a party to action, when not required to give bond or undertaking 5487.
Attached to another for judicial purposes, sheriff has same power 1658.
Claim against, if taxpayer objects, commissioners to defer action at least ten days to allow institution of proceedings to determine validity 1521.
County—continued.
Costs not payable by in action for abuse of apprentice 493.
Demand against, not presented within six months after notice that it is payable, funds may be paid for other purposes, but demand becomes due again on representation 1563.
District attorney not to advocate claim against 1520, 1605.
Indebtedness or liability to, local or special law releasing invalid (Nev. Const. art. iv, sec. 20) 278.
May have contract declared void if public officer interested 2829.
Need not give undertaking on appeal 5346.
When losing party, costs payable out of county treasury 5393.
When may recover for relief furnished indigent of another county 2922.
County assessor, failure to make settlement for taxes, district attorney to bring suit against him and sureties, no credit for delinquent 3704.
May force collection of taxes by sale of personal property, may give absolute deed, fees 3700.
Neglect to make monthly statements of collections on personal property, proceedings to be commenced against 3681.
County business, local or special law regulating, invalid (Nev. Const. art. iv, sec. 20) 278.
County clerk, fees in counties polling 800 votes or less 2007.
Fees in counties polling over 800 votes 1995.
Fees in proceedings for removal of directors or officers of corporation 1182.
Filing of certificate of district judge as to which of two justices of the peace entitled is successor 5807.
In absence of district judge may commit insane persons to asylum 2210.
May certify to certificate of incorporation 1221.
Service of notices and papers may be made upon when party has no office at county-seat 5369.
To certify to writ of attachment in justice's court for service in another county 5751.
To certify under seal to summons in justice's court for service in another county 5732.
To deduct fees paid juror in civil case from amount due him from county 2013.
To enter name of minister of gospel authorized to solemnize marriage 2340.
To file and docket abstract of judgment from justice's court 5780.
To issue execution to other counties on abstract of judgment from justice's court docketed in district court 5781.
To receive depositions on contest for members of the legislature and indorse and transmit to secretary of state 1819, 1820.
To receive docket and papers on death or removal of justice of the peace 5804.

County clerk—continued.
When may make order for inspection of mine by stockholders, registration, oath, fee 2492, 2495.
County commissioners, action for removal for contracting floating indebtedness 3834.
Authorizing contract when money not in treasury, action for removal of 3830, 3834.
Judgment to be entered against for costs on proceedings to set aside covenants of apprenticeship 493.
May be removed or suspended and others appointed to perform duties pending charges 3753.
May instruct district attorney to bring suit against assessor for failure to make settlement for taxes 3704.
May order payment and action against person for support of poor kindred 2916-2917.
May order sale of property bid in by county treasurer for delinquent taxes 3667.
May order treasurer to sell property to which he holds deed from delinquent tax sale 3767.
May remove county treasurer when action commenced on his bond 1685.
May revoke licenses, proceedings 3868.
May suspend from office county or revenue officer under presentment 3753.
May suspend revenue officer pending charges and appoint other to perform duties 3753.
Proceedings to determine whether breach of contract of apprenticeship 491.
To act in regard to apprentices 490.
To appoint successor to officer removed for malfeasance 2853.
To bring action for abatement of nuisance 1562.
To have notice of proceeding before justice of the peace to set aside covenants of apprenticeship 493.
To order abatement of nuisance in county and institution of suit 1562.
Transmission to of copy of judgment removing officer for malfeasance 2853.
Under presentment may be suspended from office by district judge 3753.
Voting for excess taxes, action for removal 3828.
Water, public, suits for pollution, tax for costs 4716, 4717.
When to pay fees and costs from sale of property bid in by county treasurer in action for delinquent taxes 3673.
County funds, assigned to payment of claim, if not collected within two years payable on other claims, new demand and reallowance necessary or claim barred 1536.
County office, time for beginning election contest 4973
County officers, legislature may regulate fees and compensation (Nev. Const. art. iv, sec. 20) 278.
Local or special law for regulating election invalid (Nev. Const. art. iv, sec. 20) 278.
County officers, may be removed for malfeasance 2851, 2852.
County recorder, action against for entering satisfaction of mortgage without affidavit that taxes are paid 3755.
County recorder—continued.
May certify to certificate of incorporation of foreign corporation 1346.
To certify copy of mortgage deed, assignment on, or payment as evidence 3789.
To file duplicate of sale under execution 5298.
To file notice of pendency of action to determine adverse claim to real property 5522.
To record order making sole trader 2191.
To record order of adoption of child 5832.
To record plat of survey of public lands as basis for possessory action 5851.
To record without charge deeds for property bid in by county treasurer on sale for delinquent taxes 3669.
County records, impart notice 1093.
Court records, reference may be made to on motion for new trial 5321.
County-seat, district court to be held at (Nev. Const. art vi, sec. 7) 322.
County surveyor, and deputies, certificate of may be submitted as evidence 1667.
County treasurer, action against district attorney for failure to pay over moneys 1601.
Failing to settle with auditor, liability in suit for taxes charged on roll 3650.
How to pay fee received from occupant of public land for absence under act relating to possessory actions 5853.
May be ordered by county commissioners to sell property to which he has deed under sale for delinquent taxes 3767.
May be removed by county commissioners when action commenced on his bond 1685.
May make deed for real estate sold by predecessor 1662, 1663.
May sell unclaimed stolen property 7449.
To bid in property on sale for delinquent taxes if no other bidders, on order of commissioners to execute deed to purchaser 3667.
To sell property for delinquent taxes amounting to less than $300 3651.
When may pay to person entitled money of deceased person received from coroner 7555.
When may sell property and place money of deceased person in county treasury 7553.
When to bring action against district attorney for failure to account 1601.
When to pay costs incurred in delinquent tax sale from rental or sale of property 3671.
When to receive surplus on sale of animals on lien for charges 5500.
County treasury, local or special law refunding money paid into invalid (Nev. Const. art. iv, sec. 20) 278.
County uses, eminent domain may be exercised for 5606.
Court, boisterous conduct toward is contempt 5394.
District, jurisdiction of (Nev. Const. art. vi, sec. 6) 321.
District, may issue writs of mandamus, injunction, quo warranto, certiorari, habeas corpus and other writs (Nev. Const. art. vi, sec. 6) 321.

Court—continued.
District, times of holding to be as fixed by law and to be at county-seat, but legislature may divide county into two or more districts and designate place of holding court (Nev. Const. art. vi, sec. 7) 322.
Every, has power to enforce order, compel obedience to its judgments, orders and process, and control conduct of its ministerial officers 4864.
Held in another place, appearance of persons required 4874.
Inferior, in cases appealed from, district court has final appellate jurisdiction (Nev. Const. art. vi, sec. 6) 321.
Court, justice's, change of place of trial in civil action 5717.
Has such criminal jurisdiction as may be prescribed by law (Nev. Const. art. vi, sec. 8) 323.
Jurisdiction of (Nev. Const. art. vi, sec. 8) 323.
Legislature may prescribe regarding appeals from (Nev. Const. art. vi, sec. 8) 323.
Place of trials of civil actions 5715.
When and where held, always open, jurisdiction in civil cases 5714.
When place of trial in civil action ordered changed, parties may agree upon court 5718.
Court, may determine controversy without action 5252.
Value of real property, judgment, costs 5377.
Court may fix amount of undertaking to stay execution of judgment or order pending appeal 5351.
Court, may order actions consolidated 5478.
Deposition taken out of state 5459.
Execution in officer's own name for unpaid fees 2027.
Property attached to be sold 5158.
Court, may provide how cases shall be entered on calendar 5200.
Court, may shorten time for notice of motion 5364.
Court, municipal, jurisdiction of 832-835.
Court of record, justices of the peace not to try cases in conflict with jurisdiction of (Nev. Const. art. vi, sec. 8) 323.
Or clerk, to ask jury if they have agreed upon verdict 5218.
Or judge, may order injunction 5136.
Or judge, may settle cost bill at chambers 5387.
Power of in proceedings under eminent domain 5614.
Sessions to be public, exception 4862, 4863.
Supreme, times of holding to be as fixed by law and to be at seat of government, (Nev. Const. art. vi, sec. 7) 322.
To fix stay bond on appeal in certain cases 5349.
To instruct jury to find special verdict 5222.
When may be held at another place 4873.
When may dispense with undertaking on appeal if appellant is executor, administrator or trustee 5352.
When may fix costs at discretion 5380, 5381.
Court of record—continued.
When may proceed upon in matter not affected by judgment or order appealed from 5352.
Court fees, appeal not deemed perfected until paid 2031.
On appeal to supreme court 2032.
To be advanced to clerk by party bringing action or taking appeal and applied to compensation of judge (Nev. Const. art. vi, sec. 16) 331.
To be paid on appeal from justice's court 2031.
Upon commencement of action or proceeding in district court 2030.
Court reporter 4908-4913.
Appointment and qualifications 4908, 4909.
Duties and oath 4910, 4911.
Fees 4913.
Not required to perform services until fees are paid or deposited with clerk 4913.
Pro tempore 4910.
Removal 4908, 4910.
Transcript certified by, as evidence 4912.
Court rules, publication of 4845.
Court seal, how may be affixed 4880.
Inscription 4876.
To what papers or proceedings to be affixed 4879.
Courts, inferior to supreme court may be established by Congress 119, 153.
Judicial power of state vested in supreme court, district courts, justices of the peace and municipal courts (Nev. Const. art. vi, sec. 1) 316.
Local or special laws relating to practice invalid (Nev. Const. art. iv, sec. 20) 278.
Persons having judicial powers not to exercise functions pertaining to legislative or executive departments (Nev. Const. art. iii, sec. 1) 258.
Proceedings of in other states, how certified and proved 5410.
Supreme and district and such other as the legislature may designate are courts of record (Nev. Const. art. vi, sec. 8) 323.
To take judicial notice of change in class and organization of cities 775.
What business allowed to transact on nonjudicial days 4870.
Where to be held 4871.
Courts and court officers, schedule of acts and of sections of general act, statutory and constitutional cross-references 4828.
Courts-martial. See State Militia.
Credibility of witness, jury to be exclusive judges 5420.
Credit, on judgment, to be ordered by judge or justice on release of joint debtor 5848.
Credits, how attached 5153, 5169.
Creditor, defined in relation to sale or assignment of goods deemed fraudulent 1079.
Having lien, may redeem real property sold under execution 5299.
How may release joint debtor of his proportion, effect 5846.
May apply for appointment of receiver and dissolution of corporation 1194, 1195.
May sue remaining debtors without making debtor released from his proportion party 5847.

Creditors, action by executor or administrator, duty to commence to set aside fraudulent conveyance made by decedent, application and payment of costs by creditors 6029, 6030.
Assignment, sale or transfer of fees or salaries of public officers void against attachment or execution 2864.
Liability of stockholders of bank to 627.
Responsibility to, of trustee appointed on dissolution of corporation in quo warranto 5677.
Trustee of, to be appointed on dissolution of corporation in quo warranto 5671.
Crimes and punishments, indictment for contemptuous conduct, sentence 5405.
Cross-complaint, against codefendants in civil action 5052.
Cross-demands, when compensated as far as equal 5049.
Cross-interrogatories, for taking deposition out of state 5460.
Cross-references, to constitutional provisions, relating to civil practice 4943, pp. 1432, 1433.
Crossings, to be made and kept in repair by party obtaining right of way under eminent domain 5626.
Cruelty, consent of parent adjudged guilty of or divorced for, when not necessary on adoption of child 5828.
Extreme, as affecting division of community property upon decree of divorce 2166.
Extreme is ground for divorce 5838.
To apprentice, master or mistress liable in damages 491.
Culverts, on right of way obtained under eminent domain to be kept in repair 5626.
Customs of mining districts 4951.
Damages, action for failure to comply with act relating to railroad companies 3581.
Action for, may be brought by workman if caused to change place of employment by misrepresentation 1938.
Action for under act fixing standard weights and measures 4812.
Action may be brought within one year after ouster of director of corporation 5669.
Assessment of in action for abuse of apprentices 491.
By animals breaking into grounds enclosed by lawful fence, recoverable 2332.
By hogs trespassing, determined by arbitration 2257.
By railroad companies entering for making survey under eminent domain 5627.
Caused by swine or goats, owner liable for double 2326.
Deemed accrued at date of summons in proceeding under eminent domain 5617.
Demand for to be contained in summons in justice's court 5727.
Entry of judgment upon by default in justice's court 5754.
Excessive, as ground for new trial 5320.
For condemnation of property for highway, viewers, appeal to district court 3008.
For death by wrongful act 5647.
For death by wrongful act, action for may be commenced within two years 4967.
Damages—continued.
For death by wrongful act, action to be brought in name of representative of deceased person 5648.
For death by wrongful act, when not liable for debts, distribution, how made 5648.
For death of adult, by whom action may be brought 4997.
For death of minor, how action may be brought 4996.
For death or injury, may be recovered in action at law regardless of employers' liability act 1925.
For death or personal injury, contract of insurance, indemnity or relief benefit will not bar recovery for injury to employee 5652.
For failure of witness to obey subpena 5439.
For herding or grazing sheep on lands of another or within one mile of ranch house 2319, 2320.
For improper working or trespass on mine or adjoining mine, how assessed 5509.
For injury to real property after execution sale and before delivery 5520.
For injury to real property surveyed under order 5513.
For personal injuries, action for 5649.
For seduction, how action may be brought 4494, 4995.
For unnecessary injury, by party obtaining underground survey of mine 5511.
How assessed in proceedings under eminent domain 5616.
In action for abatement of nuisance 5504.
In action for death or personal injury, common carrier, mill or mine operator liable for gross negligence notwithstanding slight negligence of employee 5651.
In action for delinquent taxes on proceeds of mines 3707.
In action for removal of nuisance 1562.
In action for unlawful detainer 5593.
In action to recover specific property, jury may find 5224.
In mandamus proceedings, jury may assess 5700.
In proceedings under eminent domain to be determined by court or judge in fixing bond 5614.
Judgment for in action for recovery or withholding of real property 5516.
Judgment for, to be in gold coin 5269.
Justice's court has jurisdiction of amount not exceeding $300 5714.
Liability for in undertaking on appeal 5347.
Liability for refusal to obey order of court in quo warranto 5679.
Liability of common carriers, mill or mine operators, for death or injury of employees 5650.
Liability of officer for selling under execution without notice 5291.
Live stock herded or grazed on land of another liable for with costs and attorney's fee 2336.
May be added to costs when appeal taken for delay 5359.
May be determined by jury or reference after default 5236.

Damages—continued.
May be given in judgment in replevin 5269.
May be recovered by minor for breach of contract of apprenticeship 491.
Measure of, for cutting timber for repair of highway or bridge 5507.
Measure of, on forfeiture of bail in contempt proceedings 5406.
Officers and directors of corporation liable in for making false report 1175.
On entering for survey of land under eminent domain 5610.
Party aggrieved may bring action to set aside decision of viewers on opening of highway 3015.
Pecuniary and exemplary, may be given by jury for death by wrongful act 5648.
Person injuring property of railroad company liable in treble 3565.
Railroad company liable for any, in entering upon land for making survey 3533.
Recoverable against railroad company for refusal to transport passenger or property 3559.
Recoverable by successful contestant in election contest 1816.
Recoverable for contagion spread by diseased live stock 2268.
Recoverable for grazing sheep within one mile of ranch house 2320.
Recoverable for placing animals in enclosure of lands of two or more persons 2334.
Recoverable in action after revocation of submission to arbitration 5264.
Recoverable in mandamus proceeding 5705.
Sheriff not liable for failure to make service unless fees paid 1659.
To be paid within thirty days after final judgment in proceedings under eminent domain, bond for railroad fence, attorney's fee 5619.
To real property on right of way, liability of grantee of franchise 2138.
Township in which action for to be brought in justice's court 5715.
Treble in action for cutting timber or injuring trees 5506.
Treble in action for forcible entry or unlawful detainer 5508, 5599.
Treble in action for waste 5505.
Treble recoverable from railroad for doing thing declared to be unlawful 4574.
Undertaking for costs in action in quo warranto for usurpation of public office 5660.
Value of improvements made in good faith may be allowed as offset in action for recovery of real property 5517.
When may be ordered in addition to costs on dismissal of appeal to district court 5794.
Dams, eminent domain lies for purpose of building 5606.
Dangerous excavation, action against party failing to fence 3235, 3237.
Days, nonjudicial, enumerated, what business allowed, falling on Sunday following Monday observed 4870.
Nonjudicial, when excluded in computation of time 5482.
Dead body, attachment or detention of 6476.
Death, damages for, may be recovered in action at law regardless of employers' liability act 1915, 1925.
Liability of common carriers, mill or mine owners for, of employees 5650.
Death by wrongful act, action for 4996, 4997, 5647, 5648.
Action for damages may be brought within 2 years 4967.
Contract of insurance, indemnity or relief benefit will not bar recovery for 5652.
Judgment for damages not liable for debts, distribution 5648.
Death of party after report of referee does not invalidate judgment in action for partition 5541.
Execution may be issued on judgment rendered after 5285.
Death or disability does not abate cause of action which survives, 5004.
Debt due another, surety may bring action to compel payment 5479.
Evidences of, when included in words "personal property" and "property" 5475.
No imprisonment for, except in case of fraud, libel or slander (Nev. Const. art. i, sec. 14) 243.
Payable in installments secured by mortgage or lien, how property may be sold to satisfy 5503.
Debtor, after-acquired property, rents and profits subject to execution under revived judgment, when 5306.
Arrest of, on proceedings supplementary to execution 5308.
Has six months in which to redeem real property sold under execution 5301.
How may redeem real property sold at execution sale 5300.
Joint, how released from proportion, effect of release 5846.
Joint, order for proper credit and release of from liability to be made by judge or justice 5848.
Joint, released of his proportion, not necessary party to action 5847.
Judgment, excess on sale under execution to be paid to 5289.
Levy of execution to be made only on property he indicates when excess property 5289.
May be required to give undertaking to appear in supplementary proceedings and not to dispose of property, commitment to prison for default 5308.
May direct order in which property shall be sold under execution 5292.
Or successor in interest, may redeem real property sold under execution 5299.
Party owing or having property of, may be examined under execution returned 5310.
Property of, may be ordered applied in satisfaction of judgment on supplementary proceedings 5312.
Reasonable amount of property may be exempt from execution (Nev. Const. art. i, sec. 14) 243.
Redemption of real property sold under execution restores estate to 5301.

Debtor—continued.
Required to answer concerning property in proceedings supplementary to execution 5307, 5308.
What earnings for personal service and property exempt from execution 5288.
When property sold under execution not subject to judgment lien 5306.
Debts and credits to be collected by sheriff under attachment 5157.
Due defendant subject to attachment 5151, 5152, 5154, 5169.
Memorandum to be given by garnishee 5156.
When not payable from damages recovered for death by wrongful act, distribution 5648.
Deceased persons, estates of, district court has jurisdiction (Nev. Const. art. vi, sec. 6) 321.
Representative of to bring action for damages for death by wrongful act 5648.
Decision, against garnishee 5177.
Bill of exceptions may be settled at time of making 5343.
Deemed excepted to 5318.
Judgment may be entered after death of party 5272.
May be signed by district judge in any part of state, clerk to enter 4922.
May be vacated and new trial granted, when 5320.
Modifying award of arbitrators, appeal from 5263.
Of arbitrators in voluntary submission of disputes between employer and employee 1930, 1931.
Of arbitrators under employers' liability act if unanimous to be final and binding 1922.
Of court, to be in writing and to be filed 5227.
Of district judge, may be required to be reduced to writing and exception to be noted 4847.
Of referees, may be reviewed as if made by court 5235.
Of referees, to stand as decision of court 5235.
On motion or issue of law in district court, when notice of to be given, when need not be given, rule vii, p. 1426.
On motion or issue of law in district court, when time for complying with commences to run, rule vii, p. 1426.
To be in accordance with common law of England when not repugnant to our laws 5474.
To be rendered by judge and entered in minutes before expiration of term 5489.
Decisions, judicial and laws to be free for publication 376.
Of supreme court, and statutes, legislature to provide for publication (Nev. Const. art. xv, sec. 8) 376.
Of supreme court, concurrence of majority of justices necessary, art. vi, sec. 2, 317.
Of supreme court, not effective until opinion filed with clerk (Nev. Const. art. xv, sec. 8) 376.
Of supreme court, to be in writing and recorded 4839.
Declaration, false deemed perjury 5448.
Included in oath 5475.
Decree, appointing receiver, publication 1196.
In action for divorce completely dissolves marriage contract and may change name of female 5844.
In action for divorce, effect on matters not specifically mentioned 5841.
In action for unlawful enclosure of public lands 3174.
In action to restore lost records 5634.
May order party or clerk to convey title to real property 5241.
Obtained with intent to defraud creditors is void 1083.
Of dissolution of corporation and appointment of receiver, procedure 1196.
Of district court for removal of officer for malfeasance 2852.
Of district court on incorporation of city or town 769.
Of district court that executor or administrator convey real property under contract of decedent 6032.
Of divorce on ground of imprisonment or adultery of husband and in other cases, disposition of property 5843.
Of removal of officer for malfeasance, copy of to be transmitted to governor or county commissioners 2853.
Regarding redemption or partition, time for appealing from 5329.
To be computed in dollars and cents 5271.
To direct sale of encumbered property on foreclosure of mortgage or lien 5501.
When void as to creditors 1083.
Deed, conveying homestead may be authorized by court and recorded when wife insane 2146, 2147.
Derived from sale of real property for delinquent taxes conclusive evidence of title, possession recoverable in justice's court 3666.
Invalid, local or special law giving effect to, invalid (Nev. Const. art. iv, sec. 20) 278.
Lost and restored, validated 5639.
May be made by successor of officer making sale of real estate for delinquent taxes or under execution or order of sale 1662, 1663.
Of sheriff, executor, administrator, guardian, assignee, receiver, trustee or commissioner, when prima facie evidence of regularity of sale when record lost 5631.
Of sheriff under execution sale and subsequent redemption, who entitled 5301.
Recorded in office of county recorder imparts notice 1093.
To include all property sold for taxes bid in by county treasurer 3669.
To lot in federal townsite, execution of after trial of adverse claim in district court 1984.
To lot in federal townsite, when to be made to guardian or trustee of minor or insane person 1986.
Under tax sale by treasurer not prima facie evidence of title in purchaser when record destroyed 5631.
Deed of trust, lost and restored, limitation 5638.
Sale for taxes on 3787.
Taxes are lien 3786, 3787.

De facto officer, action against for seizure of property may be brought within one year 4967.
Default, against additional parties ordered brought in by the court 5008.
If made, to be entered in justice's court docket 5800.
If opposing party does not appear, moving party entitled to have motion decided in district court, D. C. rule xi, p. 1427.
In mandamus proceedings, judgment not to be entered without hearing 5698.
Judgment may be rendered against claimant in garnishment proceedings 5180.
Judgment may be taken by, in action for delinquent taxes 3665.
Judgment upon, how entered 5236.
Judgment upon, in justice's court 5754,5755.
May be set aside when taken by mistake or neglect 5084.
When plaintiff may apply for relief demanded in complaint 5236.
Defective articles of incorporation validated 1185.
Defective verdict, procedure to cure 5219.
Defendant, allowed costs when he recovers 5379.
Deemed plaintiff when defendant applies for provisional remedies 5194.
In civil action, defined 4944.
In civil action, may appear and waive summons 5016, 5034.
In contempt proceedings may be arrested if he fails to appear on return day 5406.
May be designated by any name if true name not known, amendment of name 5085.
May be heard in opposition to filing of complaint in quo warranto 5664.
May give written notice of appearance 5374.
Nonresident in divorce action to be notified, order, publication, service of summons 5839.
To answer amended complaint 5043.
Who may be in action in quo warranto 5656, 5657.
Written admission of service of summons 5032.
Defendants, all persons having interest adverse to the plaintiff may be joined 4999.
In quo warranto for usurpation of public office 5662.
Jointly liable, joint property bound if only part served 5031.
May be sued in name or style under which contract was made 5003.
Names to be entered in alphabetical order in judgment docket 5275.
Unknown, how to be described in complaint to determine adverse claim to real property 5522.
When need not be served with summons in quo warranto 5665.
Defense, by written instrument, when not deemed denied 5063.
In action for recovery of ore, gold dust or bullion, failure to make entry or loss of books by purchaser not to operate as 2486.
What may be contained in answer in civil action in justice's court 5738.
Defenses, as many as exist may be set up in civil action, how to be stated 5050.
Deficiency, on sale of mortgaged property may be docketed as judgment and become a lien 5501.
Definition of issues of law and fact in justice's court 5761-5763.
Definitions 5475.
Delinquent taxes, action for, cost not chargeable against city or town 999.
Action for, delinquent list or certified copy is evidence 3658.
Action for, judgment and how entered, costs and penalties to be included, is lien on same and other property, default, redemption money, how paid, receipt of district attorney, evidence, execution 3665.
Action for on proceeds of mines, district attorney to begin, damages, penalties, form of complaint and answer 3707-3709.
Action for recovery of, money from redemption and from rental or sale of property bid in by county treasurer, how distributed, no fees from county 3671.
Action for, summons, what to contain and require, publication, posting and filing notice, fees 3663.
Action for, treasurer to buy in property if no other bidders, when county commissioners may order redemption 3667.
Action for, what answer may set up 3664.
Action for, when judgment and execution to contain more certain description than included in assessment roll 3662.
Amounting to less than $300, sale for 3651.
Assessor may force collection by sale of personal property, may give absolute title, fees 3700.
Assessor may sell on summary process, certificate to purchaser, court may issue citation, fees, how collected 3679.
Deed derived from sale of real property for conclusive evidence of title, possession recoverable in justice's court 3666.
Duties of district attorney on collection of 3674, 3675, 3681.
Exceeding $300, action for to be brought by district attorney 3659.
Fee of district attorney in action for 3677.
Fees of officers and costs in action for, how taxed, when payable 3673.
Form of complaint in action for 3661.
In action for, costs not to be charged against city or town 999.
In action for, more certain description may be included in summons and complaint 3662.
Officer selling property for, to embrace in one certificate of sale all property bid in by county treasurer, recording 3669.
Only smallest portion of property that will pay judgment and costs to be sold, redemption, how made 3666.
When process may be served upon executor, administrator, father, mother or guardian of minor or insane person in action for 3666.
Demand, against county not presented for payment within six months after notice that it is payable funds may be paid for other purposes, but demand becomes due again on re-presentation 1563.

Demand—continued.
Defendant may require payment in proceedings under eminent domain 5622.
Exceeding $300 exclusive of interest, district court has jurisdiction (Nev. Const. art. vi, sec. 6) 321.
Exceeding $300 exclusive of interest, not to be tried in justice's court (Nev. Const. art. vi, sec. 8) 323.
Exceeding $300 exclusive of interest, supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
For inspection of book or writing 5416.
For jury in civil action in justice's court, failure to make, waiver 5766.
For payment of claim against county, when if not renewed will be barred 1536.
Demurrer, allowed to amend pleadings in justice's court 5743.
And answer may be filed to part of complaint or at same time 5042.
Certain objections not taken by demurrer or answer waived 5045.
Deemed appearance 5474.
General, in district court, opposing counsel by three days' notice may require demurrant to furnish points and authorities, rule viii, sec. 3, p. 1427.
General, in district court, when points and authorities of demurrant must be furnished at least one day before argument, or court may overrule, rule viii, p. 1427.
Grounds for 5040.
If overruled and failure to answer, judgment may be entered in justice's court 5755.
In district court, if not in good faith, defendant to answer only upon terms, rule viii, p. 1427.
In district court, if sustained or overruled, losing party to amend or plead within ten days if present, or after notice, rule viii, p. 1427.
In intervention 5006.
Issue of law arises upon, when 5196.
May be made after time limited, or time for may be enlarged 5084.
Must specify objections to complaint 5041.
Not waived by filing answer or reply at same time 5083.
Rule of district court may provide for penalty on overruling 4845.
Time for may be enlarged 5084.
Time for to amendments 5083.
To answer, grounds 5053.
To answer in civil action 5053.
To answer in civil action, grounds of 5037, 5053.
To answer in civil action, schedule of sections relating to 5053.
To answer or reply, if overruled, how far facts deemed denied 5083.
To answer or reply, if overruled, what facts deemed denied 5083.
To complaint in civil action 5040.
To complaint in civil action, grounds for 5037, 5053, 5054.
To complaint in civil action in justice's court 5735, 5737.
Demurrer—continued.
To complaint in civil action, schedule of sections relating to 5040.
To complaint or answer in justice's court, proceedings on 5741.
To complaint or answer in justice's court, raises issue of law 5762.
To complaint or counter-claim, when overruled court may allow answer or reply 5083.
To counter-claim, grounds 5054, 5055.
To counter-claim to distinctly specify grounds of objection 5055.
To reply for insufficiency 5059.
To reply in civil action 5037, 5059.
Waives summons 5016-5034.
When may be interposed to answer in justice's court 5740.
Denial, affirmative, of corporate existence required in answer 5079.
By verified answer in justice's court or written instrument admitted 5770.
In answer in civil action in justice's court 5738.
In answer, when may be general or must be special 5046.
In reply must be specific 5057.
Departure from state, with intention to defraud creditors, when defendant may be arrested in civil action in justice's court, 5744; in district court 5088.
Dependents, of injured employee, effect of compromise of claim under employers' liability act 1928.
"Depose," includes every written statement under oath or affirmation 5475.
Deposit, and tender, in action for recovery of money, when costs not recoverable 5384.
In court in proceedings under eminent domain 5620, 5622.
In lieu of bail on arrest in civil action 5106.
In lieu of undertaking on appeal 5354.
In lieu of undertaking on appeal from justice's court 5792.
May be made in court of money or thing by trustee or other party 5192.
May be made in court of surplus money on sale on foreclosure 5502.
May be made in lieu of undertaking or bond 5486.
On arrest in civil action, disposition of 5109.
On arrest in civil action, may be withdrawn on giving undertaking 5108.
On arrest in civil action, when applied to satisfaction of judgment 5109.
Or undertaking, for payment of costs, when required from nonresident or foreign corporation, stay of proceedings 5389, 5391.
Or undertaking on appeal, required 5346.
Upon making, defendant may be released from arrest in civil action 5095.
With clerk, in lieu of undertaking on appeal 5330.
With clerk, to cover fees on appeal to supreme court before filing, rule xxvi, p. 1425.

Deposition, affidavit and application for taking, cross-interrogatories, settlement, parties may agree upon interrogatories or that deposition be taken without, rule xv, p. 1428.
Deemed evidence of party reading 5457.
How taken and by whom, out of state 5459, 5460.
In district court, how opened and filed, rule xvi, p. 1428.
Manner of taking for perpetuation of testimony 5468.
Manner of transmission of 5456.
May be forwarded to person agreed upon by parties 5456.
May be taken by justice of the peace on postponement of civil action 5759.
May be used by either party on trial 5454, 5456, 5457.
Of prisoner, how obtained 5442, 5443, 5444.
Of witness in state may be taken by deposition in certain cases 5454.
Of witness may be taken on continuance 5203.
Party may be compelled to give evidence by 5420.
Punishment for refusal of witness to subscribe 5435.
Taken before notary public may be used before any court, judge or officer 2750.
Taken for perpetuation of testimony may be read with same effect as oral testimony, objection to witness or question 5471.
Taken on postponement of civil action in justice's court may be read 5759.
Taken out of state in other state or territory by commissioner appointed by governor 5451.
Taken out of state, manner of certifying and forwarding 5461.
Taken out of state, may be read by either party 5463.
Taken out of state, may be without interrogatories upon agreement of parties 5460.
Taken out of state, what commission to authorize 5461.
Taken out of state, when trial postponed for nonreturn, diligence 5462.
To be certified by judge or officer taking 5456.
When may be taken out of state 5458.
Depositions, before whom and how may be taken in state 5455, 5456.
How taken and forwarded on contest for members of the legislature 1818, 1819.
In election contest for member of the legislature, either party may take and have forwarded 1822.
May be taken and used in action for divorce 5842.
May be taken in proceeding before public service commission 4534.
May be taken in proceeding for disbarment of attorney 522.
Permissible in proceeding for naturalization 2523.
Reference may be made to on motion for new trial 5321.
Taken out of state in civil action, schedule of sections 5458.
Depositions—continued.
Taken within the state, schedule of sections 5454.
To be received by secretary of state and delivered to presiding officer on contest for member of the legislature 1820-1822.
Descents and distribution, 6116-6125, 6140-6141.
Desertion, wilful, for one year is ground for divorce 5838.
Detainer, forcible, defined 5587.
Only tenant and subtenant need be made defendants in action for unlawful, exception 5592.
Tenant has remedies against subtenant 5590.
Tenant of agricultural lands may hold over if not notified 5589.
Unlawful, complaint and summons, what to contain, service 5593.
Unlawful, defined 5888.
Unlawful, district court has jurisdiction (Nev. Const. art vi, sec. 6) 321.
Unlawful, evidence and amendments to complaint in action for, continuance 5596.
Unlawful, issue of fact to be tried by jury unless waived 5594.
Unlawful, notice to quit, how served 5591.
Unlawful, proof required of respective parties, what possession a bar 5595.
Unlawful, service of notice, tenant or mortgagee may perform condition 5588.
Devise, executory, to be alleged in complaint in action for partition 5528.
Diligence, due must be shown in affidavit for continuance 5202.
In obtaining testimony must be shown to obtain postponement of trial in civil action in justice's court 5759.
Must be shown to obtain postponement of trial for nonreturn of deposition taken out of state 5462.
To be exercised in ascertaining residences of defendants in actions to determine adverse claims to real property 5523.
Diminution of record, on appeal to supreme court, objections to transcript or papers, how noted and corrected, S. C. rule viii, p. 1423.
Diploma, for practice of medicine, surgery and obstetrics, applicant has right to appeal to courts from decision of board of medical examiners 2366.
Director, of corporation, district judge may act in relation to removal and election of 1179.
Of corporation, judgment of ouster 5668.
Of corporation liable in damages for making false report 1175.
Of corporation, when has right to be preferred in appointment of receiver 1195.
Directors, and officers of corporation, district court has revisory power over election of, may order new election 1130.
And officers of corporation, district judge may act in relation to removal and election of 1179-1182.
Declaring dividend when railroad company insolvent, liable for payment of debts 3568.

Directors—continued.
Liability of on dissolution of corporation in quo warranto 5678.
Liable for declaring dividends except from net profits 1169.
Limitations of action against for penalty or forfeiture 4984.
When may be removed 1179.
Disability of justice of peace, other justice may act 4926, 5811.
Disbarment of attorney, proceedings 513-523.
Disbursing officer, if fee or salary of public officer garnished, may pay into court 2865.
Discharge, by plaintiff of defendant arrested in civil action 5122.
From arrest in civil action 5114.
Disincorporation of city, proceedings for in district court 872, 873, 876.
Dismissal, in district court of case ordered transferred from justice's court under section 779 new practice act, rule xxxviii, p. 1430.
Of action, for failure of nonresident or foreign corporation as plaintiff to give security for payment of costs 5391.
Of action, or nonsuit, in what cases granted and how entered, 5237.
Of action without prejudice in justice's court 5772.
Of appeal for failure to furnish requisite papers 5356.
Of appeal from justice's court to district court, D. C. rule xxxvii, p. 1430.
Of appeal, only for substantial error 5658.
Of appeal to district court may be ordered after notice 5794.
Of appeal to supreme court for failure to file transcript, restoration, S. C. rule iii, p. 1421.
Disobedience, to order, subpena or process punishable as contempt in justice's court 5795.
Disorderly conduct, when punishable as contempt in justice's court 5795.
Disqualification of judge to act 4865.
Dissolution of cooperative association, how effected 1258.
Of corporation, action for 5670.
Of corporation, procedure 1195.
Of corporation, court may order sale of property and franchise in lieu of 1197.
Of corporation, on its own application to district judge 1240.
Of limited partnership 2908.
Distribution, how made, of damages for death by wrongful act 5648.
District attorney, action against corporations, when 1354.
Action against counties, papers delivered to 5013.
Action against water-user injuring highways 3024.
Action in forfeited bail 7338.
Action to be brought against by county treasurer for failure to pay over moneys 1601, 3650.
Arrested person, property taken from, liability for 6651.
At request of attorney-general, may bring action for removal of county commissioners authorizing contract when money not in treasury 3830, 3834.
District attorney—continued.
At request of attorney-general, to bring action against certain mining companies failing to file statements 1338.
At request of attorney-general, to bring action for removal of county commissioners voting for excess taxes 3828.
Bank examiner, duty to aid 669, 686.
Delinquent list, proceeds of mines, suits on 3706-3709.
Duty of on collection of taxes 3674, 3675, 3681.
Duty of in regard to summons and notice in delinquent tax suit 3663.
Duty to bring suit against assessor for failure to make settlement for taxes 3704.
Duty to represent town 878-890.
Fee for bringing action for arrearage and to forfeit franchise of toll road 3757.
Fee in delinquent tax suit 3677.
May be selected by public service commission to act as counsel 4544.
May bring action for penalty against foreign corporation failing to file annual statement 1354.
Not to advocate payment of claim against county 1520, 1605.
Not to commence tax suit after service of receipt 3655.
Of United States, when to bring action for unlawful enclosure of public lands 3174.
Or partner not to appear in action by or against state or county 1610.
Penalty for failure to bring action against mining company failing to file statement 1338, 1340.
Receipt of for taxes and costs prima facie evidence in action for delinquent taxes 3665.
Removal from office, when 6907.
Removal of town or county officer 983.
To bring action against assessor for failure to assess property 3625.
To bring action for abatement of nuisance in county 1562.
To bring action for delinquent tax for improvement of streets in unincorporated town 934.
To bring action for delinquent taxes when amount exceeds $300 3659.
To bring suit for delinquent taxes on proceeds of mines 3707.
To prosecute or defend action by or against county 1598.
To prosecute suit against assessor and sureties for underassessing or failure to assess land 3839, 3840.
When county treasurer to bring action against for failure to account 1601.
When duty to bring action against any person unlawfully holding public office 1814.
When in election contest may have person arrested for receiving fees 1815.
When to bring action against foreign corporation for doing business without filing certificate 1350.
District court, acting as juvenile court may cite guardian 740. See Courts and Court Officers, Estates of Deceased Persons.

District court—continued.
Acting as juvenile court may order guardian to place child in hospital 738.
Acting as juvenile court may release children from custody or suspend sentence 758.
Action, controversy submitted to without 5252-5254.
Action, how commenced 5016-5034.
Action, limitations of 4946-4985.
Action, not affected by vacancy or failure of term 4884.
Action, one form of 329, 4943.
All matters on calendar to be called and disposed of in order of filing, D. C. rule ii, sec. 3, p. 1426.
Always open for transaction of business 4906.
And judges may issue writs of mandamus, injunction, quo warranto, certiorari and habeas corpus 4840.
And judges may take acknowledgments and affidavits 4883.
Appeal may be taken from judgment of in action or adverse claim to lot in federal townsite 1985.
Appeal may be taken from judgment of ouster in quo warranto 5682.
Appeal may be taken from order authorizing sale of homestead when wife insane 2148.
Appeal may be taken from municipal court 837.
Appeal to from award of damages for condemnation for highway 3008.
As juvenile court may dismiss petition and allow prosecution under criminal laws or make other order 737.
Assistance. writs of, may issue 4843.
Attachment, may issue on nonjudicial day 4870.
Attorney, judge not to act as, unless party 4866.
Award in arbitration of labor disputes, clerk to file 1930.
By attachment may compel obedience to subpena issued by railroad commission 4561.
Calendar, rule ii, p. 1425.
Calling of calendar and order of disposal of business, rule iv, p. 1426.
Chambers, business at 4843, 4922.
Charge to jury, restrictions as to fact and law 327, 7014.
Charitable corporations, may allow sale of property 1369.
Cities, duties on incorporating 768-772.
Clerk, list of trial jurors, to keep 4930.
Clerk may adjourn court, when 4872.
Clerk may issue subpena requiring attendance before public service commission 4532.
Clerk, of courts of record 290.
Clerk, receipt for fees, to give 2033.
Clerk to collect court fee, how applied 331.
Clerk to enter decisions, when 4922.
Clerk to keep register of actions 5480.
Clerk to procure and keep seal 4876, 4878.
Clerk, writs to serve, when 6231.
Clerk, writs, warrants, process, to issue 6261.
Commissioners, may be suspended, when 3753.
District court—continued.
Compromise, offer of 5265.
Contempt 5394-5407.
Contempt, disobedience of summons issued for railroad commission 4532.
Contempt, to apply to coordinate judge for same order 4882.
Contempt, to resist process 2833, 2834.
Controversy, submitting without action 5252-5254.
Corporate property, sale of 1197, 1198.
Corporations, directors, removal of and election of new 1180-1182.
Corporations, disincorporation under act of 1865, 1240.
Corporations, dissolution of 1195, 1240.
Corporations, election of directors, may require 1130, 1123.
Corporations, mergers, awards, contest of 1147, 1148.
Corporations, receiver for 1194-1199.
Corporations, religious or charitable, may allow sale of property 1369.
Corporations, removal of officers, proceedings 1180-1183.
County-seat, terms held at 4841.
Court fee to be collected, how applied 331.
Court of justice 316, 4828.
Court of record 323, 4861.
Court room and necessities, may order furnished 4841, 4921.
Decision, exception to, how taken 4847.
Decision, reduced to writing if required 4847.
Decision, unreasonable delay 4886.
Decision, where may be signed 4922.
Depositions 5454-5473.
Directors of corporations, proceedings to remove 1180-1182.
Disqualification of judge 4865.
Dissolution of corporations 1195, 1240.
District judge, any may hold court 4844, 4922.
Districts established 4901, 4905.
Due process of law, guarantee of 237.
Duties of sheriff during sessions of, D. C. rule xxxix, p. 1431.
English language to be used 4885.
Entry in docket of abstract of judgment of justice's court and issuance of execution to other counties 5781.
Equity and law in same action 329, 4843.
Equity, jurisdiction of 321.
Estates of deceased persons, orders, powers to enforce 5867.
Evidence, depositions and witnesses 5408, 5473.
Evidence, judge may state 4846.
Exceptions, how taken 5315-5318.
Exceptions, to decisions, how taken 4847.
Fact, matters of, judge not to charge on 327, 4846.
Federal jurisdiction over certain property 1949-1952.
Fees of clerk when not over 800 votes in county 1995.
Fees upon commencement of action or proceeding 2030.
Filing and serving papers 5367-5375.
For failure to prosecute an appeal, may order dismissal with costs and damages 5794.
Foreclosure of mortgage 5501-5503.

District court—continued.
Fuel, lights and stationery, may order 4841.
Guardians 6149-6201.
Guardians, accounts, may require 4849.
Habeas corpus, may issue, 321, 4840, 4843, 6226, 6265.
Habeas corpus, supreme court may make returnable before 319.
Habeas corpus, suspended, when 234.
Has jurisdiction of proceedings under juvenile court law 729.
Held, how often in each county, 4922.
Hour of opening, 10 o'clock a. m. unless otherwise ordered, D. C. rule i, p. 1425.
In districts having more than one judge the judges shall by special rules provide for division of business; D. C. rule ii, p. 1426.
Injunction 5136-5146.
Injunction, may issue 321, 4840, 4843.
Insane persons, estates of, jurisdiction 321.
Instructions may be given on nonjudicial days 4870.
Inventories, to receive in vacation 4850.
Is court of record (Nev. Const. art. vi, sec. 8) 323.
Judge, election of 4901.
Judge, may hold in any district 4844, 4922.
Judge, not to charge on matters of fact 327, 4846.
Judge, not to interfere with orders of another judge 4881, 4882.
Judge, not to have partner in practice 4867.
Judge, not to practice as attorney 4866.
Judge, not to receive fees or perquisites 325.
Judge, orders made out of court, power to enforce 4864.
Judge, when disqualified 4865.
Judgment 5236-5251, 5266-5279.
Judgment, power to enforce 4864.
Judicial days 4869.
Judicial department coordinate 258.
Judicial power vested in what courts 316.
Jurisdiction and powers 321, 4849.
Jurisdiction in contest of county or township office, may require documentary evidence by mandamus 1808.
Jurisdiction in quo warranto 5663.
Jurisdiction on disincorporation of city 872, 873.
Jurisdiction on transfer of case from justice's court 5721.
Jury, civil case, three-fourths may agree 232.
Jury, may be discharged on nonjudicial day 4870.
Jury, may be waived 232.
Jury trial 5204-5225.
Jury trial guaranteed 232.
Justice's court, appeals from 321, 5788-5794.
Justice's court, final appeals from 4840.
Juvenile department 730, 757.
Language, what and how used 4885.
Law and equity in same action 329.
Law, judge may declare 327, 4846, 7195, 7197.
Mandamus, 5694-5707, 5711-5713.
Mandamus, may issue 321, 4840, 4843.
Manner of making and hearing motions, D. C. rule xi, p. 1427.

District court—continued.
Matters of fact, judge not to charge 327, 4846.
May appoint appraisers or arbitrators 4849.
May appoint counsel to appear for child under juvenile court law 742.
May authorize action by nonresident guardian for recovery of property for ward 6200.
May authorize conveyance of homestead when wife insane, disposition of proceeds 2146, 2147.
May by writ of mandamus compel registration 1710.
May change names of persons, hearing, notice, order 5837.
May compel attendance of witnesses 4849.
May compel production of title papers of property of estate of minor 4849.
May decree that executor or administrator convey real property under contract of decedent 6032.
May enjoin proceedings of bank examiner 675.
May enter judgments and orders in term or vacation 4842.
May issue attachment for witness in contest for county or township office 1809.
May issue license to minister of gospel authorizing solemnization of marriages 2340.
May issue writ of certiorari 5684.
May issue writ of mandamus 5695.
May issue writ of mandamus to compel registration of elector, to decide contested questions of registration 1710, 1712.
May issue writs of mandamus, injunction, quo warranto, certiorari, habeas corpus and other writs (Nev. Const. art. vi, sec. 6) 321.
May make order allowing married woman to carry on business in her own name 2191.
May make order directing execution of deed by executor or administrator under contract of decedent 6147.
May make order for examination or taking deposition of prisoner 5442.
May make order for sale of real estate of Protestant Episcopal Church 1431.
May make rules, limitation 4845.
May naturalize aliens 2516.
May order contestee to appear in contest for nomination under primary election law 1764.
May order justice's court to transmit papers on appeal, service of orders, fine 5791.
May order levy of taxes to meet obligations of city on disincorporation 873.
May order new certificate of stock of corporation issued in lieu of one lost 1165.
May overrule general demurrer for failure of demurrant to furnish counsel points and authorities, rule viii, p. 1427.
May prescribe notice of disincorporation of city 875.
May render judgment in action to review order of public service commission 4540 (c).
May shorten or enlarge time for notice or hearing of motion, rule x, p. 1427.
Mechanics' liens, jurisdiction (Nev. Const.) 321, 323.

District court—continued.
Ministerial officers, conduct, to control 4864.
Minors, estates of, jurisdiction 321.
Minutes, entry to be made in of order adopting child 5832.
Mortgages, foreclosure 5501-5503.
Motion for continuance, how made, affidavits and counter-affidavits, service, D. C. rule xii, p. 1427.
Motion not to be reheard unless by leave after notice, D. C. rule xi, p. 1427.
Motion, when five days' notice required, what notice to specify, court may shorten or enlarge time, D. C. rule x, p. 1427.
Motions and orders 5362-5366.
New trials in 5319-5324.
Nonjudicial days designated, certain business may be transacted on 4870.
Notice of time of holding to be given by judge or clerk, D. C. rule iii, p. 1426.
Notices 5367-5375.
Notice to adverse claimants, townsite lots 1984.
Nuisance, action for 5504-5513.
Of county in which property is situated has jurisdiction of action to restore lost records 5636, 5637.
Official reporter 4908-4913.
Official reporter, committee to examine 4909.
Official reporter, duties 4908.
Official reporter, excused, when may be 4910.
Official reporter, fees, how paid 4913.
Official reporter, judge to appoint 4908.
Official reporter, oath of office 4911.
Official reporter, qualifications, test of 4909.
Official reporter, removable at pleasure, 4908, 4910.
Official reporter, temporary appointment 4910.
Official reporter, transcript prima facie evidence 4912.
On removal of officer for malfeasance, to transmit copy of judgment to governor or county commissioners 2853.
On Saturday of each session law questions to be heard unless good cause shown for delay, D. C. rule v, p. 1426.
One form of action 329.
Open always 4906.
Or judge may make preliminary order regarding disposition of children or property in action for divorce 5840, 5841.
Or judge, supreme court may make writ of habeas corpus returnable before (Nev. Const. art. vi, sec. 4) 319.
Or judge, supreme court or justice thereof may make writ of habeas corpus returnable before 4834.
Order, by one judge not to be changed or affected by another, 4881, 4882.
Order, power to preserve and enforce 4864.
Order, refused or granted conditionally, application for same order only to higher judge 4881.
Original appellate jurisdiction 4840.
Panel of trial jurors, how drawn and summoned 4930.
Papers, filing and serving 5367-5375.
Partition, proceedings in 5527-5583.
District court—continued.
Partner in practice, judge not to have 4867.
Payment of attorneys appointed for defense 7540, 7541.
Perpetuating testimony 5464-5473.
Personal injuries, action for 5649-5652.
Petition for changing name of person to be filed in 2835.
Place of holding, changed when 4873, 4874.
Pleadings 5035-5086.
Pleadings and documents to be on legal cap, in proper form, and not to be amended by changing original without leave of court, D. C. rule ix, p. 1427.
Power of county, to enforce process 2835.
Power to enforce orders, judgment and process 4864.
Powers, estates to enforce 5867.
Powers, in vacation 4842, 4850.
Presentation to of complaint for removal of officer for malfeasance 2852.
Proceedings for removal of officers 2851-2854.
Proceedings, public, exception 4862, 4863.
Proceedings, to be certified to when adverse claims for lot in federal townsite 1984.
Proceedings, to remove directors of corporations 1180-1182.
Process, clerk to issue 6261.
Process, power to enforce 2833-2835, 4864.
Process, resistance of, contempt 2833, 2834.
Process, style of (Nev. Const.) 328.
Prohibition 5708-5713.
Prohibition, may issue 4840.
Quo warranto 5656-5682.
Quo warranto, may issue 321, 4840, 4843.
Railroad commission may apply to for summons, procedure 4532, 4540.
Receivers 5193.
Receivers for corporations 1194-1199.
Referee, power to enforce order before 4864.
Reference and referees 5230-5235.
Register of actions, clerk to keep 5480.
Religious or charitable corporations, may allow sale of property 1369.
Resistance of process, contempt 2833, 2834.
Revenue officers, removal or suspension 3753.
Revisory power over election of officers of corporation, may order new election 1130.
Room and necessities, may direct sheriff to provide 4841, 4921.
Rule, may impose penalty on overruling demurrer 4845.
Rules, pp. 1426-1431.
Rules, may make restrictions on 4845.
Sale of corporate property 1197, 1198.
Seal, how affixed 4880, 5481.
Seal, to what papers affixed 4879.
Second judicial district, number of judges, powers, may make rules 4903.
Sheriff may adjourn court, when 4872.
Sheriff, may direct to provide room and necessities 4841, 4921.
Sheriff, to attend, orders to obey and enforce 1648.
Sheriff, to summon venire 4930.
Sickness of judge or juror pending trial 7194.
State, actions against 5653-5655.
Submitting controversy without action 5252-5254.

District court—continued.
Subpena issued by railroad commission, may enforce 4561.
Surety company bond, may accept 695-701.
Suspend administrators, executors or guardians during vacation 4850.
Terms 4842, 4906.
Terms, when and where held (Nev. Const.) 332.
Testimony, judge may state 327.
Testimony, perpetuating 5464-5473.
Times of holding to be as fixed by law and to be at the county-seat, but legislature may divide county into two or more districts and designate place of holding court (Nev. Const. art. vi, sec. 7) 322.
Title papers, may require production 4849.
To act in incorporation of cities and towns 768, 769.
To appoint probation officer 733.
To be held at county-seat 4871.
To be held in each county, how often 4922.
To cite officer on filing of complaint charging malfeasance 2852.
To determine contests for state lands 3208.
To have seal 4875.
To set one day in month for setting cases unless business requires different arrangement, D. C. rule ii, sec. 4, p. 1426.
Transfer of cases to from justice's court 5721.
Trespass, action for 5504-5513.
Trial by jury guaranteed (Nev. Const.) 232.
Trial, civil 5195-5229.
Trial, jury, panel, drawing and summons of 4930.
Unlawful detainer, jurisdiction of (Nev. Const.) 321.
Vacation, powers in 4842, 4850.
Verdict may be received on nonjudicial day 4870.
Waste, action for 5504-5513.
When may appoint some one to perform duties of district attorney and certify compensation 1597.
When may order new trial on appeal from justice's court 5794.
When to enter decree for removal of officer for malfeasance 2852.
Wills 6202-6225.
Wills, power to probate 4849.
Witness not to be unreasonably detained (Nev. Const.) 235.
Writs, what may issue 321, 4840, 4843, 6228.
Writs and warrants, clerk to issue 6261.
District judge, action contesting election of, triable in adjoining district court in like manner as contest for county or township office 1813.
Appearance, consent and agreement before on adoption of children 5826.
As trustee of federal townsite may act after term 1988.
Assistance, writs of, may issue at chambers 4843.
Box for names of jurors, to approve 5204.
Certiorari, may issue, determine at chambers 321, 4843.
Chambers, business transacted in any part of state 4922.
District judge—continued.
Children under 14 years, to approve employment 6824.
Claim against estate, may file 5966.
Corporations, directors, revisory power over election of 1130.
Court, may hold in any county 4844.
Decision, may sign in any part of state, 4922.
Disqualified, probate, procedure 5940, 5941.
Duties, may perform certain after expiration of term 1988, 5489-5491.
Estates, disqualified to act in, duty 5940, 5941.
Facts, not to charge in regard to (Nev. Const.) 327.
Federal townsites, may enter as trustee 1961.
Fees and expenses for patent and deeds to federal townsite 1986.
Guardianship, may grant special letters in vacation 4850.
Habeas corpus, may issue 321, 4840, 6228.
Habeas corpus, refusal of writ, penalty 6262.
Has jurisdiction concurrent with justice of the peace in action for possession where relation of landlord and tenant exists or possession unlawfully withheld 5604.
Impeachment, liable to 335.
Insane person, duty in regard to commitment of 2204.
Insane person, if property exhausted may certify to secretary of state, who shall transfer insane person to indigent list 2201.
Jurisdiction, equal, coextensive and concurrent 4922.
Jury box, to approve 5204.
Mandamus, may issue (Nev. Const.) 321.
Mandamus, may issue and determine in chambers 4843.
May act in case of death or disability of trustee in federal townsite 1991.
May act in relation to removal and election of directors and officers of corporations 1179-1182.
May be required to reduce decision to writing and note exception thereto 4847.
May hold court in any judicial district upon request of judge of district or direction of governor 4844.
May issue citation for discovery of personal property on which taxes delinquent 3679.
May issue writ of certiorari 5684.
May issue writ of mandamus 5695.
May make order authorizing the mortgaging of estates of deceased persons 6146.
May order correction of error or omission relating to primary election, disobedience contempt 1763.
May order dissolution of corporation on its own application 1240.
May order execution in officer's own name for unpaid fees 2027.
May sign decision in any part of state, clerk to enter 4922.
May sign records left unsigned by predecessor, effect 4923.

District judge—continued.
May suspend county commissioner pending charges and appoint other to perform duties 3753.
May take and certify to affidavit for examination of books of assayer, mill or purchaser of ore, gold dust or bullion 2484.
May try and determine writs, dispose of motions for new trials and transact other business at chambers 4843.
Not to charge juries on matters of fact, but may state evidence and declare law 4846.
Only one having charge of proceeding shall grant further time unless absent or unable to act, exception, rule xliii, p. 1431.
Powers of in vacation 4850.
Probation officer, to appoint 733.
Proceedings before on adoption of children, order 5829.
Public administrators to make semiannual report to 1618.
Quo warranto, may issue and determine in chambers 321, 4843.
Records signed and bills of exception settled by, after expiration of term effective 5490, 5491.
Removal from office by legislature 336.
To act as trustee in entering federal townsites and conveying lots 1981-1988.
To act on voluntary dissolution of corporation 1240.
To appoint guardian and order sale of property of insane person and payment of expenses for the insane from money or property or by kindred 2200.
To approve undertaking for stay of execution pending motion for new trial in district court, rule xxvi, p. 1429.
To control business in his district 4922.
To decide before end of term and may perform certain acts after term expires 5489.
To designate paper for publication of notice for taking testimony for perpetuation 5466.
To fix time for hearing election contest for county or township office 1808.
To give notice of obtaining as trustee, patent for federal townsite 1982.
To give notice of time of holding court, D. C. rule iii, p. 1426.
To make order for taking testimony for perpetuation 5466.
To sell lots in federal townsite not conveyed within one year 1987.
Trial jury, commissioner to draw 4930.
Vacation of office by absence 332.
Veterinarian, service, may require 4379.
When any shall have entered upon trial or hearing or made ruling, no other judge to act unless upon written request, rule xli, p. 1431.
When in election contest may make order for arrest of person receiving fees 1815.
When may commit idiots and feeble-minded persons to hospital for mental diseases 2211.

District judge—continued.
When two justices of the peace equally entitled, to certify which is successor 5807.
Writs, what may issue 221, 4840, 4843, 6228.
District judges, for reasonable cause may be removed on two-thirds vote of members elected to each branch of the legislature (Nev. Const. art. vii, sec. 3) 336
Have equal, coextensive and concurrent jurisdiction, functions of court and judges at chambers 4922.
How elected, terms of office (Nev. Const.) art. vi, sec. 5) 320.
Legislature may increase or diminish number, change not to take effect except in case of vacancy or expiration of term (Nev. Const. art. vi, sec. 5) 320.
Several may hold court in one county at one time 4922.
Two or more in one district may adopt rules for division or disposal of business, rule xli, p. 1431.
District of Columbia, when included in word "state" and words "United States" 5475.
Districts, judicial, legislature may provide for and number of judges, change not to take effect except in case of vacancy or expiration of term (Nev. Const. art. vi, sec. 5) 320.
Ditch companies, rates may be regulated by the legislature (Nev. Const. art. iv, sec. 20) 278.
Ditches, eminent domain may be exercised for 5606.
Dividends, directors of insolvent railroad company paying liable for debts 3568.
Divorce, custody of children may be changed pending or after action 5840.
Disposition of children pending and after proceedings, order for production of, enforcement 5840.
Disposition of property, what considerations determine, effect of decree on matters not specifically mentioned, preliminary restraining orders 5841.
Disposition of property rights, rule when wife obtains decree on ground of imprisonment or adultery of husband, alimony pendente lite, procedure, orders 5843.
Either party entitled to jury to try issue of fact 5845.
How community property divided upon granting decree 2166.
How obtained, grounds for, verified complaint, venue 5838.
In proceedings for, court may direct trial of fact to be private 4863.
Local or special laws for granting are invalid (Nev. Const. art. iv, sec. 20) 278.
Nonresident defendant to be notified, order, publication, service, summons, compulsory process may issue 5839.
Order for, completely dissolves marriage contract and may change name of female 5844.
Order regarding children may be enforced by attachment, commitment or requiring security 5840.

Divorce—continued.
Schedule of sections relating to 5838.
Testimony, pleadings, orders, depositions and practice same as in actions at law 5842.
Docket, and papers in case of death or removal of justice of the peace to be delivered to other justices or county clerk 5804.
And papers must be delivered by justice of the peace to successor 5803.
Certified transcript of on change of place of trial in justice's court 5719.
Conviction of contempt in justice's court to be entered 5799.
Entry in judgment docket of district court of abstract of judgment in justice's court 5780.
Entry of judgment of supreme court to be made 5360.
Execution or other process may be issued by justice of the peace upon docket of predecessor 5805.
For judgment liens, how kept and what to contain 5275.
In justice's court, alphabetical index required to be kept 5802.
In justice's court, certified copy to be transmitted on appeal to district court 5791.
In justice's court, copy of to be used on appeal in district court 5789.
In justice's court, entry to be made of date of trial or hearing and mailing notice 5733.
In justice's court, in civil action, entry of waiver of jury 5766.
In justice's court, what entries to be made 5800.
Judgment for deficiency may be entered after sale on foreclosure and become lien on real estate 5501.
Of judgment, costs to be included 5278.
Of judgment, to include entry of interest and costs 5388.
To be open for inspection without charge 5276.
Transcript of to be certified by justice's court on transfer of case to district court for trial 5721.
Document, bringing of may be required by witness 5431.
Production may be required by arbitrators on voluntary submission of dispute between employer and employee 1932.
Public, of this state or the United States other than judicial in custody of public officer or certified or verified copy may be read in evidence 5409.
Documentary evidence, may be required by mandamus in contest for county or township office 1806.
Drainage, eminent domain may be exercised for 5606.
Drunkard, habitual, consent of parent adjudged guilty of being, when not required on adoption of child 5828.
Drunkenness, habitual, gross, when ground for divorce 5838.
Due process of law, state shall not deprive any person of (U. S. Const.) 185.
Due process of law—continued.
Person shall not be deprived of life, liberty or property without (Nev. Const. art. i, sec. 8) 237.
Dues, from corporations may be secured but corporators not individually liable for debts (Nev. Const. art viii, sec. 3) 340.
Duplicate notice, of location of mine in office of county recorder receivable in evidence same as original 2473.
Earnings, of judgment debtor, when exempt from execution 5288.
Earnings, of wife, not subject to debts of husband 2167.
Easement, when may be taken under eminent domain 5607.
Editors, libraries and certain property of, exempt from execution 5288.
Ejectment. See Forcible Entry and Detainer 5585-5605, 6743.
Ejectment, jurisdiction 321, 4840.
Election, alien not to be naturalized within 30 days prior to general 2519.
Election, and terms of office of district judges (Nev. Const. art. vi, sec. 5) 320.
Elector may apply to district court for writ of mandamus to compel registration of name 1710, 1712.
Of county and township officers, local or special laws regulating, invalid (Nev. Const. art. iv, sec. 20) 278.
Of officers of corporation, district court has revisory power over, may order new election 1130.
Primary, justice of supreme court or district judge may order correction of error or omission, disobedience contempt 1763.
To county or township office, how and when elector may contest, filing of statement, what to contain 1805, 1806.
When time for contest or recount begins to run 1894, 1895.
Election contest, delays in obtaining evidence not to cause contest to fail 1894.
For city office, how brought and determined 801.
For county or township office, clerk of board of county commissioners to issue certificate in accordance with judgment 1810.
For county or township office, fees of clerk, sheriff and witnesses same as in district court 1811.
For county or township office, if judgment annuls election and no appeal taken within thirty days certificate becomes void 1812.
For county or township office, issuance and service of subpenas, attachment to compel attendance of witnesses 1809.
For county or township office, jurisdiction of district court, may require documentary evidence by mandamus 1806.
For county or township office, statement or complaint, filing, fixing time for hearing, notice and service 1808.
For district judge, triable in adjoining district court in like manner as contest for county or township office 1813.

Election contest—continued.
For member of legislature, either party may take depositions under rules of district court, forwarding to secretary of state, delivery to presiding officer 1822.
For member of legislature, how started and conducted, service of notice, depositions, how taken and transmitted 1818, 1819, 1820.
For member of legislature, justice of the peace to issue subpenas for taking depositions, witness may be attached and fined, certification of testimony to county clerk 1819.
For member of legislature, presiding officer to notify members of receipt of depositions and papers 1821.
For member of legislature, secretary of state to receive depositions and papers and deliver to presiding officer 1820-1822.
For nomination 1764.
For office other than state office, time for commencement of 4973.
For state office, attorney-general to prosecute, supreme court has original jurisdiction 1823.
For state office, time for commencement of 4972.
For state officer, who may contest, how prosecuted 1823.
May be brought by district attorney when any person unlawfully holds any public office 1814.
One action may be brought against several persons claiming same office 1817.
Sheriff to serve papers 1808, 1809, 1811, 1818, 1820.
Successful contestant may recover damages 1816.
When district attorney may have person arrested for receiving fees, bail 1815.
Election day, elector not to be arrested under civil process on (Nev. Const. art. ii, sec. 4) 253.
Elector, convicted of certain crimes to be excluded from jury unless restored to civil rights (Nev. Const. art. iv, sec. 27) 285.
May apply to district court for writ of mandamus to compel registration 1710.
Not to be arrested under civil process on election day (Nev. Const. art. ii, sec. 4) 253.
Residence required to constitute, persons not electors excluded from jury (Nev. Const. art. ii, secs. 1, 2) 250, 251, 285.
When and how may contest election to county office, statement, what to contain 1805, 1806.
Electric light and power lines, when eminent domain may be used for 5606.
Electric power company, may condemn for right of way 2138.
Elisor, duty of on stay of execution pending motion for new trial in district court, rule xxvi, p. 1429.
Entitled to same fees as sheriff 5498.
How to confine sheriff upon his arrest 5497.
May execute process same as sheriff 5496, 5498.
Elisor—continued.
When may be appointed, bond 5495.
When to return and stay execution pending appeal in district court, rule xxii, p. 1420.
Embassador of United States, may take affidavits in foreign countries 5452.
To certify to judicial record of foreign country 5411.
Embezzlement, of public funds, conviction of disqualifies from holding public office (Nev. Const. art. iv, sec. 10) 268.
Eminent domain, action begun anew where defendant's title defective 5618.
All parties in interest may appear 5613.
Apportionment of costs in proceedings 5623.
By accepting payment defendant abandons defenses except claim for greater compensation 5622.
Compensation for property taken by, guaranteed 175, 237, 344.
Condemnation by railroad companies, what may be condemned, procedure 3535-3550, 3574, 5627.
Condemnation for right of way 2138.
Conditions precedent to condemnation 5609.
Contents of complaint 5612.
Corporation not to appropriate right of way without compensation 344.
Court may authorize occupancy by plaintiff after judgment or pending appeal upon payment or deposit, stay 5622.
Crossings to be made and kept in repair 5626.
Damages deemed accrued at date of service of summons 5617.
Damages, how assessed 5616.
Damages to be paid within thirty days after final judgment, bond for railroad fence, attorney's fee 5619.
Estates and rights subject to condemnation 5607.
Final order made upon payment, recording 5621.
Franchises may exercise right of for 2138.
Irrigation projects may exercise 4770.
Jurisdiction of district court, complaint, verified 5611.
May be exercised for construction of toll road 3052.
May be exercised in behalf of what uses 5606.
Mining claims on land in private ownership 2458-2462.
Occupancy of premises pending action, notice, hearing, proof, bond, restraining order 5615.
Payment may be made defendants or deposited in court, execution, if money not made on execution, proceedings annulled 5620.
Power of court or judge 5614.
Procedure in civil cases applicable 5624.
Property shall be taken for public use without just compensation having been first made or secured, exception (Nev. Const. art i, sec. 8) 237.
Property subject to condemnation 5608.
Railroad company to execute bond for building of fences in proceeding under eminent domain 5619.

Eminent domain—continued.
Right may be exercised by foreign corporations 5629.
Right may be exercised by foreign or domestic railroad 3574.
Right of way not to be appropriated to corporation until compensation is made or secured (Nev. Const. art. viii, sec. 5) 344.
Right to enter to make survey, damages 5610.
Rights of cities and towns for highway purposes not affected 5625.
Schedule of sections 5606.
When two railroad companies have right over same pass or territory, change and expense of reconstruction of road 5628.
Employee, damages for injury or death under employers' liability act 1924.
Has right of action for damages if caused to change place of employment by misrepresentation 1938.
Judgment for death or injury preferred claim to extent of wages under employers' liability act 1926.
Liability of common carriers, mill or mine operators, for death or personal injury 5650.
Of insolvent corporation has preferred lien for wages 1187.
Employer, common carrier, mill or mine operator liable for damages for death or injury of employees 5650.
Owing wages responsible for poll tax of employee 3718.
When liable for injury to workmen under employers' liability act 1915, 1924.
When may enforce liability to employee under employers' liability act 1927.
Employer and employee, arbitrators on voluntary submission of dispute may subpena witnesses and administer oaths 1932.
Award of arbitrators on voluntary submission of dispute may be enforced in equity 1930.
Fees and expenses of arbitrators on voluntary submission of dispute 1935.
Injunction not to issue to compel service of employee 1930.
Schedule of acts 1915.
Voluntary arbitration of disputes 1929, 1935.
Employers' liability act, arbitration proceedings under 1922.
Claim for injury or death, judgment preferred claim to extent of wages 1926.
Claims under may be compromised 1928.
Court may increase or diminish weekly payments 1923.
Employer or owner liable for injury in doing work by contractor or subcontractor, indemnity 1924.
If arbitrators fail to agree either party may have adjudication by court 1923.
Judgment of court under 1923.
Making of claim against employer operates as assignment by employee of assignable cause of action in tort 1927.
Prevailing party to recover costs and reasonable attorney fee 1923.
Employers' liability act—continued.
Provisions may be disregarded and damages recovered in action at law 1925.
Schedule of sections 1915.
English language, to be used in judicial proceedings, abbreviations and numbers permissible 4885.
Entries, in justice's court docket, are prima facie evidence 5733, 5801.
In justice's court docket, what to be made 5800.
Entry, forcible, defined 5586.
Forcible, district court has jurisdiction (Nev. Const. art. vi, sec. 6) 321.
Of county clerk relating to partnership, copies of are evidence 2914.
To be made only when legal and in peaceable manner 5585.
What deemed unlawful and fraudulent under act relating to possessory actions on public lands 5855.
Equity, courts of, when receiver may be appointed 5193.
District court has jurisdiction (Nev. Const. art. vi, sec. 6) 321.
Enforcement in of award of arbitrators in voluntary submission of dispute between employer and employee 1930.
Equity action, supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
Equity and law, may be administered in same action (Nev. Const. art. vi, sec. 14) 329.
Equity cases, may be tried with or without jury 5229.
Equitable relief, action for when adverse claim made 5479.
Error, in matter of form only, not ground for quashing proceedings in action for forcible entry or unlawful detainer 5602.
Matter within specification of may be reviewed on appeal 5340.
Not substantial to be disregarded 5066.
Only substantial warrants dismissal of appeal 5358.
Or defect, in transcript on appeal to supreme court, correction, rule vii, p. 1423.
Or omission, in primary election may be ordered corrected by justice of supreme court or district judge, disobedience contempt 1763.
Prejudicial only deemed material 5080.
When ground for new trial 5320.
Errors, computation of judgment in dollars and cents sufficient 5271.
In attachment papers in district court, attachment not to be dissolved if copy amended without affecting substantial rights, rule xx, p. 1428.
What to be embodied in statement on appeal 5332.
Escape, of defendant arrested in civil action, sheriff liable as bail 5110.
Escheat, balance of proceeds of unclaimed property sold by jeweler 532.
Escheat, of funds in hands of public administrators 1619. See Escheats.
Estate for life, proceedings on termination of, notice, order 5584.

Estate for life or years, how set off in action for partition 5548.
Tenant to receive compensation on sale in partition 5556.
Estates and rights, subject to condemnation under eminent domain 5607.
Estates of deceased persons. See Estates of Deceased Persons.
Actions against not to be maintained unless claims have been filed 5972.
Actions to be brought on rejected claims within 30 days after notice 5968.
Costs in matters of to be determined by court and execution to issue therefor 6109.
Community property not subject to if wife pays or secures indebtedness 2165.
Coroner to deliver property or money to county treasurer 7553.
Costs not recoverable in actions against unless more recovered than allowed on claim 5973.
District court has jurisdiction (Nev. Const. art. vi, sec. 6) 321, 4840, 4849; and of minors 4849.
Guardian may join in partition of real estate of ward 6166.
Issues of fact to be determined as in common-law actions 6109.
Judgment rendered after death of party payable in course of administration 5272.
On death of husband, community property subject to debts, family allowance and expenses of administration 2165.
Payment of court fee upon commencement of proceeding 2030.
Public administrator may bring action for protection of 1622.
Public administrators, powers and duties of 1615-1627.
Schedule of acts and sections 5857. See Estates of Deceased Persons and references thereto.
Statute of limitations does not run for one year after issuance of letters when person died out of the state 4978.
Wages are preferred claims against 6145.
When claim against may be presented within one year, and when suit may be brought 4977.
When county treasurer may pay to persons entitled money received from coroner 7555.
When execution not to issue on judgment recovered against deceased in his lifetime 5975.
When executor or administrator liable for costs in actions against 5976.
When homestead and exempt property to be set apart for widow and minor heirs 2165, 5957.
When judgment ranks as approved claim and execution not to issue 5974.
When party or assignor not to testify if other party to transaction is dead 5419, 5423.
Estates of minors and insane persons, district court has jurisdiction (Nev. Const. art. vi, sec. 6) 321, 4849.
Estoppel of surety company to deny corporate power 700.
Estray animals, notice and proceedings in regard to 2274-2284.
Evidence, admission or inspection of writings 5416-5418.
Admission that evidence shown in affidavit on motion for continuance would be given allows trial to proceed 5202.
Admission that it would be given avoids continuance in action for forcible entry or unlawful detainer 5598.
Affidavit of notice for presentation of claims against bank in hands of bank examiner 671.
Affidavit of service of notice to persons holding claims against closed bank prima facie 671.
Affidavit of what expected to be obtained on postponement of civil action in justice's court 5759.
All courts to take judicial notice of change in class and organization of any city 775.
And amendment to complaint in action for forcible entry or unlawful detainer, continuance 5596.
Application to take testimony for perpetuation 5465.
Attorney, client or attorney's secretary, when not to be witness 5425.
Authenticated copy location notice 2424. See Mines and Mining.
Books of public utility, public service commission may require production of 4529, 4531.
Burden of proof in action to review order of public service commission 4540(e).
Certificate of acknowledgment or proof of conveyance may be rebutted 1045, 1046.
Certificate of county surveyor or deputy may be submitted 1667.
Certified copies of order of railroad commission are prima facie evidence 4565.
Certified copies of papers or records relating to naturalization are 2541.
Certified copies of records in office of county recorder may be read 1094.
Certified copies of records of city clerk, admissible 818.
Certified copies of records of notary, prima facie evidence 2754, 2755, 2759.
Certified copies of records relating to mining claims may be obtained, prima facie evidence 1636, 2754, 2759.
Certified copies of records relating to mines to have same force in courts as original 2467.
Certified copies of re-recorded records lost have effect of original 5630.
Certified copy of certificate of incorporation is prima facie evidence, when 1221; foreign corporation 1346.
Certified copy of incorporation of athletic, historic, scientific or literary societies, prima facie 1384.
Certified copy of incorporation of W. C. T. U. prima facie 1437.
Certified copy of instrument recorded in office of county recorder, may be read 1094.
Certified copy of roll and ordinance for special assessment by city is prima facie 867.

Evidence—continued.
Certified copy of will to be admitted 5877.
Clergyman not to testify regarding confession without consent 5426.
Commission to take deposition out of state to authorize commissioner to administer oath 5461.
Contents of writing, how proved 5417.
Conveyance properly acknowledged may be read 1043.
Copies of entries of county clerk relating to partnership are prima facie 2914.
Copies of records relating to mining claims impart notice and may be read 1635, 1636.
Copy of record of conveyance may be read 1044.
Courts to take judicial notice of change in class and organization of city 775.
Deed derived from sale of real property for delinquent taxes conclusive 3666.
Deed of sheriff, executor, administrator, guardian, assignee, receiver, trustee or commissioner prima facie evidence of regularity of sale when record lost 5631.
Deed to have same effect when made by successor of officer making sale of real estate for delinquent taxes or under execution or order of sale 1662, 1663.
Deed under tax sale made by treasurer not prima facie of title of purchaser when record destroyed 5631.
Delinquent tax list or certified copy is 3658.
Deposition deemed of party reading 5457.
Deposition for perpetuation of testimony to be filed with clerk 5468.
Depositions may be taken in proceeding before public service commission 4534.
Deposition permissible in proceeding for naturalization 2523.
Deposition taken for perpetuation of testimony may be read with same effect as oral testimony, objection to witness or question 5471.
Deposition taken out of state may be read by either party 5463.
District court may state to jury, limitation 4846.
Documentary, may be required by mandamus on contest for county or township office 1906.
Documentary, reference may be made to on motion for new trial 5321.
Duplicate notice of location of mine in office of county recorder receivable same as original 2473, 1635, 1636.
Duty of witness to testify, produce papers and remain pending hearing 5436.
Entries in justice's court docket are prima facie 5733, 5801.
Exclusion of witness during trial 5449.
Failure of wife to file inventory of separate property is prima facie evidence that it is not the separate property of wife 2159.
Fares and rates fixed by railroad commission are prima facie 4563, 4564.
Grubstake contracts for location of mines are prima facie 2475.
How and by whom deposition may be taken out of state 5459, 5460.
How attendance of witness may be enforced to take testimony 5432.
Evidence—continued.
How subpena issued for witness 5432.
How treated by court in action to review order of public service commission 5440(b).
Husband and wife, prosecution for crime committed by one against the other, either may testify 5424.
Husband or wife to consent to the giving of testimony by the other 5422.
If conveyance acknowledged and recorded subsequent purchasers and mortgagees deemed to take with notice 1039.
If inspection of writing refused it may be excluded or contents presumed and party punished for contempt 5416.
If insufficient to justify verdict or decision or if error in ruling upon, motion for new trial must be made before appeal 5328.
If no reporter court may order clerk to take down 5473.
In action against railroad company for baggage 3553.
In action for libel truth may be given (Nev. Const. art. i, sec. 9) 238.
In action for recovery of ore, gold dust or bullion, when failure to make entry or loss of books by purchaser no defense 2486.
In action to review order of public service commission, additional may be introduced 4540(c).
In bankruptcy proceedings 563.
In district court in action to review order of public service commission may be transmitted to commission 4540(b).
In possessory action for public lands, when possessory right extends to boundaries of survey 5854.
In statement on appeal, or amendments to proposed statement on appeal, when to be reduced to narrative form and when complete transcript may be furnished 5333.
Insufficient as grounds for new trial 5320.
Interrogatories direct and cross for taking deposition out of state 5460.
Judicial records of other states, how certified and proved 5411.
Judge or jury may be called 5429.
Judge to designate officer to take testimony for perpetuation and prescribe notice 5466.
Justice's court may make order for inspection of written instrument and delivery of copy 5769.
Libel, in action for, truth may be given (Nev. Const.) 238.
Manner of taking testimony for perpetuation 5468.
Marriage certificate or certified copy is 2350.
Materiality of, must be shown in affidavit for continuance 5202.
Matters of excuse, justification or avoidance may be given in action for forcible entry or unlawful detainer 5602.
Newly discovered and material as ground for new trial 5320.
Notice and demand for inspection of book or writing 5416.
Of fact, deemed excepted to 5318.
Of foreign corporation, acting without filing certificate 1347.

Evidence—continued.
Of foreign corporation, certificate of incorporation certified by county recorder 1346.
Of incorporation 1110.
Of lost writing 5417.
Of more certain description than included in assessment roll may be given in action for delinquent taxes 3662.
Offer to allow judgment in justice's court not admissible 5777.
Officially reported, when may be used on subsequent trial 5472.
On foreclosure of mortgage in district court, rule xxiii, p. 1429.
On hearing petition to change name of person 5837.
On motion for new trial 5321.
Only so much as necessary to explain grounds to be inserted in statement on appeal on questions of law alone from justice's court 5789.
Only so much as necessary to explain need be stated in taking exception 5317.
Oral, of loss and contents of writing 5417.
Order of admission on trial by jury 5210.
Original documentary not to be taken from district court, rule xix, p. 1428.
Original or certified copy of judicial records of this state or the United States 5408.
Papers or records certified by adjutant-general are 4080.
Party or assignor cannot testify if other party to transaction is dead 5419, 5423.
Penalty for witness disobeying subpena, forfeiture and damages 5439.
Person present compelled to testify 5435.
Persons excluded as witnesses 5423.
Presumption as to value of ore extracted from mine 5509.
Prima facie of facts when filed with testimony taken for perpetuation 5469.
Prima facie of neglect of assessor if property not assessed 3625.
Printed statutes and laws of other states or foreign government presumed to be correct 5413.
Production of witnesses and papers may be required by arbitrators on voluntary submission of dispute between employer and employee 1932.
Proof by affidavit or oral testimony on trial laying foundation for introduction of deposition 5456.
Public officer not to be examined as witness 5428.
Rates fixed by public service commission prima facie lawful 4539, 4540.
Receipt of district attorney or tax receiver in suit for delinquent taxes is prima facie 3665.
Recorded affidavit of annual work on mines or copy is prima facie 2431.
Recording of marriage contract imparts notice 2183.
Records, how proved under act of Congress 526-529.
Records of courts of other states, how certified and proved 5410.
Regarding forcible entry and detainer may be given in justice's court 5721.
Evidence—continued.
Regarding title of real property or legality of tax, impost, assessment, toll or municipal fine not to be given in justice's court 5721.
Right to take copy of book or paper 5416.
Sale by vendor in possession of goods without delivery conclusive of fraud 1078.
Selling and delivery of commodity under act fixing standard weights and measures as prima facie representation by vendor 4812.
So much as is necessary to explain errors to be embodied in statement on appeal 5332.
Statute affecting competency of witnesses does not apply to attestation of written instrument 5419.
Subpena, how served if witness be concealed 5434.
Subpena, how served, witness may demand fees 5433.
Surety company's qualifications 698, 700.
Surveys made by county surveyor or by mutual consent may be admitted in evidence 1667.
Taken by deposition out of state may be without interrogatories upon agreement of parties 5460.
Testimony for perpetuation to be taken before judge 5467.
Testimony of witness may be taken and perpetuated 5464-5473.
That property cannot be divided without prejudice in action for partition 5538.
Time for recount in election contest not to run until evidence available 1894, 1895.
Transcript of official reporter duly certified is prima facie, of testimony in court proceedings 4912.
United States laws published by Little & Brown to be 529.
Warrant may issue to bring witness, when 5440.
What required before entry of judgment in action for partition 5534.
When admissible on part of state to show that company is not duly incorporated 1154.
When arrest void in civil action and arresting officer liable 5446.
When bank deemed insolvent 629.
When certified copies or record of United States land patents may be read 5415.
When certified copy of record of notary public or of procedure is prima facie 2754, 2759.
When contents of numerous accounts or documents may be proved 5417.
When conveyance may be read 1043-1046.
When copy of foreign record admissible 5412.
When deposition may be taken out of state 5458.
When husband or wife cannot be witness against the other 5424.
When instrument affecting real property or copy may be read 5414.
When interpreter may be summoned and sworn, contempt 5430.
When may be heard after service of summons in action for divorce 5839.

Evidence—continued.
When notice imparted by record of instrument in county recorder's office 1093.
When notice or affidavit regarding annual work or payment, or certified copy thereof, is prima facie evidence 2432.
When objection not available to form of interrogatories in deposition 5456.
When objection to form of interrogatory in testimony taken for perpetuation must be made at examination and before trial 5470.
When record of this state or the United States other than judicial in custody of public officer or certified or verified copy may be read 5409.
When survey and certificate of survey are prima facie of boundaries of mines 2429.
When testimony taken for perpetuation may be used on trial, certified copy, form of interrogatories 5470.
When trial postponed for nonreturn of deposition taken out of state 5462.
When unnecessary in statement on appeal 5333.
When witness exempt from arrest in civil action 5445.
When witness may be required to attend and bring books, distance from place of trial, mileage 5431.
When witness not immune from testifying under act to regulate railroad and other rates 4565.
Which may be received in action to restore lost records 5635.
Who to explain altered writing 5418.
Witness, competency of 5419-5449.
Witness may be punished for disobedience to subpena, refusal to be sworn or answer or to subscribe affidavit or deposition 5438.
Witness may take affirmation instead of oath, form 5448.
Witness must answer as to previous conviction of felony 5437.
Witness need not testify unless paid fee if demanded 2012.
Witness not Christian, how sworn 5447.
Witness not excused from testifying or producing papers before public service commission on ground would criminate 4536.
Witness not required to give answer which would degrade or subject him to punishment for felony except as to conviction 5437.
Witness not to be unreasonably detained (Nev. Const.) 235.
Witness required to answer legal and pertinent questions 5437.
Witness shall not be rendered incompetent on account of religious belief (Nev. Const. art. i, sec. 4) 233.
Witness subscribing to will examined 5874.
Evidences of debt, when are included in words "personal property" and "property" 5475.
Ex post facto law, or law impairing obligation of contracts not to be passed (Nev. Const. art. i, sec. 15) 244.
Examination, of books of assayer, mill, or purchaser of ore, gold dust or bullion upon affidavit before justice of the peace or district judge 2484.
Excavation, dangerous, action against party failing to fence 3235, 3237.
Exception, bills of, may be settled by judge after expiration of term 5489.
Bills of, when settled by judge after expiration of term have legal effect 5490, 5491.
Defined, when to be taken, must be material 5315.
Form of, point of exception need not be repeated 5317.
How taken, when may be proved before supreme court 5316.
Matters deemed excepted to 5318.
Only so much evidence as necessary to explain need be stated 5317.
To be disregarded on motion for new trial or appeal unless material and prejudicial 5315.
To decision, district judge may be required to note 4847.
To error of law occurring on trial 5320.
To ruling upon admissibility of testimony, what portion of testimony to be set out by question and answer in statement on appeal 5333.
To sureties to undertaking for attachment in justice's court 5750.
Exceptions, bill of, may be taken and settled at time of decision, order or ruling, only pertinent facts to be stated 5343.
In civil action, schedule of sections 5315.
Must be taken and settled in lower court to want or insufficiency of finding 5345.
To be embodied in statement on appeal 5332.
To deposition taken out of state 5463.
To want or insufficiency of finding, when to be taken and settled in lower court 5345.
Verified memorandum of, upon motion for new trial, when to be filed 5322.
Execution, action against officer for nonpayment upon may be commenced within 2 years 4967.
After sale under court may enjoin injury to real property 5519.
Alias process may issue for restoration of possession of land after conviction of contempt for reentry 5394, 5395.
All blanks must be filled in by justice of the peace before issuance 5809.
Amount to be computed in dollars and cents 5271.
And satisfaction of, in proceedings in eminent domain 5620.
Appraisers may be appointed to estimate value of homestead 2144.
Arrest of defendant on supplementary proceedings 5308.
Cabinet of ores, geological specimens or curiosities, or paleontological, remains exempt 5823, 5824.
Catalogue to be kept of specimens, ores or curiosities, exempt 5824.
Charge allowed for publication of notice of sale under 5290.
Costs in aid of, who entitled to in justice's court 5813.
Damages to real property after sale and before delivery 5520.
Debtor of judgment debtor may pay creditor 5309.

Execution—continued.
Debtor may be ordered to give undertaking to appear in supplementary proceedings and not to dispose of property, commitment to prison for default 5308.
Defacing notice of sale, penalty 5291.
Disobedience of orders in supplementary proceedings punishable as contempt 5314.
Excess of homestead value over $5,000 may be sold under, partition 2144.
Exemption of homestead not to extend to unmarried person unless having charge of certain kin 2145.
Fees and salaries of persons holding office or positions under state subject to 2864.
For cost of partition fence 3605.
For costs to be issued when remittitur filed in lower court 5361.
Homestead of value of $5,000 exempt from 2142.
How levied and sale how made of mortgaged personal property 1080.
How to be issued, what to state and require 5281.
Horses and property of state militia exempt from 4086.
If another party claims property of debtor or denies debt, suit may be ordered and transfer forbidden in supplementary proceedings 5313.
In action by woodchopper on lien 2230.
In action for lien for keeping animals 5499.
In civil actions, schedule of sections 5280.
In civil actions in justice's court, when defendant subject to arrest on 5759.
In district court, not to be stayed upon motion for new trial except upon bond and notice, rule xxvi, p. 1429.
In district court, practice for stay of pending appeal, rule xxii, p. 1429.
In justice's court, duty of officer receiving 5786.
In justice's court, may be issued, stay 5783.
In justice's court, may be renewed or an alias issued 5785.
In justice's court, schedule of sections 5783.
In justice's court, what must contain 5784.
Judge may order property applied in satisfaction in supplementary proceedings 5312.
Justice of the peace may issue upon docket of predecessor 5805.
Justice of the peace may issue to any part of county 5808.
Liability for stay of on appeal 5347.
Liability of sheriff for failure to execute writ 1651.
Material furnished for building exempt from 2225.
May be issued in action for delinquent taxes as in other civil cases 3665.
May be issued to different counties 5286.
May be issued under judgment revived for failure of purchaser to obtain real property sold 5306.
May be levied on property under attachment 5287.
May be levied upon mortgaged personal property, including growing crops 1080.
May issue after death of party 5285.
Execution—continued.
May issue for costs in estates of deceased persons 6109.
May issue for costs on review other than by appeal 5386.
May issue in officer's own name for unpaid fees 2027.
May issue to enforce judgment in mandamus proceeding 5705.
May issue to enforce order for payment of money 5366.
Not stayed pending appeal unless sureties justify 5354.
Not to be levied in action on claim against bank in hands of bank examiner 671.
Not to be levied on benefit from insurance on assessment plan 1318.
Not to issue in action against estate of deceased person 5974.
Notice of sale under, how given 5290.
Of judgment requiring payment of money or performance of act 5284.
Of written instrument copied into complaint or answer, when admitted 5062, 5063.
Officer selling property under without notice, damages and penalty 5291.
On homestead, exemption not allowed surviving spouse on separate property 2145.
On judgment for deficiency for sale under foreclosure 5501.
On judgment on joint contract, how satisfied where some defendants not served with summons 5282.
On judgment on joint contract, satisfaction of out of joint property 5282.
One undertaking sufficient to stay on appeal from judgment and order granting or denying new trial 5348.
Or renewals, issuance of, payment upon, entry to be made in justice's court docket 5800.
Proceedings supplementary to 5307, 5308.
Proceedings supplementary to, relating to district court, are applicable to justice's court 5787.
Property attached may be sold to satisfy 5151.
Property obtained from garnishee to be sold under 5175.
Property may be ordered applied in satisfaction of in supplementary proceedings, 5308.
Property not exempt for purchase price or for amount due on mortgage or lien 5288.
Property of husband not liable for debts of wife as sole trader 2194.
Publication of notice of sale under 5290.
Real property sold subject to redemption, who may redeem 5299.
Reasonable amount of debtor's property to be exempt (Nev. Const. art. i, sec. 14) 243.
Resistance to, punishable as contempt in justice's court 5795.
Sale of franchise under, organization of new corporation, credit sale 1151, 1152.
Sale of real estate under suit to foreclose liens to be similar 2227.
Sale under, debtor may direct order in which property shall be sold 5292.

Execution—continued.
Sale under, how made 5292.
Sale under, of land in two counties, notice to be given in both 5292.
Sale under to be absolute in action by majority owners against minority owners for expenditures on mine 2482.
Sheriff after term of office may collect upon previously levied 1656.
Stay of, does not result from appeal from judgment of ouster in quo warranto 5682.
Stay of, how obtained in action for forcible entry or unlawful detainer 5601.
Stay of, on appeal from judgment or order directing execution of conveyance 5350.
Stay of, on payment of judgment by tenant in action for unlawful detainer 5599.
Stay of, when appeal perfected 5352.
Time and issuance of 5280.
To be levied only on such property as judgment debtor indicates when there is excess 5289.
To issue by county clerk to other counties on abstract of judgment from justice's court docketed in district court 5781.
To satisfy deficiency if attached property insufficient to satisfy judgment 5160.
Undertaking or deposit for stay of on appeal from justice's court 5792.
Undertaking to stay on appeal from judgment or order directing sale or delivery of property and in other cases 5351.
Unsatisfied, court may appoint referee to examine party owing or having property of debtor 5310.
Unsatisfied, party owing debtor or having property may be examined 5310.
Unsatisfied, when receiver may be appointed 5193.
Wages are preferred claim against 5494.
What exempt from 5288.
What liable to, property not affected until levy 5287.
When may be stayed without undertaking if appellant is executor, administrator, trustee or person acting in another's right 5352.
When not to be issued on judgment against closed bank 671.
When not to issue on judgment recovered against deceased in lifetime 5975.
When notice of sale may be posted instead of published 5290.
When returnable 5283.
When stay of to be ordered by justice's court pending appeal, when officer to relinquish property 5793.
Witnesses required to appear and testify in proceedings supplementary to execution 5311.
Writ of, how executed 5289.
Execution sale, certificate of officer conveys all right debtor had in property on day execution levied 5296, 5297.
Certificate of redemption to be recorded and noted by recorder 5301.
Duplicate of certificate to be filed with county recorder 5298.
Judgment may be given and execution issue against purchaser refusing to pay bid 5294.
Execution sale—continued.
Of personal property to be in view of those who attend sale of real property at the court house 5292.
Officer may reject bid of person who has refused to pay bid 5294.
Personal property and certificate to be delivered to purchaser 5296.
Proceedings against party refusing to pay bid 5294.
Purchaser refusing to pay his bid liable for loss and costs 5293.
Purchaser refusing to pay bid may claim a jury 5294.
Real estate subject to redemption, certificate of sale, what to state 5298.
Redemption of debtor restores estate to him 5301.
Subsequent redemptions, who entitled, conditions, sheriff's deed 5301.
Time and conditions of redemption, taxes 5300.
When sheriff or officer not liable for more than amount bid by subsequent purchaser 5295.
Who are termed redemptioners 5299.
Execution sale of real property, failure of purchaser to recover possession, revival of original judgment for amount paid by purchaser with interest 5306.
Payment of redemption money, how made 5302.
Purchaser or redemptioner evicted may recover price paid from judgment creditor 5306.
Redemption to be made in same kind of money specified in execution 5302.
Rents and profits, how disposed of during period for redemption 5305.
Waste may be restrained until expiration of redemption period, waste defined 5304.
What papers redemptioner must serve with notice 5302, 5303.
What redemptioner must do to redeem 5303.
Executor, action against on rejected claim to be brought within thirty days after notice 5968.
Action for death by wrongful act 5648.
Allegation of as a legal conclusion, when sufficient 5078.
Action not to be maintained on claim against estate of deceased person unless claim has been filed 5972.
Costs in action by or against executor, administrator or trustee and how chargeable 5385.
Duty of to commence action to set aside fraudulent conveyance made by decedent, application and payment of costs by creditors 6029, 6030.
Limitation of action to recover estate sold by or to set aside sale 4964.
May have execution issued on judgment on death of party 5285.
May make conveyance under contract of decedent 6147.
May sue without joining beneficiary 4987.
Time within which action may be brought by or against 4977, 4978.
When may have execution stayed on appeal without giving stay bond 5352.

Executor—continued.
Who is not qualified, when not necessary party to action 6027.
Executory devise, to be alleged in complaint in action for partition 5528.
Exempt property, to be set apart to surviving spouse 2145.
Exemption, from execution of benefit from insurance on assessment plan 1318.
From execution, of homestead of value of $5,000 2142.
From execution of, horses and property of state militia 4086.
From execution, reasonable amount of property of debtor to be (Nev. Const. art. i, sec. 14) 243.
Of homestead, does not extend to lien 2143.
Of homestead, from forced sale (Nev. Const. art. iv, sec. 30) 288.
Of homestead, not allowed surviving spouse on separate property 2145.
Of homestead, not to extend to unmarried person unless having charge of certain kin 2145.
Of material furnished for building from attachment or execution 2225.
Of witness from arrest in civil action 5446.
Exemptions, from execution 5288.
Under state law allowed bankrupt 548.
Exhibit, when original or copy certified by clerk, may be brought up on appeal 5344.
Ex officio tax receiver, failing to settle with auditor, liability in action for taxes charged on roll 3650.
Ex parte order, extending time invalid unless notice promptly given, rule xxxvi, p. 1430.
Explosives, negligent storing of, liability for death or injury of employee 5650.
Express company, rates may be fixed by railroad commission 4555, 4560, 4562.
Extreme cruelty, as affecting division of community property upon decree of divorce 2166.
Is ground for divorce 5838.
Fact, conclusions of, to be presented by special verdict 5222.
Issue of arises, how 5197.
Issue of, defined 5195.
Issue of, either party may demand trial by jury in action for divorce 5845.
Issue of, how tried 5199.
Issue of, how tried in justice's court 5765.
Issue of, in contest of probate of will, how tried 5874.
Issue of, in justice's court, defined 5761, 5763.
Issue of, supreme court may order trial of by jury in district court in quo warranto 5681.
Matters of, district judge not to charge jury on 4846.
Question of, fradulent intent is 1086.
Question of in mandamus proceedings may be tried by jury 5700.
Facts, agreed statement of, how appeal taken 5341.
Certain entries in justice's court docket are prima facie evidence 5801.
Finding of in special verdict controls general verdict 5222.
Facts—continued.
May be approved and settled on appeal by supreme court if judge or referee refuses 5333.
May be specified in statement on appeal instead of testimony by question and answer 5333.
Only pertinent need be stated in bill of exceptions 5343.
Failure, of husband to provide common necessaries of life, when ground for divorce 5838.
False imprisonment, action for may be brought within 2 years 4967.
Farmer, implements and certain property of exempt from execution 5288.
Father, when acknowledgment of, makes illegitimate child legitimate from birth 5833.
When consent of, required on adoption of child 5828.
When entitled to damages for death by wrongful act 5648.
When illegitimate child deemed adopted by conduct of 5833.
When may sue for seduction of daughter 4995.
Federal jurisdiction over certain land within state 1949-1952. See Federal Jurisdiction.
Federal townsites, deed to lot, execution of after trial of adverse claims in district court 1984.
District judge may enter as trustee and dispose of lots under legislative authority 1961, 1982.
If adverse claimants for lots, proceedings to be certified to district judge 1984. See Federal Townsites.
Feeble-minded persons, when may be committed to hospital for mental diseases 2211.
Fee, for absence of occupant of public lands under act relating to possessory actions, disposal of 5853.
Not to be charged for administering oath of office to receiver or other officer 2039.
Of attorney in action for damages for herding or grazing live stock on lands of another 2336.
Of attorney recoverable as costs in justice's court 5814.
Of attorney recoverable by prevailing party in action by workman caused to change place of employment by misrepresentation 1938.
Of attorney recoverable by prevailing party under employers' liability act 1923.
Of county clerk and justice of the peace for services in proceeding for inspection of mine by stockholder 2493.
Of county clerk in proceedings for removal of directors or officers of corporation 1182.
Of district attorney for bringing action for arrearage and to forfeit franchise of toll road 3757.
Of district attorney in action for delinquent taxes 1603, 3677, 3709.
Of district attorney in action for percentage of receipts and forfeiture of franchise of toll road 3757.
Of public officer, if garnished may be paid into court by treasurer or disbursing officer 2865.

Fee—continued.
On appeal to supreme court, payment required before filing, rule xxvi, p. 1425.
Owners in, bound by judgment in actions for partition 5541.
To be paid garnishee before answering under oath 5174.
Fees, and compensation of county and township officers, legislature may regulate (Nev. Const. art. iv, sec. 20) 278.
And costs in action for delinquent taxes, when payable, how entered and taxed 3673.
And expenses of district judge for deed to lot in federal townsite 1986.
And mileage of witnesses appearing before public service commission 4531, 4532.
Attorney as witness not entitled to 2038.
Collection of illegal as ground for removal of officer 2852.
Court, not to be charged for written return 2041.
Court, on appeal to supreme court 2032.
Court, to be paid on appeal from justice's court 2031.
District court, upon commencement of action or proceeding 2030.
Duty of clerk of court to give receipt for upon demand 2033.
Elisor entitled to same as sheriff 5498.
Failure to post table of, officer liable to penalty, recoverable before justice of the peace 2025.
Folio defined, filing of paper includes certificate 2036.
For publication and filing of notice in delinquent tax suit 3663.
In election contest, person may be arrested for receiving 1815.
In proceedings for erection of partition fences 3606.
In proceeding to obtain right of way for railroad 3544.
May be demanded by witness when served with subpena 5433.
Mileage, how and from where computed 2040.
Mileage of constable computed for actual distance traveled 2040.
Not to be allowed as costs for more than two witnesses to same facts 2000.
Not to be received to own use by judicial officer except justice of the peace or city recorder (Nev. Const. art. vi, sec. 10) 325.
Of arbitrators on voluntary submission of dispute between employer and employee 1935.
Of attorney, governed by agreement, lien for 5376.
Of clerk need not be included in cost bill 5387.
Of clerk of court upon naturalization, half to be transmitted 2526.
Of clerk of supreme court 2006.
Of clerk, sheriff and witnesses in contest for county or township office, same as in district court 1811.
Of constable in counties polling over 800 votes 2011.
Of constable when not over 800 votes in county 1999.
Of coroner when acting as sheriff 2010.
Fees—continued.
Of counsel, previously incurred, when not apportioned in action for partition 5543.
Of county clerk in county polling over 800 votes 2007.
Of county surveyor 2017.
Of court reporter, when may be taxed as costs 4913.
Of court reporter, when to be paid by parties 4913.
Of interpreters and translators 2016.
Of juror in civil case to be deducted from amount due him from county 2013.
Of juror, witness, constable, in proceeding relating to apprentices 494.
Of jurors, if no verdict, plaintiff to pay temporarily 2001.
Of jurors in counties polling over 425 votes 2013.
Of jurors in justice's court 2013.
Of jurors paid when no verdict recoverable from losing party 2013.
Of jurors, recoverable as costs from losing party 2001.
Of jurors, when not over 450 votes in county 2001.
Of justice of the peace and recorder for acting in relation to estray animals 2282.
Of justice of the peace in counties polling over 800 votes 2015.
Of justice of the peace, when not over 800 votes in county 2003.
Of notary public in county polling 800 votes or less 2004.
Of notary in county polling over 800 votes 2018.
Of officer selling animals on execution under judgment for charges 5499.
Of public officers subject to attachment and execution 2864.
Of recorders in counties polling over 800 votes 2008.
Of recorders when not over 800 votes in county 1996.
Of referees 5382.
Of referees in action for partition apportioned among parties 5583.
Of sheriff in counties polling over 800 votes 2009.
Of sheriff when not over 800 votes in county 1997.
Of witness in civil case to be taxed as costs, affidavit 2000, 2012.
Of witness in counties polling over 450 votes 2012.
Of witness may be demanded in advance 5431.
Of witness not to be allowed for more than two witnesses to same fact 2012.
Of witnesses and jurors in action for abuse of apprentices 494.
Payable in advance if demanded, if unpaid officers may have execution in own name 2027.
Per diem of jurors to be paid each day by party demanding jury, recovery from losing party 2013.
Sheriff, constable or coroner serving more than one paper in same cause requiring only one journey entitled to only one mileage 2037.

Fees—continued.
Sheriff not liable for failure to make service unless paid 1659.
Table of, to be posted by officers 2025.
To be charged only as provided by statute 2019.
To be entered in book under title of proceeding and open to inspection 2020.
When paid garnishee 5189.
Witness may demand as condition before testifying 2000.
Witness need not testify unless paid if demanded 2012.
Witness, when not over 450 votes in county 2000.
Fee simple estate, when may be taken under eminent domain 5607.
Fellow-servant, damages for personal injuries 5649.
Felony, causing death, action for damages 5647.
Conviction of does not disqualify witness, but may be shown to affect credibility 5420.
Conviction of is ground for divorce 5838.
Witness must answer as to previous conviction 5437.
Witness not required to answer questions which would degrade or subject him to punishment for, except as to conviction 5437.
Felony cases, supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
Female, name may be changed in action for divorce 5844.
Unmarried, when may sue for seduction 4994.
Feminine gender, included in the masculine 5475.
Fences, partition, proceedings for erection at joint expense 3604-3608.
Railroad company to execute bond for building of in proceeding under eminent domain 5619.
Ferries, eminent domain may be exercised for 5606.
Filing of paper, includes certificate 2036.
Final decision, deemed excepted to 5318.
Final judgment, appeal from, of what transcript to consist 5356.
Finding, court may direct in accordance with evidence, although variance 5081.
When exception to must be taken and settled in lower court 5345.
When want or insufficiency of is ground for reversal on appeal 5345.
Findings, contrary to judgment or order, record on appeal 5342.
In juvenile court department in district court, separate entry 730.
May be reported on reference 5230.
Modification of, to conform to issues and evidence 5227.
Of fact, may be waived, how 5228.
Of referee deemed excepted to 5318.
When contrary to judgment or order appeal may be taken upon certified copy of judgment roll 5342.
Fine, action for, justice's court has jurisdiction if amount does not exceed $300, exception 5714.
Fine—continued.
For contempt 5403.
For refusal to obey order of court in quo warranto 5679.
Imposed on officer on refusal to obey writ of mandamus may be retained from salary 5707.
May be imposed by district court on justice of the peace for failure to transmit papers on appeal 5791.
Municipal, district court has jurisdiction of cases involving legality (Nev. Const. art. vi, sec. 6) 321.
Municipal, in action involving legality supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
Municipal, if legality of involved in justice's court, case to be transferred to district court for trial 5721.
Or imprisonment for refusal to obey writ of mandamus 5707.
What, may be imposed by justice's court for contempt 5798.
Fines, district attorney to prosecute action for recovery 1598.
Fire, in case of property may be taken for public use, compensation to be made afterward (Nev. Const. art. i, sec. 8) 237.
Fire insurance company, mutual, action may be maintained by against members 1296.
Flue dust, when eminent domain may be used for disposition of 5606.
Flume companies, rates may be regulated by the legislature (Nev. Const. art. iv, sec. 20) 278.
Flumes, eminent domain may be exercised for 5606.
Folio, defined for computing fees 2036.
Forcible detainer, defined 5587.
Action for, form of writ of restitution 5605.
Forcible entry, action for, appeal, undertaking, stay 5601.
Action for, court not to quash proceedings for want of form 5602.
Action for, district court has jurisdiction (Nev. Const. art. vi, sec. 6) 321.
Action for, form of writ of restitution 5605.
And unlawful detainer, judgment in action for, restitution, rent, treble damages, stay of execution, when tenant may remain in possession on payment of judgment 5599.
And unlawful detainer, jurisdiction in district court 4840.
And unlawful detainer, under act concerning justice of the peace has jurisdiction of possessory actions 5855.
And unlawful detainer, schedule of sections 5585.
Defined 5586.
No continuance in action when admission that evidence would be given 5598.
Other provisions relative to civil actions, appeals and new trials applicable 5603.
Forcible or unlawful entry, treble damages 5508.
Foreclosure, court may enjoin injury to real property during 5519.
Of lien 2227.
Of mortgage, when receiver may be appointed 5193.

Foreclosure—continued.
Of mortgage on mines, holder entitled to recover expenditure made to prevent forfeiture 1091.
Of mortgage or lien, affidavit of payment of taxes 3756.
Of mortgage or lien, how surplus money on sale paid or deposited 5502.
Of mortgage or lien, only sufficient property to be sold to pay installments due and costs, court may order more sold as amounts become due; if property cannot be sold in portions more may be ordered sold 5503.
Of mortgage, practice in district court, reference, service by publication, rule xxiii, p. 1429.
Of mortgage or lien, sale, land in two counties, execution, judgment for deficiency, lien 5501.
Foreign corporation, action against for doing business without filing certificate 1350.
Dismissal of action upon failure to give security for payment of costs 5391.
May exercise right of eminent domain 5629.
Plaintiff, requirement of security for costs, stay of proceedings 5389.
Resident agent to appoint 1178, 1304, 5024.
Foreigners, who are bona fide residents, have same property rights as native-born citizens (Nev. Const. art. i, sec. 16) 245.
Foreign records, how proved under act of Congress 528, 5411, 5412.
Foreign wills, probate of 5878, 5879.
Forfeiture, action for upon a statute, when may be brought within 2 years, exception 4967.
By public utility, action for in name of State of Nevada in district court 4544, 4579.
Justice's court has jurisdiction, if amount does not exceed $300, exception 5714.
Witness not liable to for testifying before public service commission 4536.
Forfeitures, district attorney to prosecute actions for 1598.
Forgery, conviction of excludes from jury, unless restored to civil rights (Nev. Const. art. iv, sec. 27) 285.
Form of abstract of justice's court judgment, 5779.
Of action, only one in civil cases 4943.
When complaint or proceedings in contest for county or township office not to be dismissed for want of 1807.
Forms, for use in proceedings for naturalization 2540.
Foundrymen, liens of 2231.
Franchise, grantee of, liable for damages to real property on right of way 2138. See Franchises.
Nonuser or abuse of by corporation, judgment for dissolution 5670.
Of toll road, action in quo warranto to determine whether forfeited 3049.
Sale of, organization of new corporation 1151, 1152.
When may be taken under eminent domain 2138, 5608.
Fraud, action on ground of may be commenced within 3 years after discovery of facts 4967.
Fraud—continued.
Assignment, sale or transfer of fees or salaries of public officers void against attachment or execution 2864.
Creditor defined in relation to sale or assignment of goods deemed fraudulent 1079.
Duty of executor or administrator to bring suit to set aside fraudulent conveyance made by decedent 6029, 6030.
For debt contracted by and in case of libel and slander there may be imprisonment (Nev. Const. art. i, sec. 14) 243.
Fraudulent intent is question of fact 1086.
Sale by vendor in possession of goods without delivery conclusive of 1078.
Suit, decree, judgment and other things had with intent to defraud are void 1083.
When assignments void in bankruptcy proceedings 609.
When ground for arrest of defendant in civil action in justice's court 5744.
When vitiates judgment or decree as to creditors 1083.
Fraudulent purchase of property, action to vacate, receiver may be appointed 5193.
Freight, when common carrier may sell unclaimed property to pay 541.
Freight rates, may be regulated by the legislature (Nev. Const. art. iv, sec. 20) 278.
Fumes, when eminent domain may be used for disposition of 5606.
Fund, when receiver may be appointed to take charge of 5193.
Funds, of county, assigned to payment of claim, if not collected within two years payable on other claims, new demand and reallowance necessary or claim barred 1536.
Garnishee, may be ordered to appear before the court 5170.
Garnishment, amendments to be liberally allowed in proceedings 5190.
Answer of claimant in garnishment proceedings 5180.
Answer of garnishee deemed true if no reply by plaintiff 5178.
Answer of garnishee, reply 5178.
Debts owing defendant by municipal or other corporations may be garnished 5154.
Debts subject to 5152, 5154, 5169.
Different writs of, with different names, may be issued 5172.
Discharge of garnishee does not bar action by defendant 5183.
Disposal of property received by sheriff from garnishee after payment or performance 5187.
Fees and salaries of persons holding office or positions under state, subject to 2864.
Form of writ 5171.
Garnishee may be cited, examined and sued 5177.
Garnishee may be required to deliver property to sheriff 5155, 5175.
Garnishee may deduct sums due him by either party, record of judgment, counterclaim 5181.
Garnishee may deliver property or money, release, return 5175.
Garnishee may pay indebtedness or deliver property and be discharged 5180.

Garnishment—continued.
Garnishee not chargeable with costs unless his answer is successfully controverted 5175.
Garnishee to deliver property to sheriff, sale, judgment against garnishee 5175.
Garnishee, to give memorandum of debts, credits and property 5156.
Garnishee, to file answer under oath, fee, interrogatories 5174.
Issuable with attachment or afterward 5169.
Judgment acquits garnishee for amounts paid and demands 5182.
Judgment against garnishee 5177.
Judgment against garnishee for debt not due, execution deferred 5184.
Judgment against garnishee on failure to answer 5175.
Judgment when answer of garnishee and no reply 5178.
Judgment may be entered against garnishee in favor of plaintiff 5175.
May be served before return of writ of attachment 5173.
New matter in plaintiff's reply to answer of garnishee deemed denied, trial, judgment, costs 5179.
Of fee or salary of public officer, auditor, treasurer or disbursing officer, may pay into court 2865.
Party refusing to give memoranda may be required to pay costs of obtaining information 5156.
Person owing defendant may be examined under oath 5155, 5170, 5174.
Proceedings, costs, when garnishee entitled to fees 5189.
Proceedings, may be had after judgment 5190.
Proceedings, new trials and appeals allowed as in other cases 5191.
Property pledged to garnishee to deliver on payment or performance 5185, 5186.
Schedule of sections relating to 5169.
Service of complaint and summons on garnishee 5177.
Service of, gives court jurisdiction to proceed against garnishee 5173.
Sheriff to give receipt for money collected 5157.
Third person may be interpleaded, notice, proceedings, judgment 5180.
When garnishee liable for contempt for failure to deliver 5188.
When garnishee may be released from liability 5175.
Witnesses may be subpenaed to testify against garnishee 5177.
Writ of, how served and returned, alias writs 5172.
Gas company, may condemn for right of way 2138.
Gender, masculine includes the feminine and neuter 5475.
General manager of corporation, deposition of may be taken 5454.
Genuineness, of signature to note or instrument admitted in justice's court unless denied by verified answer 5770.
Geological specimens, exempt from execution 5822, 5823.
Gold coin, judgment for damages to be in 5269.
Gold dust and bullion, to be returned as money and not sold under execution 5287.
Good faith, if demurrer in district court not interposed in, defendant to answer only on terms and case to be set for early trial, rule viii, p. 1427.
"Goods," when is included in words "personal property" and "property" 5475.
Governor, liable to impeachment for misdemeanor or malfeasance (Nev. Const. art. vii, sec. 2) 335.
Governor, may direct attorney-general to commence action in quo warranto 5658.
Governor, may direct district attorney to bring action against any person unlawfully holding public office 1814.
Governor to appoint successor to officer removed for malfeasance 2853.
Governor, transmission to of copy of judgment removing officer for malfeasance 2853.
Governor, trial of, impeachment, chief justice to preside over senate (Nev. Const. art. vii, sec. 1) 334.
Governor, when may direct district judge to hold court in another district 4844.
Governor, when to direct bringing of action against foreign corporation for doing business without filing certificate 1350.
Grand jury, local or special law for summoning or impaneling or for compensation, invalid (Nev. Const. art. iv, sec. 20) 278.
Grazing, when action for possession of public lands may be maintained 5849.
Grazing sheep on lands of another, or within one mile of ranch house, damages 2319.
Grounds for arrest in civil action 5088.
For challenge to jury for cause 285, 5206.
Grubstake contracts, for location of mines acknowledged and recorded, are prima facie evidence 2475.
Guardian ad litem, how appointed 4993. See Guardians.
How appointed in civil action in justice's court 5726.
May be appointed when infant, insane or incompetent person is party 4992, 4993.
When to give bond, D. C. rule xxxi, p. 1430.
Who may be appointed, rules xxix-xxx, p. 1430.
Guardians, ad litem, appointment 4992, 4993, 5726, 6161. See D. C. rules xxix-xxxi, p. 1430.
Guardians for insane or incompetents, action by or against, to appear by 4992, 4993.
Appointed, when, bond of 2200, 2201.
Bond of 6164.
Bond to secretary of state for expenses 2201.
Partition of property 5572.
Petition for letters, procedure 6162.
Powers, qualifications 6164.
Guardians for minors, action by or against, appearance by 4992, 4993, 4996, 4997.
Action for seduction of female ward 4995, 4996.
Action to recover estate of sold by, limitation 4963.
Appointment for 6149.
Appointment, order of 6151.

Guardian for minors—continued.
Apprentices, liability for 492, 497.
Bond, additional, neglect to give 6157, 6159.
Bond of, conditions, sureties 6155-6158.
Consenting to employment of ward under fourteen 6824.
Custody may be taken from, when 734.
Death by wrongful act or injury, action for may bring, when 4996, 4997.
Deed to townsite lot made to 1986.
District court, power to appoint 4849.
Divorce, judgment of, how affects ward 5841.
Education and maintenance 6160.
Estate of, application to 6160.
Female, permitting in house of prostitution 6445.
Judge to approve 6152.
Juvenile court law, provisions 734, 735, 738, 739, 740, 751, 752.
Lawful age 6154.
Letters, revocation of 6158, 6159.
Limitation of action for estate sold by 4963.
Minor may nominate 6151, 6152.
Named in will 6150, 6161.
Next friend, sue or defend for 6161.
Notice of petition 6150.
Order appointing 6151.
Orphans 4096.
Parent entitled to be 6153.
Pendente lite 6161.
Petition for letters 6150.
Powers and duties of 6154.
Railroads, conveyance to by 3534.
Removal, procedure 6159.
Seduction of, may bring action for 4995.
Summons, service on 5023.
Superintendent of institution for care of may be 735.
Suspension, pending hearing of charges 6159.
Ward under 14, employment unlawful, when 6824.
Will, named in 6150.
Guardian for minors, nonresident, application for letters 6187.
Bond and qualifications 6187, 6189.
Duties and powers 6188, 6189.
Estate, removal of out of state, proceedings 6198-6201.
First granted, exclusive powers 6190.
Jurisdiction 6190.
Letters, application for 6187.
Local guardian, executor or administrator discharged 6201.
Nonresident guardian may be appointed 6187.
Powers and duties 6188, 6189.
Qualifications 6189.
Record of foreign proceedings, evidence 6187.
Removal of property out of state, proceedings 6198-6201.
Guardians, general provisions, accounts, how rendered 6168.
Accounts, settlement or compounding 6167.
Accounts, when may be required 4949.
Action against sureties, limitation 6185.
Action for partition 5561-5573, 6166.
Action on bond 6184.
Account, joint guardians 6194.
Guardians, general provisions—continued.
Ad litem, how appointed 4993, 5726, D. C. rules xxix-xxxi, p. 1430.
Allegation of as legal conclusion, when sufficient 5078.
Appointment and duties, juvenile court law 739, 740, 751.
Appointment, district judge may make 4849.
Appointment of successor 6181.
Assessed for estate 3929.
Bond, action on within three years 6185.
Bond, additional required on sale 6179.
Bond, form and filing 6184.
Bond, liability on 6184.
Bond of joint guardian 6193.
Bond, new required 6183.
Conversion or concealing estate 6186.
Compensation 6191.
Costs, sale proceedings 6177.
Credit on sales of realty 6195.
Debts, payment of 6165.
Discharge of 6182.
Discharge of sureties 6183.
District court, accounts may require 4849.
District court, power in vacation 4850.
Estate, conversion or concealing 6186.
Estate, investment of 6170-6172, 6180.
Expenses 6191.
Fees of clerk 6196.
Fraud, proceedings on, charge of 6186.
Income, application of 6166.
Income, insufficient, sale 6169.
Injury of ward, may bring action 4995, 4996.
Inventory of estate 6168.
Investment of estate, notice, hearing and order 6180.
Irrigation district may sign petition to annex land to 4772.
Joint, account of 6194.
Joint, bond of 6193.
Joint guardianship 6192-6194.
Justice's court, general may appear in, may appoint ad litem, when 5726.
Legal proceedings 6167.
Limitations, action against sureties 6185.
Management of estate 6166.
Mortgage of property 6165.
New bond required 6183.
Notice of petition to sell estate 6173, 6178, 7174.
Objections to sale of estate, hearing on 6175.
Order for investment 6180.
Order of sale of estate 6178.
Partition, may consent to 5573.
Partition, not to be interested in 5561.
Partition of property 6166.
Partition, sale, security may be taken on 5555.
Partition, to receive share of insane person 5572.
Payment of debts 6165.
Petition for order of sale 6173.
Procedure for sale of estate 6173-6178.
Proceeds of sale, application of 6170-6172.
Railroads, conveyance to 3534.
Removal of 6181.
Resignation of 6181.
Sale for investment 6170.
Sale of estate, procedure for 6173-6178.

Guardians, general provisions—continued.
Sale on partition, security may take 5555.
Sale of property 6165, 6166, 6169.
Sales of realty, credit 6195.
Sale, proceeds, application of 6171, 6172.
Successor to, appointment 6181.
Sureties, discharge of 6183.
Townsite lot, application for deed made to 1983, 1986.
Two or more appointed 6192.
Ward may be removed from custody of 734.
Waste may be sued for, treble damages 5505.
Will, guardian named in 6150, 6161.
Guardians, schedule of sections 6149.
Guardians, special, may be appointed by district judge in vacation 4850.
Habeas corpus, schedule of sections 6226. See Habeas Corpus.
Supreme court and justice thereof may issue, supreme court empowered to issue writ (Nev. Const. art. vi, sec. 4) 319, 4834.
Supreme court or justice thereof may make returnable before district court or judge in any part of the state 4834.
Writ of, district court or judge may issue (Nev. Const. art. vi, sec. 6) 321, 4840.
Writ of, justice of the supreme court may issue to any part of the state returnable before himself, the supreme court or district court or judge (Nev. Const. art. vi, sec. 4) 319.
Writ of, shall not be suspended unless public safety require in case of rebellion or invasion (Nev. Const. art i, sec. 5) 234.
Habitual drunkard, consent of parent adjudged guilty of being, when not required on adoption of child 5828.
Habitual gross drunkenness, when ground for divorce 5838.
Handwriting, when evidence of may be taken by officer taking acknowledgment 1031.
Hearing, in mandamus proceedings 5698.
On writs of mandamus, certiorari and prohibition may be set for any time 5711.
Under writ of certiorari 5691.
Hearings, when any district judge has entered upon trial or hearing or made ruling no other judge to act unless upon written request, rule xl, p. 1431.
Heir, bound by judgment in action for partition 5541.
May sue for death of adult 4887.
Unknown may be made party in action regarding real property 5009, 5010.
Unknown, service of summons by publication 5028.
When entitled to damages for death by wrongful act 5648.
Highway, action may be brought by party aggrieved to set aside damages awarded by viewers on opening 3015.
Condemnation of property for, viewers, damages, appeal to district court 3008.
Measure of damages for cutting timber for repair 5507.
Highways, local or special laws for vacating are invalid (Nev. Const. art. iv, sec. 20) 278.
High crime, conviction excludes from jury unless restored to civil rights (Nev. Const. art. iv, sec. 27) 285.
Holographic wills 6223, 6225.
Homestead, decree setting apart 6111. See Homesteads.
Descent to heirs 2145.
Excess of value over $5,000 may be sold under execution, partition 2144.
Exempt from execution 5288.
Exemption does not extend to lien 2143.
Exemption not allowed surviving spouse on separate property 2145.
Exemption not to extend to unmarried person unless having care of certain kin 2145.
Liable for purchase money, taxes, improvements or lien given by consent of husband and wife (Nev. Const. art. iv, sec. 30) 288.
Litigation, existing rights not affected 2145.
Not affected by preferred claim for wages 5494.
Not to be alienated without joint consent of husband and wife and to be exempt from forced sale, when (Nev. Const. art. iv, sec. 30) 288.
Owner may obtain order of court to convey if wife insane, disposition of proceeds 2146, 2147.
Selection of 2142.
Taxes, when not exempt from sale for (Nev. Const. 288) 2149.
To value of $5,000 exempt from execution 2142.
When to be set apart for use of widow and minor heirs 2165, 5957.
Hotel, when and how baggage left at may be sold 2153.
Husband. See Crimes, Divorce, Marriage, Husband and Wife.
Imprisonment or adultery of, what disposition may be made of property in action for divorce 5843.
Insane, wife as witness, when consent unnecessary 5422.
May apply for lot in federal townsite for benefit of wife 1983.
May be ordered to pay alimony pendente lite and direction made for application of property 5843.
Neglect of to provide common necessaries of life, when ground for divorce 5838.
Not lawfully separated from wife cannot adopt child without consent of wife 5827.
Not responsible for debts of wife as sole trader 2194.
Not to superintend business of wife when sole trader 2192.
Party to action 4989, 4991.
Separate property of not liable for debts of wife contracted before marriage 2170.
When cannot be witness against wife 5424; in criminal cases 7452.
When deserted by wife may prosecute or defend action in her name 4991.
When entitled to damages for death of wife by wrongful act 5648.
When must be joined as party with wife 4989.

Husband—continued.
When not liable for support of wife when she abandons him 2177.
When not responsible for debts, except 2194.
When reasonable value of necessaries furnished wife may be recovered from 2176.
When wife may be required to support 2178.
Husband and wife, age and requirements on adoption of children 5825.
Community property, how divided upon decree of divorce 2166.
Debts of wife contracted before marriage 2170.
Earnings of wife not liable for debts of husband 2167.
Homestead not to be alienated without joint consent (Nev. Const. art. iv, sec. 30) 288.
Necessaries furnished wife, husband bound 2176.
Property subject to debts of husband 2165.
Sole trader, responsible for maintenance of children 2193.
Sole trader, rights and liabilities 2192.
Statute of limitations, effect on married woman 2976.
Support of husband by wife, when 2177, 2178.
Townsite lots, when married woman may make application 1983.
When either may defend if sued together 4990.
Wife living separate from husband may sue and be sued alone 2179.
Wife's separate property not liable for debts of husband 2171.
Witness for or against each other 5424, 7452.
Idiots, when and how may be committed to hospital for mental diseases 2211.
Illegitimate child, action to determine paternity 765.
Heirs of 6118.
Inheritance of 5833, 6117, 6118.
Judgment that putative father stand charged with maintenance of, refusal to obey contempt 766.
When deemed adopted by conduct of father 5833.
Immunity of witness in court granted, when 4565.
Impeachment, assembly shall have sole power of, concurrence of majority of all members necessary (Nev. Const. art. vii, sec. 1) 334.
Governor, state and judicial officers, except justice of peace, liable to for misdemeanor or malfeasance (Nev. Const. art vii, sec. 2) 335.
Judgment not to extend further than removal from office and disqualification to hold office 335.
Of governor or lieutenant-governor, trial, chief justice to preside over senate (Nev. Const. art. vii, sec. 1) 334.
Schedule of sections relating to 6878. See Impeachment and references thereto.
Trial by senate, oath of senators, concurrence of two-thirds elected necessary (Nev. Const. art. vii, sec. 1) 334.
Impeachment—continued.
Impost, district court has jurisdiction of cases involving legality (Nev. Const. art. vi, sec. 6) 321.
If legality of involved in justice's court, case to be transferred to district court for trial 5721.
Improvements, made in good faith, value allowed as offset to damages in action for recovery of real property 5517.
Required by claimant of possession of public lands 5852.
Incompetent person, as party, how guardian ad litem appointed in civil action in justice's court 5726.
Guardian for 6162-6186.
Incumbrance, action to restore lost record of 5632.
Incumbrances, subject to lis pendens 5021.
Indebtedness, or liability of corporation or person to state, county or municipality, local or special law for release of, invalid (Nev. Const. art. iv, sec. 20) 278.
Indemnity, no bar or defense to action for death or personal injury 5652.
Of owner by contractor under employers' liability act 1915, 1924.
Index, to docket in justice's court required to be kept 5802.
Indictment, for contemptuous conduct, sentence 5405.
Indigent, of another county, when county may recover for relief furnished 2922.
Indigent insane, district judge to cause to be conveyed to asylum at expense of state 2204.
If property exhausted district judge to certify to secretary of state, who shall order insane person transferred to indigent list 2201.
Indorser of negotiable instrument, liability 2614, 2615.
Infamous crime, conviction of is ground for divorce 5838.
Infant, as party, how guardian ad litem appointed in civil action in justice's court 5726.
Must appear in action by general guardian or guardian ad litem 4992.
Not required to give compensation in case of unequal partition 5570.
Share of paid to guardian in action for partition 5571.
Under 14 years of age may apply for appointment of guardian ad litem in civil action in justice's court 5726.
When may apply for appointment of guardian ad litem 4993.
Who may be appointed guardian ad litem, rules xxlx and xxx, p. 1430.
Informal verdict, procedure to cure 5219.
Inheritance, child adopted, entitled to 5826, 5829.
General provisions 6116, 6119, 6140, 6141.
Injunction, action to enjoin shipment and selling of ores 2489.
Bond may be given to prevent dissolution 5146.
Court may enjoin injury to real property during foreclosure or after execution sale 5519.

Injunction—continued.
Court or judge may order hearing before granting 5141.
Defined, how may be granted 5136.
Dissolved when sureties fail to justify 5140.
District court may order against proceedings of bank examiner 675.
District court or judge may issue 4840.
Exception and justification to sureties on undertaking 5140.
Granted without notice, how defendant may apply to dissolve 5143.
Hearing of application, affidavits, evidence 5141.
In actions regarding real property, venue 5011.
In lieu of granting court may require opposing party to give bond for payment of damages regarding use of mine or irrigation of land 5145.
In what cases may be granted 5137.
May be dissolved if plaintiff is injuring defendant or property 5146.
May be granted or continued upon failure of opposing party to give bond 5145.
Motion to dissolve or modify, notice, hearing 5143.
Not allowed after answer except on notice 5139.
Not to issue to compel service by employee 1930.
Orders of public service commission may be enforced by 4545.
Party may be punished for contempt as in case of for removing ore pending continuance of trial 5203.
Railroad commission may enforce orders by 4583.
Restraining corporation from exercising its powers or doing business 1195.
Restraining order on issuance of writ of certiorari 5687.
Schedule of sections 5136.
Service of order fixing time for hearing application 5141.
Staying order of public service commission not to issue until after hearing and notice 4540 (a).
Supreme court may prescribe rules regarding applications for motions to dissolve 5144.
Time for appealing from order granting or refusing 5329.
To suspend business of corporation, notice, exception, when state a party 5142.
Undertaking required upon, exceptions, 5140.
Waiver of objection to sureties by failure to except to sufficiency 5140.
When may be granted upon verified complaint or affidavit 5138.
When may be refused, dissolved or modified 5145.
When to be served with copy of verified complaint or affidavit 5138.
Writ of, district court or judge may issue (Nev. Const. art. vi, sec. 6) 321.
Injury, damages may be recovered in action at law regardless of employers' liability act 1925.
Inquiry into sanity of person accused of crime, schedule of sections 7385. See Crimes and Punishments, and other references.
Insane, guardian or trustee of, may apply for lot in federal townsite 1983.
In absence of district judge county clerk may commit to asylum 2210.
Indigent, district judge to cause to be conveyed to asylum at expense of state 2204.
Order of district judge for payment of expenses for from property or by kindred 2200.
Or incompetent person, must appear in action by general guardian or guardian ad litem 4992.
When idiots and feeble-minded persons may be committed to hospital for mental diseases 2211.
Insane husband or wife, other as witness, when consent unnecessary 5422.
Insane person, accused of crime, schedule of sections relating to 7385. See Crimes and Punishments, and other references.
Action for annulment of marriage 2357.
As party, how guardian ad litem appointed in civil action in justice's court 5726.
Cannot be witness 5423.
Estate of, district court has jurisdiction (Nev. Const. art. vi, sec. 6) 321.
Guardian of to give bond for payment of expenses in advance to secretary of state 2201.
How examined and committed 2204.
If property exhausted district judge may certify to secretary of state, who shall transfer insane person to indigent list 2201.
Kindred may be ordered by district judge to pay charges for, and order becomes lien against property of kindred 2200.
Marriage, recovery, when marriage not to be annulled 2356.
Share of, in action for partition to be received by guardian 5572.
When deed to lot in federal townsite to be made to guardian or trustee 1986.
Inscription, of court seal 4876.
Insolvent bank, when deemed 629. See Banks and Banking.
Insolvent corporation, compensation of receiver 1199.
Dissolution of 1190-1199.
When court may order receiver to sell deteriorating property of 1198.
Inspection, of written instrument, if denied execution not admitted 5063.
Of written instrument, order for in justice's court 5769.
Or admission of writings 5416-5418.
Installments, debt payable in, secured by mortgage or lien, when property may be sold to pay installments before due 5503.
Instructions, demand may be made for giving jury before argument begins 5210.
Further, may be given to jury 5215.
If erroneous, motion for new trial must be made before appeal 5328.
Judge shall not charge jury in respect to matters of fact, but may state testimony and declare the law (Nev. Const. art. vii, sec. 12) 327.

Instructions—continued.
May be given to jury on nonjudicial days 4870.
To jury 5210.
To jury, for finding special verdict 5222.
To jury, further may be given if they become necessary by reason of the argument, rule xl, p. 1431.
To jury, to be in writing 5212.
When to be submitted, settled and given in district court, rule xl, p. 1431.
Instrument, affecting real property or copy, when may be read in evidence 5414.
Copy of, as complaint in justice's court 5736.
Invalid, local or special law giving effect to, invalid (Nev. Const. art. iv, sec. 20) 278.
Judgment for execution of not stayed unless instrument executed and deposited with clerk 5350.
Or copy affecting real property, when may be read in evidence 5414.
When justice's court may make order for inspection of 5769.
Written, when admitted in justice's court unless denied by verified answer 5770.
Instruments, in office of county recorder, impart notice, certified copies may be read in evidence 1094.
Insular possession, when included in words "United States" 5475.
Insurance, life, when exempt from execution 5288.
No bar or defense to action for death or personal injury 5652.
On assessment plan, benefit not to be attached or seized 1318.
Insurers, may be joined in action for a loss under different policies 5002.
Interest, and costs, must be included by clerk in judgment and docket 5388.
And money 2497-2501.
Judgment to draw 7 per cent per annum if no other rate provided 5271.
Legal rate, when not otherwise fixed 6470.
To be included in judgment 5278.
When allowed on disbursements in action for partition 5546.
When may be rebated if property sold on foreclosure to pay installments not due 5503.
Interlocutory order, deemed excepted to 5318.
Interpleader, third person may be brought in in garnishment proceedings 5180.
Interpreter, may be summoned and sworn, contempt 5430.
Interpreters and translators, fees of 2013, 2016.
Interrogatories, and cross-interrogatories, settlement or waiver on application for taking deposition in district court, rule xv, p. 1428.
For taking deposition out of state 5460.
Objection to form of, in testimony taken for perpetuation, when may be made at examination and before trial 5470.
To be put to garnishee 5174.
Intervention, complaint and pleadings 5006.
When costs to be paid by intervener 5006.
Who may intervene as parties 5006.
Invalid deed, local or special law giving effect to, invalid (Nev. Const. art. iv, sec. 20) 278.
Invalid instrument, local or special law giving effect to, invalid (Nev. Const. art. iv, sec. 20) 278.
Invalid will, local or special law giving effect to, invalid (Nev. Const. art. iv, sec. 20, as amended, 1889) 278.
Inventories and accounts, district judge may receive in vacation 4850.
Inventory, estate of deceased persons 5942-5949.
Of separate property of wife filed with county recorder is notice of title 2158.
Verified, to be filed by trustee with clerk on dissolution of corporation in quo warranto 5676.
Irregularity, not affecting substantial rights not ground for dismissal of appeal 5358.
Irrigable lands, on application for injunction court may require opposing party to give bond for payment of damages 5145.
Irrigation, eminent domain may be used for purposes of 5606.
Issue, either party may bring to trial 5201.
In action for unlawful detainer to be tried by jury 5594.
Of fact, arises how 5197.
Of fact, how tried 5199.
Of fact, how tried in justice's court 5765.
Of fact, in contest of probate of will, how tried 5874.
Of fact, in estate to be determined as in common-law action 6109.
Of fact, not shown by the pleadings, when may be tried by jury 4945.
Of fact, party may demand trial of by jury in action for divorce 5845.
Of fact, supreme court may order trial of by jury in district court in quo warranto 5681.
Of fact, when special verdict may be rendered 5222.
Of law and fact defined 5195.
Of law, arises upon demurrer, when 5196.
Of law, how tried 5198.
Of law, in justice's court must be tried by court 5764.
Of law or motion, in district court, when may be heard orally at any place in state or submitted on briefs, rule vii, p. 1426.
Of law, to be first disposed of 5199.
Reference may be ordered for accounting 5229, 5231.
Regarding title to real property or legality of tax, impost, assessment, toll or municipal fine not to be tried in justice's court, transfer of from justice's court to district court 5721.
Issues, how tried when parties in action on joint contract are not summoned until after judgment 5248.
In civil action in justice's court, disposition of 5756.
May be tried on reference 5230, 5231.
May be tried with or without jury in chancery cases 5229.
Mode of trial and postponement, schedule of sections 5195.
Of law and fact in justice's court defined 5761-5763.
Jail, house deemed in which sheriff, or other party in action with sheriff, confined 232, 1646, 1762, 5497, 7603.

Jeweler, when may sell unclaimed property to pay charges 530.
Joinder of causes of action 5039.
Joint debtors, how released from proportion, effect of release 5846.
Order for proper credit and release of from liability to be made by judge or justice 5848.
Released of his proportion not necessary party to action 5847.
Joint property, liable for satisfaction of judgment on joint contract 5282.
Liable on execution if part of defendants jointly liable are served 5031.
Joint tenants, may bring actions for partition 5527.
Judge, before removal from office by legislature shall have opportunity to be heard in person or by counsel (Nev. Const. art. vii, sec. 3) 336.
Compensation of court fee to be advanced to clerk and applied on (Nev. Const. art. vi, sec. 16) 331.
District, may issue writ of certiorari 5684.
District, may issue writ of mandamus 5695.
District, when any shall have entered upon trial or hearing or made ruling no other judge to act unless upon written request rule xli, p. 1431.
Except justice of the peace or city recorder not to receive fees to his own use (Nev. Const. art. vi, sec. 10) 325.
For reasonable cause may be removed on two-thirds vote of members elected to each branch of the legislature (Nev. Const. art. vii, sec. 3) 336.
How to issue subpena requiring attendance out of court 5432.
Insolent behavior toward, is contempt 5394.
Liable to impeachment for misdemeanor or malfeasance (Nev. Const. art. vii, sec. 2) 335.
May administer oath or affirmation 5483.
May be called as witness 5429.
May correct statement on appeal 5335.
May extend time for filing statement and papers on appeal 5336.
May fix amount of undertaking to stay execution of judgment pending appeal 5351.
May make and enforce order for production of child in action for divorce 5840.
May make order for service of subpena on concealed witness 5434.
May order action dismissed for failure of nonresident or foreign corporation as plaintiff to give security for payment of costs 5391.
May order deposition taken out of state 5459.
May order hearing before granting injunction 5141.
May order injunction 5136.
May order motion transferred for hearing before another judge 5365.
May order property attached to be sold 5158.
May order property to be applied on execution in supplementary proceedings 5312.
May order survey of real property 5512, 5513.
May shorten time for notice for taking deposition in state 5455.
May shorten time for notice of motion 5364.
May summon interpreter, contempt 5430.
Judge—continued.
May take affidavit to be used in this state 5450.
May take deposition of witness on continuance 5203.
May vacate or modify order made without notice 5326.
Not properly allowing exception, same may be proved before supreme court 5316.
Not to charge jury in respect to matters of fact, but may state testimony and declare the law (Nev. Const. art. vi, sec. 12) 327.
Of court of record having seal in foreign country may take affidavit 5452, 5453.
Of court of record having seal may take affidavits and depositions in other state or territory 5451, 5453.
Or court may settle cost bill at chambers 5387.
Or court to make order for notice to show cause on application for underground survey of mine 5511.
Or justice of the peace, not to have partner acting as attorney 4867.
Out of state may take deposition 5459.
Power of in proceedings under eminent domain 5614.
Refusal of to settle statement on appeal in accordance with facts, same may be settled by supreme court 5333.
Shall direct bail in contempt proceedings 5398.
To annex examination to undertaking on justification of bail in civil action 5105.
To be served with complaint on proceedings before legislature for removal from office (Nev. Const. art. vii, sec. 3) 336.
To decide before end of term and may perform certain acts after term expires 5489.
To designate and give notice of time for settlement of statement on appeal 5331.
To fix amount of bond to stay execution on appeal from judgment or order directing sale or delivery of property 5351.
To make order for taking testimony for perpetuation 5466.
To order proper credit on judgment on release of joint debtor 5848.
To sign bill of exceptions at time of making decision or order 5343.
To take testimony for perpetuation 5467.
Vacancy in office of not to affect action 4884.
When disqualified to act 4865.
When "justice" to be substituted for in sections relating to attachment 5752.
When may appoint receiver 5193.
When may settle statement on appeal before or after his term of office 5334.
When not to act as attorney 4866.
When to settle exceptions for want or insufficiency of finding 5345.
Judges, and clerks of supreme and distfict courts may take acknowledgments and affidavits 4883.
District court, two or more in one district may adopt rules for division or disposal of business, rule xli, p. 1431.
Judgment, according to fact if plaintiff's right terminates during pendency of action for recovery of real property, damages for withholding 5516.

Judgment—continued.
Acquits garnishee for amounts paid and demands 5182.
Action upon can be commenced within six years 4967.
Action to restore lost record of 5632.
Affidavit for restoration of record of, what to state 5641.
After demurrer overruled and failure to answer in justice's court 5755.
Against claimant in garnishment proceedings 5180.
Against closed bank, when execution not to be issued 671.
Against corporation for dissolution or restraint 5660.
Against defendant arrested in civil action to remain in force against in estate 5121.
Against deceased in lifetime, when execution not to issue against estate 5975.
Against estate of deceased person, certified copy to be filed 5974.
Against garnishee 5175, 5177.
Against garnishee for debt not due, execution deferred 5184.
Against garnishee on failure to answer 5175.
Against parties in action on joint contract, when not summoned until after 5248.
Against state, controller to draw warrant for amount of on presentation of certified copy 5655.
Against surety on official bond, when to pay only for his proportion and costs 2886.
Against unknown heirs, plaintiff to file affidavit that he is without information 5029.
Alias process may issue for restoration of possession of land after conviction of contempt for reentry 5394, 5395.
Amount to be computed in dollars and cents 5271.
And judgment lien in action for delinquent taxes 3665.
Appeal allowed from, in garnishment proceedings 5191.
Appeal from, and from order denying new trial, one statement for both and what to contain 5332, 5333.
Appeal from final, transcript, of what to consist 5356.
Appeal from, when testimony to be reduced to narrative form in statement or amendments to proposed statement and when complete transcript may be furnished 5333.
Appeal may be taken on bill of exceptions settled at time of making decision, order or ruling 5343.
Appealed from, may be reversed, affirmed or modified 5359.
Award of arbitrators may be enforced as 5257.
Binding on unknown heirs served by publication 5028, 5029.
Binding on unknown parties served by publication 5030.
Binds joint property of members of association 5007.
Binds subtenant entering after commencement of action for unlawful detainer 5592.
By confession, may be entered in justice's court 5771.
Judgment—continued.
By confession, verified statement and judgment indorsed constitute judgment roll 5251.
By confession, when and how may be entered, costs 5249, 5250, 5251.
By default may be entered upon failure to answer amended complaint 5043.
Certified copy in contest for county or township office, clerk of board of county commissioners to issue certificate of election 1810.
Certified copy of may be served upon parties required to perform act 5284.
Copy of written opinion in rendering to be furnished appellate court on appeal 5356.
Court may compel acknowledgment of satisfaction 5279.
Damages may be added to when appeal taken for delay 5359.
Directing delivery of documents or personal property, bond on appeal 5349.
Effect of in proceeding to restore lost record 5644.
Entry of in justice's court docket 5800.
Entry of may be deferred by court for further argument 5266.
Execution may be issued on after death of party 5285.
Execution may issue on in mandamus proceeding 5705.
Execution upon may be issued to different counties 5286.
Final process on may be issued by justice of the peace to any part of county 5808.
Final, time within which appeal may be taken from 5329.
For abatement of nuisance and damages 5504.
For costs, execution may issue 5361.
For costs, when plaintiff entitled to 5377.
For damages for death by wrongful act, when not liable for debts, distribution, how made 5648.
For damages to be in gold coin 5269.
For damages under the employers' liability act preferred claim to extent of wages 1926.
For deficiency on sale of mortgaged property may be docketed and become lien on real estate, execution for deficiency 5501.
For delinquent taxes, to include city taxes 878.
For divorce on ground of imprisonment or adultery of husband and in other cases, disposition of property 5843.
For treble damages in actions for forcible or unlawful entry 5508.
Garnishment proceedings may be had after 5190.
Holder of may redeem real property sold under execution 5299.
How enforced in controversy submitted without action, appeal 5254.
How entered in civil action in justice's court 5775.
How given, for or against whom 5239.
How pleaded 5070.
How reviewed on appeal in civil action 5325.
If another party claims property of debtor or denies debt, suit may be ordered and transfer forbidden 5313.

Judgment—continued.
If attached property insufficient, to be satisfied by execution.
If no answer, relief shall not exceed demand of complaint, in other cases relief may be granted consistent with the case and issue 5241.
In action against estate of deceased person does not create lien 5974.
In action against estate of deceased person ranks as approved claim 5974.
In action against the state for services or advances authorized by law 5653.
In action by majority owners against minority owners for expenditures on mine 2481, 2478.
In action by woodchopper on lien 2230.
In action for abuse of apprentice 492.
In action for delinquent taxes to include costs and penalties 3660.
In action for divorce completely dissolves contract and may change name of female 5844.
In action for forcible entry or unlawful detainer, form, when tenant may pay and remain in possession 5599.
In action for foreclosure of mortgage or lien, affidavit of payment of taxes before entry 3756.
In action for partition conclusive upon whom 5541.
In action for partition does not affect tenant for less than ten years 5542.
In action for partition, payment of costs may be specified 5574.
In action for partition, proof required 5534.
In action for unlawful detainer 5592.
In action for unlawful enclosure of public lands 3174.
In action of railroad company against railroad commission to set aside rate 4564.
In action to determine adverse claim to real property, when and how rendered and effect 5524.
In action to determine whether breach of articles of apprenticeship 492.
In action to enforce liens, 2224, 2227.
In certiorari proceedings, copy of to be transmitted to inferior tribunal or officer 5692.
In civil action in justice's court, to state arrest of defendant 5775.
In district court not to be vacated, modified or corrected unless upon notice within six months, rule xlv, p. 1431.
In divorce action, effect of in relation to parties' children and property 5841.
In favor of complainant for $500 on removal of officer for malfeasance 2852.
In garnishment proceedings 5179.
In general in civil action, schedule of sections 5238.
In justice's court, abstract filed in recorder's office creates lien on lands 5782.
In justice's court, abstract of may be obtained and entered in docket of district court and execution issue to other counties 5779, 5780, 5781.
In justice's court, form of abstract 5779.
Judgment—continued.
In justice's court, if amount found due exceeds jurisdiction party may remit excess 5776.
In justice's court, schedule of sections 5754.
In justice's court, taken by mistake, inadvertence or excusable neglect may be set aside 5742.
In justice's court, to be entered at close of trial if no jury 5774.
In justice's court, to be entered at once in conformity to verdict 5773.
In justice's court, to include costs 5778.
In justice's court, waiver of objection that action is in wrong township 5772.
In justice's court, what notice of appeal must contain 5788.
In proceedings for disbarment of attorney 523.
In proceedings under eminent domain, recording 5621.
In quo warranto for usurpation of public office 5661.
In quo warranto ousting director of corporation 5668.
In replevin may be for return of property to defendant 5269.
In replevin may be in alternative and with damages 5269.
Interest and costs must be included by clerk 5388.
Interest and costs to be included 5278.
Interlocutory regarding certain property, time for appealing from 5329.
Intermediate orders affecting may be reviewed on appeal 5340.
Is the final determination of the rights of parties 5238.
Joint or several, when given 5240.
Judge or justice to order proper credit on release of joint debtor 5848.
Justice's court may enter on confession if amount does not exceed $300 exclusive of interest 5714.
Lost or restored, limitation 5638.
Lost or destroyed, may be restored 5640.
Manner of giving and entering 5266.
May be applied for after publication and default and court shall require proof 5236.
May be denied by answer of party summoned after judgment in action on joint contract 5246.
May be entered on report of referees 5235.
May be entered on verdict or decision after death of party, not lien on real property but payable in course of administration 5272.
May be for treble damages in actions for waste 5505.
May be given for defendant for affirmative relief on counter-claim exceeding plaintiff's demand 5268.
May be payable in kind of money specified in contract or obligation, or received in fiduciary capacity 5269.
May be rendered against persons shown to belong to firm executing contract 5003.
May be rendered in action by city, notwithstanding special assessment irregular 868.

Judgment—continued.
May be reported on reference 5230.
May be taken against party refusing to testify or give deposition 5421.
May order party or clerk to convey title to real property 5241.
May vest or convey title to real property 5241.
Method and entry of satisfaction 5279.
Not invalid except on appeal, when taken after overruling, objection in justice's court that action is in wrong township 5772.
Not of record, holder of, need not be made party in action for partition 5529.
Not to be entered until expense of boarding and lodging jurors paid by prevailing party 2035.
Not to be rendered on verdict until expense of jury is paid 4942.
Not to be reversed except for error affecting substantial rights 5066.
Obtained for damages, lien of 5510.
Obtained with intent to defraud creditors is void 1083.
Of court under employers' liability act 1923.
Of dismissal without prejudice may be entered in justice's court in certain cases 5772.
Of district court for removal of officer for malfeasance 2852.
Of district court may be entered in term or vacation 4842.
Of nonsuit, in what cases may be entered 5237.
Of ouster in quo warranto, costs, delivery of books, violation by corporation 5667.
Of ouster on dissolution of corporation, liability of directors 5679.
Of supreme court not effective until opinion filed with clerk 376.
Of supreme court on appeal, entry of in lower court 5360.
Offer to allow as compromise, notice, acceptance. affidavit, result 5265.
Offer to allow in justice court not admissible in evidence, when further costs not recoverable 5777.
On adverse claim to mine when either party establishes right 2384.
On appeal, how certified and entered 5360.
On award of arbitrators, when not appealable 5263.
On conviction of contempt in justice's court to be entered in docket 5799.
On discharge of garnishee does not bar action by defendant 5183.
On dismissal or nonsuit, and how entered 5237.
On failure to answer, how entered 5236.
On impeachment not to extend further than removal from office and disqualification from holding office (Nev. Const. art. vii, sec. 2) 335.
On joint contract, how satisfied where some defendants not served with summons 5282.
On joint contract, satisfaction of out of joint property 5282.
On removal of officer for malfeasance, copy of to be transmitted to governor or county commissioners 2853.
Judgment—continued.
Or decree as affecting adverse possession 4956, 4958.
Order changing name of person to be recorded as 5837.
Order for payment of money may be enforced in same manner 5366.
Party jointly liable, how may be released from his proportion, effect 5846.
Person dispossessed of land under, reentering is contempt 5394, 5395.
Proceeds of property sold under, attachment may be applied upon 5158, 5159.
Property attached may be sold to satisfy 5151.
Property may be ordered applied in satisfaction of, in supplementary proceedings 5312.
Record of, in garnishment proceedings 5181.
Relief may be given from, when obtained by mistake or inadvertence 5084.
Rendered on appeal from justice's court has same force as other judgments in district court 5794.
Requiring payment of money or performance of act, how enforced 5284.
Requiring performance of act or obedience may be enforced 5284.
Revival of for price paid if purchaser fails to obtain real property sold under execution 5306.
Revival of, petition, notice regarding when purchaser fails to obtain real property sold under execution 5306.
Revived because purchaser fails to obtain real property sold under execution to have effect of original judgment 5306.
Sale of franchise under, organization of new corporation 1151, 1152.
Several may be rendered in same action against insurers under different policies 5002.
Shall be rendered upon order of public service commission 4540(c).
Sheriff to specify from sale of property attached 5159.
Subject to lien for attorneys' fees 5376.
Supreme court may reverse or modify on appeal 4835.
To be entered in judgment book to be kept by clerk 5270.
To be given according to special verdict 5222.
To direct sale of encumbered property on foreclosure of mortgage or lien 5501.
To draw 7 per cent interest per annum if no other rate provided 5271.
To recover against sheriff after notice to sureties conclusive against sureties 5242.
That putative father stand charged with maintenance of illegitimate child, refusal to obey contempt 766.
Transcript may be filed in any county and become lien 5277.
Two justices of supreme court may pronounce, reargument if two do not agree 4837.
Under writ of certiorari 5691.
Undertaking for payment of, if adjournment for more than ten days in justice's court 5760.

Judgment—continued
Unknown persons and persons under legal disability concluded by in action to determine adverse claim to real property 5523.
Upon acceptance of offer of compromise 5265.
Upon issue, reference may be ordered for accounting 5229, 5231.
What relief may be awarded to plaintiff 5241.
What matters may be reviewed on appeal from 5340.
When answer of garnishee and no reply 5178.
When appeal may be upon judgment roll or with statement 5338.
When attorney may acknowledge satisfaction 507.
When controvery is submitted without action 5252, 5253.
When court below may proceed upon other matter notwithstanding appeal 5352.
When defendant fails to appear in justice's court 5754.
When entry of award of arbitrators has effect of 5260.
When may be reversed on appeal for want or insufficiency of evidence 5345.
When parties not summoned in action on joint contract may be summoned after judgment 5243.
When plaintiff may apply for relief demanded in complaint after default 5236.
When receiver may be appointed to carry into effect or preserve property 5193.
When satisfied sheriff to deliver to defendant remaining property attached 5160.
When to be entered on award of arbitrators 5260.
When to be satisfied by deposit given on arrest of defendant in civil action 5109.
When void as to creditors 1083.
Judgment creditor, liable for price paid by purchaser or redemptioner 5306.
Judgment debtor, answer in proceedings supplementary to execution 5307, 5308.
Arrest of on proceedings supplementary to execution 5308.
Debtor of may pay creditor under execution 5309.
Excess on sale under execution to be paid to 5289.
Has six months in which to redeem real property sold under execution 5301.
How may redeem real property sold at execution sale 5300.
Levy of execution to be made only on property he indicates when excess property 5289.
May be required to give undertaking to appear in supplementary proceedings and not to dispose of property, commitment to prison for default 5308.
May direct order in which property shall be sold under execution 5292.
Or successor in interest may redeem real property sold under execution 5299.
Party owing or having property of may be examined under execution returned 5310.
Judgment debtor—continued.
Property may be ordered applied in satisfaction of judgment on supplementary proceedings 5312.
Refusing to apply property, receiver may be appointed 5193.
What earnings for personal service and property exempt from execution 5288.
When property sold under execution not subject to judgment lien 5306.
Judgment docket, how kept, form and entries 5275.
Interest and cost included in entry 5278.
Names of defendants to be entered in alphabetical order 5275.
To be open for inspection without charge 5276.
Judgment lien, docket, how kept, what to contain 5275.
Entry, duration 5274.
When property of debtor sold under execution not liable to 5306.
Judgment roll, agreed statement of facts, when appeal taken from 5341.
Appeal may be taken upon, when findings contrary 5342.
Appeal upon 5338.
Copy of judgment constitutes, in controversy submitted without action 5253.
Copy of, to be annexed to statement on appeal 5338.
Entry of, minute of judgment of supreme court 5360.
In action on adverse claim for mines to be filed in land office 2384.
What constitutes, in proceedings in certiorari 5693.
What to constitute 5273.
When judgment is entered by confession 5251.
Judicial departments, persons having powers under not to exercise functions pertaining to legislative or executive departments (Nev. Const. art. iii, sec. 1) 258.
Judicial districts, legislature may provide for and number of judges, change not to take effect except in case of vacancy or expiration of term (Nev. Const. art. vi, sec. 5) 320.
Judicial notice, all courts to take of change in class or organization of any city 775.
Court takes under pleading 5072.
Courts to take of class and organization of city 775.
Judicial officer, except justice of the peace and city recorder not to receive fees to own use (Nev. Const. art. vi, sec. 10) 325.
For reasonable cause may be removed on two-thirds vote of members elected to each branch of the legislature (Nev. Const. art. vii, sec. 3) 336.
Liable to impeachment for misdemeanor or malfeasance (Nev. Const. art. vii, sec. 2) 335.
Judicial power, of state vested in supreme court, district courts, justices of the peace and municipal courts (Nev. Const. art. vi, sec. 1) 316.
Of United States (U. S. Const.) 153-155.
Of United States, does not extend to suit commenced against state by citizen of another state or alien (U. S. Const.) 181.

Judicial proceedings, authentication of under act of Congress 526.
Judicial purposes, county attached to another for, sheriff has same power 1658.
Judicial records, of courts of other states, how certified and proved 5410.
Of foreign country, how certified and proved 5411.
Of this state or the United States, proved by original or certified copy 5408.
Jurisdiction, and powers of district court 4849.
Appellate, of supreme court 4832, 4833.
Civil process may be served on land ceded to the United States 1949-1951.
District court has final appellate, in actions appealed from justice's court (Nev. Const. art. vi, sec. 6) 321.
District court to determine contests for state lands 3208.
Duties of justice of the peace and constable, local or special laws invalid (Nev. Const. art. iv, sec. 20) 278.
Extent of review under certiorari 5690.
In action for delinquent taxes 3659.
In action for possession where relation of landlord and tenant exists, or possession unlawfully withheld, in justice of the peace concurrent with district court 5604.
In civil action after service of summons 5034.
In contest for county or township office in district court 1806.
In district court for proceedings under eminent domain 5611.
In justice's court, if amount found due exceeds, party may remit excess 5776.
In municipal court to be fixed by law so as not to conflict with courts of record (Nev. Const. art. vi, sec. 9) 324.
Justice of the peace has, of violations of city ordinances 886.
Justice of the peace may act in behalf of another in case of sickness or absence 5811.
Justice's court to which civil action is transferred has same 5719, 5720.
Of action for collection of taxes where amount does not exceed $300, in justice's court 5714.
Of action for possession of lands unlawfully obtained or withheld, in justice's court 5714.
Of action involving title to real property does not lie in justice's court 5714.
Of action to enforce mechanic's lien, justice's court does not have 5714.
Of action to recover personal property where value does not exceed $300, in justice's court 5714.
Of action to restore lost records in district court of county where property situated 5636, 5637.
Of action where relation of landlord and tenant exists in justice's court 5714.
Of district court (Nev. Const. art. vi, sec. 6) 321.
Of district court on disincorporation of city 872, 873.
Of district court on transfer of case from justice's court 5721.
Of district judge in vacation 4850.
Jurisdiction—continued.
Of district judges, equal, coextensive and concurrent, functions of court and judges at chambers 4922.
Of federal and state courts in bankruptcy proceedings 564-567.
Of justice of the peace in action by county against person for support of poor kindred 2916, 2917.
Of justice of the peace in action for delinquent taxes for improvement of streets in unincorporated town 934.
Of justice of the peace in action on wood chopper's lien 2230.
Of justice of the peace in possessory actions on public lands 5855.
Of justice of the peace or judge of police court in action against party failing to fence dangerous excavation 3235, 3237.
Of justices of the peace (Nev. Const. art. vi, sec. 8) 323.
Of justice's court in action to foreclose lien 2227.
Of justice's court in cases of forcible entry and detainer 5721.
Of justice's courts in civil cases 5714.
Of municipal court 832-835.
Of recorders' courts in incorporated cities 4853.
Of supreme and district court in quo warranto 5663.
Of supreme court defined (Nev. Const. art. iv, sec 4) 319.
Of the court not waived by failure to demur or answer 5045.
Of U. S. courts (U. S. Const.) 153-155.
Of U. S. courts, does not extend to suit commenced against state by citizen of another state or alien (U. S. Const.) 181.
Original appellate, of district court 4840.
Proceedings under juvenile court law in district court 729.
Supreme court has original in contest for state office 1823.
To enter judgment by confession when amount exclusive of interest does not exceed $300, in justice's court 5714.
What provisions of civil practice act are applicable to justice's court 5815.
Juror, amount paid him in civil case to be deducted from amount due him from county 2013.
Attempting to influence is contempt 5394.
Fees 2001, 2013.
Fees of in action for abuse of apprentice 494.
May be called as witness 5429.
Not to be excused except in open court and name to be withdrawn, rule xxviii, p. 1429.
Person over 65 years of age exempt 4941.
When may be excused for cause 4933.
When sick, procedure 5209.
Jurors, challenges for cause 5206.
Challenges to, how tried 5207.
Expense of keeping together to be paid before entry of verdict or judgment 2035.
Fees, if no verdict, plaintiff to pay temporarily 2001.
Fees of, in proceeding relating to apprentices 494.

Jurors—continued.
Fees recoverable as costs from losing party 2001.
Fees when not over 450 votes in county 2001.
Names of, drawing from jury box 5204.
Names of, to be entered in justice's court docket 5800.
Number and grounds of challenges 5205, 5206.
Peremptory challenges, or for cause 5205.
Per diem of in justice's court 2013.
Per diem to be paid each day by party demanding jury, recovery from losing party 2013.
Per diem and mileage in counties polling over 425 votes 2013.
Per diem and mileage paid when no verdict, recoverable from losing party 2013.
Trial panel of, how drawn 4930, 4937, 4940.
When excess may be discharged 4936.
When kept together expenses of board and lodging to be taxed as other costs 2035.
Who are qualified 4929.
Jurors and juries, schedule of acts and statutory and constitutional cross-references 4929.
Jury, bailiff to attend upon 4916.
Counsel may use instructions in addressing, rule xl, p. 1431.
Deliberation of, duty of officer in charge, parties may appoint persons to remain with officer 5213.
Demand for, entry to be made in justice's court docket 5800.
Demand for, in civil action in justice's court, postponement of trial 5757.
Drawing, number upon consent, examination of 5204.
Finding of, may be had in chancery cases 5229.
How summoned and challenged, number of challenges, in civil action in justice's court 5768.
How to be summoned in action for abuse of apprentices 491.
In civil action in justice's court, parties may consent to number not more than twelve nor less than four 5768.
Instructions may be given to, on nonjudicial day 4870.
Irregularity of, ground for new trial 5320.
Local or special law for summoning or impaneling, or for compensation, invalid (Nev. Const. art. iv, sec. 20) 278.
May be claimed by purchaser refusing to pay bid at execution sale 5294.
May be had by person against whom involuntary petition in bankruptcy filed 561.
May come into court for further instructions 5215.
May correct insufficient verdict 5219.
May determine damages after default 5236.
May determine value of real property, judgment, costs 5377.
May exonerate libel if true and published with good motives (Nev. Const. art. i, sec. 9) 238.
May hear testimony in proceedings under eminent domain 5616.
May render verdict on nonjudicial day 4870.
May take with them certain papers 5214.
Jury—continued.
May try question of fact and assess damages in mandamus proceedings 5700.
May view property or premises 5211.
Not to be charged by district judge on matters of fact 4846.
Oath and custody of 5208.
Of 6 or 12 may be demanded or ordered in trial in juvenile court 729.
On proceedings in justice's court to set aside apprenticeship 493.
Persons not electors, or convicted of certain crimes, to be excluded from unless restored to civil rights (Nev. Const. art. iv, sec 27) 285.
Supreme court may order trial of issue of fact by, in district court in quo warranto 5681.
Three-fourths in civil cases may render verdict, but legislature by two-thirds vote may require unanimous (Nev. Const. art. i, sec. 3) 232.
Three-fourths must agree to find verdict 5220.
To assent to recorded verdict 5220.
To be exclusive judge of credibility of witness 5420.
To be had unless waived in action for unlawful detainer 5594.
To be summoned to determine whether breach of contract of apprenticeship 491.
To determine questions relating to negligence in actions against common carrier, mine or mill operator for death or personal injury 5651.
To find value and may assess damages in action to recover specific property 5224.
Trial by secured but may be waived in civil cases (Nev. Const. art. i, sec. 3) 232.
Verdict of in district court may be certified to supreme court in quo warranto 5681.
When kept together, expense of board and lodging how paid, charged as costs, clerk to disburse 4942.
When may try special issues 4945.
When new may be drawn if juror sick or unable to act 5209.
Jury trial 5204.
Court may adjourn while jury absent, but deemed open, sealed verdict 5217.
If court states testimony must inform jury they are exclusive judges of fact 327, 5212.
If verdict not given, cause may be tried again 5216.
In civil action in justice's court, how waived 5766.
In civil action, schedule of sections 5204.
May be waived, when and how 5226.
Of issue of fact, either party entitled to in action for divorce 5845.
Order of, evidence, defense, instructions, argument 5210.
Right of, in common-law action in U. S. court (U. S. Const.) 177.
To be had in justice's court unless waived 5765.
Justice, duties imposed on extended to in actions for claim and delivery in justice's court 5753.
How to issue subpena requiring attendance out of court 5432.

Justice—continued.
May administer oath or affirmation 5483.
Make take affidavit to be used in this state 5450.
Presiding to certify to records under act of Congress 527.
"Justice," to be substituted for "judge" in proceedings supplementary to execution in justice's court 5787.
When to be substituted for "judge" in sections relating to attachment 5752.
When to be substituted for word "judge" in sections relating to publication of summons 5732.
Justice's court, and justice of the peace. Regarding duties of justice of peace in criminal and other cases, see Justice's Court and Justice of Peace, under "J."
Absence of justice of the peace, another may attend in his behalf 4926, 5811.
Abstract of judgment in justice's court, filed in recorder's office creates lien on land 5782.
May be obtained and entered in docket of district court and execution issued to other counties 5779.
Account, copy of as complaint in justice's court 5736.
When inspection and copy may be ordered in action in justice's court 5769.
Action, appeal from justice's court, power of district court, dismissal, damages, costs, judgment 5794.
Civil, how commenced in justice's court 5722.
Civil, in justice's court, adjournment not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
Alias summons may issue, time for appearance 5729, 5730.
Amendment to complaint or answer may be allowed 5741.
Amendment to pleadings, adjournment, costs, relief from judgment by denial 5742.
Answer and what to contain 5735, 5738.
Answer or demurrer allowed to amended pleadings 5743.
Arrest of defendant, must give undertaking before applying for postponement 5759.
Complaint defined and what to contain 5736.
Court to try issue of law 5764.
Defendant may appear and waive summons 5724.
Demurrer to complaint 5735, 5737.
Entry to be made in docket of date of trial or hearing and mailing notice 5733.
Failure of either party to appear, trial may proceed 5767.
How guardian appointed when necessary 5726.
How judgment entered 5775.
How jury waived 5766.
Justice's court, action—continued.
If defendant fails to set up counterclaim he cannot afterwards sue 5739.
Judgment taken by mistake, inadvertence or excusable neglect may be set aside 5742.
Jury, how summoned and challenged 5768.
Limitation of service of summons 5731.
Notice of hearing after service of summons or appearance 5733.
Parties entitled to one hour in which to appear after time fixed in notice 5733.
Parties may appear in person or by attorney 5725.
Place of trial 5715.
Pleadings and form of 5734, 5735.
Postponement of trial by consent 5758.
Postponement of trial on application of party, grounds, procedure 5759.
Proceedings on demurrer to complaint or answer 5741.
Summons, how served, directed and what to contain 5727.
Summons, how served by publication 5732.
Summons to be served out of town to have certificate and seal of county clerk attached 5732.
Time for appearance of defendant to be specified in summons 5728.
Vacancy does not affect 4884.
Voluntary appearance and pleading without summons 5715.
What statement on appeal on questions of law alone must contain, amendments and settlement 5789.
When admission that evidence would be given avoids postponement 5789.
When attachment to issue 5749, 5750.
When consent to taking of testimony or admission that it would be given avoids postponement 5759.
When court may postpone 5757.
When defendant may be arrested 5744.
When order for inspection of written instrument may be made 5769.
When plaintiff may demur to answer 5740.
When postponement discharges defendant from arrest 5759.
Action, civil, judgment by confession may be entered in justice's court 5771.
Justice of the peace to receive all money collected by sheriff or constable and pay same to parties entitled 5810.
Justice's court to which transferred has same jurisdiction 5719, 5720.
Transfer of from justice's court to district court 5721.
Trial by jury secured but may be waived (Nev. Const., art. i, sec. 3) 232.
Action for claim and delivery in justice's court 5124, 5135, 5753.
For collection of taxes not exceeding $300, justice's court has jurisdiction 5714.

Justice's court, action—continued.
For enforcement of mechanic's lien where amount exclusive of interest does not exceed $300, justice's court does not have jurisdiction 5714.
For possession of land unlawfully obtained or withheld, justice's court has jurisdiction 5714.
For possession of land where relation of landlord and tenant exists, justice's court has jurisdiction 5714.
Action, in justice's court, abstract of judgment filed in recorder's office creates lien on land 4782.
By whom and how summons served and returned 5732.
Certain sections made applicable 5732.
Certificate of county clerk to writ of attachment for service in another county 5751.
Copy of note or instrument admitted unless denied in verified answer 5770.
Deposit may be made in lieu of undertaking 5816.
Entry of judgment after demurrer and failure to answer 5755.
Execution, duty of officer receiving 5786.
Execution may be renewed or alias issued 5785.
Execution to issue by county clerk to other counties on abstract of judgment docketed in district court 5781.
Fees of attorney recoverable as costs 5814.
For recovery of money or damages, when defendant may be arrested 5744.
If amount found due exceeds jurisdiction party may remit excess 5776.
Issuance and stay of execution 5783.
Issue of fact to be tried by jury unless waived 5765.
Judgment of dismissal may be entered without prejudice in certain cases 5772.
Judgment to be entered at close of trial if no jury 5774.
Judgment to be entered at once in conformity to verdict 5773.
Judgment upon default 5754, 5755.
No statement required on appeal to district court on questions of fact or both law and fact 5790.
Offer to allow judgment, when further costs not recoverable 5777.
Place of trial may be changed in certain cases or another justice called 5716, 5718.
Pleadings, issues of law and fact defined 5761-5763.
Proceedings after order changing place of trial 5719.
Undertaking on appeal, requirements with or without stay, deposit, justification of sureties 5792.
Waiver of objection that it is in wrong township 5742.
What entries to be made in docket 5800.
What execution must contain 4784.
What notice of appeal from judgment must contain 5788.
Justice's court, action—continued.
What papers to be transmitted on appeal to district court 5791.
What provisions of civil practice act are applicable 5815.
When place of trial cannot be changed more than once on motion of same party 5717.
When trial must be commenced and how continued 5756.
Who entitled to costs 5813.
Action, involving title to real property or legality of tax, impost, assessment, toll or municipal fine not to be tried in justice's court, 5721.
Action, justice of the peace may issue citation or other process on docket of predecessor 5805.
May issue subpena and final process to any part of county 5808.
May require deposit or undertaking as security for costs before issuing summons 5812.
On appeal to district court, provisions relating to change of place of trial applicable 5794.
Admission, of making of note or instrument in justice's court unless denied by verified answer 5770.
That evidence would be given, when avoids postponement of civil action in justice's court 5759.
Adjournment, entry regarding to be made in justice's court docket 5800.
In justice's court not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
On amendment of pleadings in justice's court if necessity for be shown under oath, costs 5742.
When civil action to be continued without in justice's court 5756.
Affidavit, for change of place of trial in justice's court 5716.
For arrest of defendant in civil action in justice's court 5745.
For attachment in civil action in justice's court 5747, 5749.
Of evidence expected to be obtained on application for postponement of civil action in justice's court 5759.
Showing cause for setting aside judgment in justice's court 5742.
Alias execution in justice's court 5785.
Alias summons in civil action in justice's court may issue, time for appearance 5729, 5730.
Alias venire for jurors in civil action in justice's court 5768.
Allegation in complaint controverted by answer and allegation of new matter in answer, when raises issue of fact in justice's court 5763.
Alphabetical index to docket in justice's court required to be kept 5802.
Amendment, failure to make after sustaining demurrer to complaint in justice's court, action may be dismissed 5772.

Justice's court, amendment—continued.
May be allowed to complaint or answer in justice's court 5741.
Of pleadings in civil action in justice's court 5742.
Of pleadings in justice's court, answer or demurrer allowed to 5743.
Of pleadings, when postponement allowed in action in justice's court 5757.
To statement on appeal on questions of law alone, when to be filed in justice's court 5789.
Answer, allowed to amended pleadings in justice's court 5743.
In civil action in justice's court, what to contain 5735, 5738.
New matter in, raises issue of fact in justice's court in absence of demurrer 5763.
Summons in justice's court to contain direction that defendant appear and answer 5727.
Verified in justice's court showing title of real property or legality of tax, impost, assessment, toll or municipal fine involved, case to be transferred to district court 5721.
With verified denial required in justice's court or written instrument will be admitted 5770.
Appeal, and notice of appeal from judgment in justice's court, what must contain 5788.
For failure to prosecute, district court after notice may order dismissal with costs and damages 5794.
From justice's court disregarded upon failure of sureties to justify 5792.
From justice's court, final 4840.
From justice's court, in district court either party may have benefit of objections 5791.
From justice's court, legislature may prescribe regarding (Nev. Const. art. vi, sec. 8) 323.
From justice's court, money transmitted to clerk in lieu of undertaking to be paid out on order of district court 5792.
From justice's court, on questions of fact or both law and fact, not statement but trial anew 5790.
From justice's court, undertaking on, requirement with or without stay, deposit, justification of sureties 5792.
From justice's court, what papers to be transmitted to district court 5791.
From justice's court, when stay of execution to be ordered, when officer to relinquish property 5793.
Judgment rendered on has same force as other judgments in district court 5794.
Notice and bond on, entry in justice's court docket 5800.
On questions of law alone on judgment in justice's court, what statement must contain, amendments and settlement 5789.
Justice's court, appeal—continued.
Reversal of judgment taken on overruling of objection that action in justice's court is in wrong township 5772.
To district court, provisions relating to change of place of trial applicable 5794.
Appearance, defendant may appear in justice's court and waive summons 5724.
Failure of defendant to make within one hour ground for dismissal of action in justice's court 5772.
Failure of either party to make in justice's court, trial to proceed 5767.
Failure to make in justice's court waives jury 5766.
Time for of defendant to be specified in alias summons in justice's court 5729, 5730.
Time of to be entered in justice's court docket 5800.
Voluntary without summons in justice's court 5715.
Arrest, of defendant in certain civil actions in justice's court 5744.
Of defendant in civil action in justice's court, affidavit and undertaking 5745.
Of defendant in civil action in justice's court, must give undertaking before applying for postponement 5759.
Of defendant in civil action in justice's court, officer must give notice to plaintiff, return 5747.
Of defendant in civil action in justice's court, to be detained until discharged by justice 5748.
Of defendant in civil action in justice's court, to be stated in judgment 5775.
Of defendant in civil action in justice's court, to be taken before justice, when to be taken before another justice 5746.
Of defendant in civil action in justice's court, when postponement discharges from 5759.
Of defendant in civil action in justice's court, when subject to on execution 5759.
Of elector on civil process not to be made on election day (Nev. Const. art. ii, sec. 4) 253.
Of person charged with contempt by justice's court 5797.
On civil process, members of legislature exempt from during session and for 15 days before (Nev. Const. art. iv, sec. 11) 269.
Order of in civil action to be entered in justice's court docket 5800.
Assessment, if legality of involved in justice's court, case to be transferred to district court for trial 5721.
Assignee cannot sue on counterclaim not set up in justice's court 5739.
Attachment, in civil action in justice's court, undertaking, exception to sureties, justification, waiver 5750.
In civil action in justice's court, undertaking for release of 5751.
In justice's court, certain sections made applicable 5752.

Justice's court, attachment—continued.
May issue on nonjudicial day 4870.
When issued in civil action in justice's court 5749, 5750.
Writ of in civil action in justice's court, substance of, several may be issued to different sheriffs 5751.
Writ of in justice's court for service in another county to have certificate under seal of county clerk 5751.
Writ of, issuance to be noted in justice's court docket 5800.
Attorney, any person except constable may appear as in justice's court 5725.
Authority of, to bind client 507.
Fee of attorney recoverable as costs in justice's court 5814.
Name of plaintiff's to be indorsed on summons in justice's court 5727.
Notice of hearing in justice's court, when to be given to 5735.
Authentication of records, federal act concerning 526-529.
Bill, copy of, as complaint in justice's court 5736.
Bill of exchange, or other instrument, when admitted in justice's court unless denied by verified answer 5770.
Blanks must be filled in all papers except subpena before issuance by justice of the peace 5809.
Bond, action upon, justice's court has jurisdiction if amount does not exceed $300 5714.
Copy of as complaint in justice's court 5736.
For payment of judgment when adjournment for more than ten days in justice's court 5760.
In justice's court, deposit may be made in lieu of in all cases 5616.
On appeal, entry of in justice's court docket 5800.
On appeal from justice's court, requirements with or without stay, deposit, justification of sureties 5792.
Surety company's, may accept premium taxed as costs 695-701.
Breach of the peace, when punishable as contempt in justice's court 5795.
Certificate, and seal of county clerk to be attached to summons in action in justice's court to be served out of town 5732.
Of district judge as to which justice of the peace is successor when two equally entitled, to be filed with county clerk 5807.
Challenges to jurors in civil action in justice's court, grounds and number 5768.
Civil action, appeal from justice's court, power of district court, dismissal, damages, costs, judgment 5794.
Entries in justice's court docket are prima facie evidence 5801.
For claim and delivery in justice's court 5124, 5135, 5753.
How commenced in justice's court 5722.
In justice's court, abstract of judgment filed in recorder's office creates lien on land 5782.
Justice's court, civil action—continued.
In justice's court, adjournment not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
In justice's court, alias summons may issue, time for appearance 5729, 5730.
In justice's court, amendment to complaint or answer may be allowed 5741.
In justice's court, amendment to pleadings, adjournment, costs, relief from judgment by denial 5742.
In justice's court, answer and what to contain 5736, 5738.
In justice's court, answer or demurrer allowed to amended pleadings 5743.
In justice's court, arrest of defendant, must give undertaking before applying for postponement 5759.
In justice's court, attorneys' fees recoverable as costs 5814.
In justice's court, certain sections made applicable 5762.
In justice's court, certificate of county clerk to writ of attachment for service in another county 5751.
In justice's court, complaint defined and what to contain 5736.
In justice's court, copy of note or instrument admitted unless denied by verified answer 5770.
In justice's court, defendant may appear and waive summons 5724.
In justice's court, demurrer to complaint 5735, 5737.
In justice's court, deposit may be made in lieu of undertaking 5816.
In justice's court, entry to be made in docket of date of hearing and mailing notice 5733.
In justice's court, execution, duty of officer receiving 5786.
In justice's court, execution may be renewed or alias issued 5785.
In justice's court, execution to issue to county clerk on abstract of judgment docketed in district court 5781.
In justice's court, failure of either party to appear trial may proceed 5767.
In justice's court, hearing after service of summons or appearance 5733.
In justice's court, how guardian appointed when necessary 5726.
In justice's court, how judgment entered 5775.
In justice's court, how jury waived 5766.
In justice's court, how summons issued, directed and what to contain 5727.
In justice's court, if amount found due exceeds jurisdiction, party may remit excess 5776.
In justice's court, if defendant fails to set up counterclaim he cannot afterwards sue 5739.
In justice's court, issuance and stay of execution 5783.
In justice's court, issue of fact to be tried by jury unless waived 5765.
In justice's court, judgment of dismissal may be entered without prejudice in certain cases 5772.

Justice's court, civil action—continued.
In justice's court, judgment to be entered at close of trial if no jury 5774.
In justice's court, judgment to be entered at once in conformity to verdict 5773.
In justice's court, judgment taken by mistake, inadvertence or excusable neglect may be set aside 5742.
In justice's court, jury, how summoned and challenged 5768.
In justice's court, limitation of service of summons 5731.
In justice's court, no statement required on appeal to district court on questions of fact or both law and fact 5790.
In justice's court, offer to allow judgment, when further costs not recoverable 5777.
In justice's court, parties may appear in person or by attorney 5725.
In justice's court, pleadings, form of 5734, 5735.
In justice's court, pleadings, issues of law and fact defined 5761-5763.
In justice's court, postponement by consent 5758.
In justice's court, postponement of trial on application of party, grounds, procedure 5759.
In justice's court, proceedings on demurrer to complaint or answer 5741.
In justice's court, summons, by whom and how served and returned 5732.
In justice's court, time for appearance of defendant to be specified in summons 5728.
In justice's court, undertaking on appeal, requirements with or without stay, deposit, justification of sureties 5792.
In justice's court, waiver of objection that it is in wrong township 5772.
In justice's court, what entries to be made in docket 5800.
In justice's court, what execution must contain 5784.
In justice's court, what notice of appeal from judgment must contain 5788.
In justice's court, what papers to be transmitted on appeal to district court 5791.
In justice's court, what provisions of civil practice act are applicable 5815.
In justice's court, what statement on appeal on questions of law alone must contain, amendments and settlement 5789.
In justice's court, when admission that evidence would be given avoids postponement 5759.
In justice's court, when attachment to issue 5749, 5750.
In justice's court, when consent to taking of testimony or admission that it would be given avoids postponement 5759.
In justice's court, when court may postpone 5757.
In justice's court, when defendant may be arrested 5744.
Justice's court, civil action—continued.
In justice's court, when defendant may demur to answer 5740.
In justice's court, when order for inspection of written instrument may be made 5769.
In justice's court, when postponement discharges defendant from arrest 5759.
In justice's court, when trial must be commenced and how continued 5756.
In justice's court, who entitled to costs 5813.
Judgment by confession may be entered in justice's court 5771.
Justice of the peace may issue execution or other process upon docket of predecessor 5805.
Justice of the peace may issue subpena and final process to any part of county 5808.
Justice of the peace to receive all moneys collected by sheriff or constable and pay same to parties entitled 5810.
Justice's court may require deposit or undertaking as security for costs before issuing summons 5812.
Justice's court to fix time for trial 5733.
Justice's court to try issue of law 5764.
Justice's court to which transferred has same jurisdiction 5719, 5720.
Place of trial in justice's court 5715.
Transfer of from justice's court to district court 5721.
Trial by jury secured, but may be waived (Nev. Const. art i, sec. 3) 332.
Civil process, elector not to be arrested under on election day (Nev. Const. art. ii, sec. 4) 253.
Members of legislature exempt from arrest under during session and 15 days before (Nev. Const. art iv, sec. 11) 269.
Claim and delivery, action for, in justice's court 5124, 5753.
Clerk, county, to issue execution to other counties on abstract of judgment from justice's court docketed in district court 5781.
County, to file and docket abstract of judgment from justice's court 5780.
Pleadings and transcript to be certified to on transfer of case from justice's court to district court 5721.
To pay on order of court money transmitted in lieu of undertaking on appeal from justice's court 5792.
Complaint, and what to contain in civil action in justice's court 5734, 5735, 5736.
Filing of in justice's court 5722, 5723.
In civil action in justice's court to be indorsed with date of filing 5723.
In justice's court, copy of note or instrument admitted unless denied by verified answer 5770.
Confession, judgment by may be entered in civil action in justice's court 5771.
Judment may be entered upon in justice's court if amount does not exceed $300 exclusive of interest 5714.

Justice's court—continued.
Consent of parties, to not more than 12 nor less than 4 jurors in justice's court in civil action 5768.
To taking of testimony in civil action in justice's court on postponement 5759.
Constable, duties imposed on sheriff extend to in action for claim and delivery 5753.
Duties of on receiving execution from justice's court 5786.
Fees 1999, 2011.
Local or special laws relating to jurisdiction and duties of, invalid (Nev. Const. art iv, sec. 20) 278.
May serve summons in action in justice's court 5732.
To be substituted for "sheriff" in proceedings supplementary to execution in justice's court 5787.
To detain defendant arrested in civil action in justice's court until discharged by justice 5748.
To give notice and make return on arrest of defendant in civil action in justice's court 5747.
To pay moneys collected on execution of process to justice of the peace 5810.
When may arrest defendant in civil action in justice's court 5744.
When not to act as attorney in justice's court 5725.
When substituted for "sheriff" in sections relating to attachment 5752.
When to relinquish property on stay of execution on appeal from justice's court 5793.
When to take defendant arrested in civil action in justice's court before another justice 5746.
Contempt, conviction of in justice's court to be entered in docket 5799.
In immediate view and presence of justice's court, proceedings for 5796.
Not in immediate view and presence of justice's court, proceedings for 5797
What acts punishable as in justice's court 5795.
What punishments may be imposed for by justice's court 5798.
Continuance in justice's court not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
Contract, entry of judgment upon by default in justice's court 5754.
Justice's court has jurisdiction of amount not exceeding $300 exclusive of interest 5714.
Obligation of two or more persons in different counties, limitation of service of summons in justice's court 5731.
Township in which action for to be brought in justice's court 5715.
Conviction of contempt in justice's court to be entered in docket 5799.
Costs, and damages, when may be ordered on dismissal of appeal to district court 5794.
Fees of attorney recoverable in justice's court 5814.
Justice's court, costs—continued.
In justice's court to be included in judgment 5778.
Justice's court may require deposit or undertaking as security before issuing summons 5812.
Payment of on adjournment made necessary by amendment of pleadings in justice's court 5742.
Payment of on change of place of trial of action in justice's court 5719.
Payment of on setting aside judgment by default in justice's court 5742.
To be included in entry of judgment in justice's court docket 5800.
When not recoverable after offer to allow judgment in justice's court, recovery against party refusing offer 5777.
Who entitled to in justice's court 5813.
Counterclaim, if not set up in action in justice's court defendant or assignee cannot afterwards sue 5739.
In civil action in justice's court 5738.
Counties, change in boundaries, justice of the peace successor of predecessor 5805.
County clerk, filing of certificate of district judge as to which of two justices of the peace entitled is successor 5807.
To certify to writ of attachment in justice's court for service in another county 5751.
To certify under seal to summons in justice's court for service in another county 5732.
To file and docket abstract of judgment from justice's court 5780.
To issue execution to other counties on abstract of judgment from justice's court docketed in district court 5781.
To receive docket and papers on death or removal of justice of the peace 5804.
Court, inferior, in cases appealed from district court has final appellate jurisdiction, Nev. Const. art. vi, sec. 6)321.
Justice's, change of place of trial in civil action 5717.
Justice's, jurisdiction of (Nev. Const. art. vi, sec. 8) 323.
Justice's, legislature may prescribe regarding appeals from (Nev. Const. art. vi, sec. 8) 323.
Justice's, place of trial of civil actions 5715.
Justice's, when and where held, always open, jurisdiction in civil cases 5714.
Justice's, when place of trial in civil action ordered changed, parties may agree upon court 5718.
Of record, justices of the peace not to try cases in conflict with jurisdiction of (Nev. Const. art. vi, sec. 8) 323.
Damages, demand for to be contained in summons in justice's court 5727.
Entry of judgment for upon default in justice's court 5754.
Justice's court has jurisdiction of amount not exceeding $300 5714.
Township in which action for to be brought in justice's court 5715.

Justice's court, damages—continued.
When may be ordered in addition to costs on dismissal of appeal to district court 5794.
Default, if made, to be entered in justice's court docket 5800.
Judgment upon in justice's court 5754, 5755.
Defense, what may be contained in answer in civil action in justice's court 5738.
Definition of issues of law and fact in justice's court 5761-5763.
Demand, exceeding $300 exclusive of interest not to be tried in justice's court (Nev. Const. art. vi, sec. 8) 323.
For jury in civil action in justice's court, failure to make, waiver 5766.
Demurrer, allowed to amended pleadings in justice's court 5743.
If overruled and failure to answer judgment may be ordered in justice's court 5755.
To complaint in civil action in justice's court 5735, 5737.
To complaint or answer in justice's court, proceedings on 5741.
To complaint or answer in justice's court, raises issue of law 5762.
When may be interposed to answer in justice's court 5740.
Denial, by verified answer in justice's court or written instrument admitted 5770.
In answer in civil action in justice's court 5738.
Departure from state with intention to defraud creditors, when defendant may be arrested in civil action in justice's court 5744.
Deposit in lieu of undertaking on appeal from justice's court 5792.
Deposition, may be taken by justice of the peace on postponement of civil action 5759.
Taken on postponement of civil action in justice's court may be read 5759.
Diligence in obtaining testimony must be shown to obtain postponement of trial in civil action in justice's court 5759.
Dismissal, of action without prejudice in justice's court 5772.
Of appeal to district court may be ordered after notice 5794.
Disobedience of order, subpena or process punishable as contempt in justice's court 5394, 5395, 5795.
Disorderly conduct, when punishable as contempt in justice's court 5795.
District court, entry in docket of abstract of judgment of justice s court and issuance of execution to other counties 5781.
For failure to prosecute an appeal, may order dismissal with costs and damages 5794.
Jurisdiction of on transfer of case from justice's court 5721.
May order justice's court to transmit papers on appeal, service of order, fine 5791.
Justice's court—continued.
On appeal, either party may have benefit of objections made in justice's court 5791.
Transfer of cases to from justice's court 5721.
When may order new trial on appeal from justice's court 5794.
When two justices of the peace equally entitled, to certify which is successor 5807.
Docket, and papers in case of death or removal of justice of the peace to be delivered to other justice or county clerk 5804.
And papers must be delivered by justice of the peace to successor 5803.
Certified transcript of on change of place of trial in justice's court 5719.
Conviction of contempt in justice's court to be entered 5799.
Entry in judgment docket of district court of abstract of judgment in justice's court 5780.
Execution or other process may be issued by justice of the peace upon docket of predecessor 5805.
In justice's court, alphabetical index required to be kept 5802.
In justice's court, copy of to be used on appeal in district court 5789.
In justice's court, entry to be made of date of trial or hearing and mailing notice 5733.
In justice's court in civil action, entry of waiver of jury 5766.
In justice's court, what entries to be made 5800.
Of justice's court, certified copy to be transmitted on appeal to district court 5791.
Transcript of to be certified by justice's court on transfer of case to district court for trial 5721.
Election contest, for member of legislature, to issue subpena for taking depositions, may attach and fine witness, certification of testimony to county clerk 1819.
Election day, elector not to be arrested under civil process on (Nev. Const. art. ii, sec. 4) 253.
Elector not to be arrested under civil process on election day (Nev. Const. art. ii, sec. 4) 253.
Entries, in justice's court docket are prima facie evidence 5733, 5801.
In justice's court docket, what to be made 5800.
Evidence, affidavit of what expected to be obtained on postponement of civil action in justice's court 5759.
Entries in justice's court docket are prima facie 5733, 5801.
In action for libel truth may be given (Nev. Const. art. i, sec. 9) 238.
Justice's court may make order for inspection of written instrument and delivery of copy 5769.
Offer to allow judgment in justice's court not admissible 5777.

Justice's court, evidence—continued.
Only so much as necessary to explain grounds to be inserted in statement on appeal on questions of law alone from justice's court 5789.
Regarding forcible entry and detainer may be given in justice's court 5721.
Regarding title to real property or legality of tax, impost, assessment, toll or municipal fine not to be given in justice's court 5721.
Witness shall not be rendered incompetent on account of religious belief (Nev. Const. art. i, sec. 4) 233.
Exception to sureties on undertaking for attachment in justice's court 5750.
Execution, all blanks must be filled in by justice of the peace before issuance 5809.
Costs in aid of, who entitled to in justice's court 5813.
In civil action in justice's court, when defendant subject to arrest on 5759.
In justice's court, duty of officer receiving 5786.
In justice's court, may be issued, stay, 5783.
In justice's court, may be renewed or an alias issued 5785.
In justice's court, what must contain 5784.
Justice of the peace may issue upon docket of predecessor 5805.
Justice of the peace may issue to any part of county 5808.
Or renewals, issuance of, payment upon, entry to be made in justice's court docket 5800.
Proceedings supplementary relating to district court are applicable to justice's court 5787.
Resistance to punishable as contempt in justice's court 5795.
To issue by county clerk to other counties on abstract of judgment from justice's court docketed in district court 5781.
Undertaking or deposit for stay of on appeal from justice's court 5792.
When stay of to be ordered by justice's court pending appeal, when officer to relinquish property 5793.
Fact, issue of, how tried in justice's court 5765.
Issue of in justice's court defined 5761, 5763.
Facts, certain entries in justice's court docket are prima facie evidence 5801.
Fees, court, to be paid on appeal from 2031.
In counties polling over 800 votes 2015.
In counties polling not over 800 votes 2003.
In proceeding relating to apprentices 494.
Fence viewers, to appoint, when 3605.
Fine, action for, justice's court has jurisdiction if amount does not exceed $300, exception 5714.
May be imposed by district court on justice of the peace for failure to transmit papers on appeal 5791.
Justice's court, fine—continued.
Municipal, if legality of involved in justice's court, case to be transferred to district court for trial 5721.
What may be imposed by justice's court for contempt 5798.
Forfeiture, justice's court has jurisdiction if amount does not exceed $300, exception 5714.
Form of abstract of justice's court judgment 5779.
Fraud, when ground for arrest of defendant in civil action in justice's court 5744.
Genuineness of signature to note or instrument admitted in justice's court unless denied by verified answer 5770.
Guardian, ad litem, how appointed in civil action in justice's court 5726.
General, how appointed in civil action in justice's court 5726.
Has jurisdiction concurrent with district judge in action for possession where relation of landlord and tenant exists or possession unlawfully withheld 5604.
Has jurisdiction in action on woodchopper's lien 2230.
Has jurisdiction of violation of city ordinances 886.
If justice material witness, place of trial of action in justice's court may be changed or another justice called 5716.
If two or more justices equally entitled to, district judge to certify who is successor 5807.
If vacancy by death or removal, docket and papers to be delivered to other justice or county clerk 5804.
Impost, if legality involved in justice's court, case to be transferred to district court for trial 5721.
Imprisonment, what may be imposed by justice's court for contempt 5798.
Incompetent person as party, how guardian ad litem appointed in civil action in justice's court 5726.
Index to docket in justice's court required to be kept 5802.
Infant, as party, how guardian ad litem appointed in civil action in justice's court 5726.
Under 14 years of age may apply for appointment of guardian ad litem in civil action in justice's court 5726.
Insane person as party, how guardian ad litem appointed in civil action in justice's court 5726.
Inspection of written instrument, order for in justice's court 5769.
Instrument, copy of as complaint in justice's court 5736.
When justice's court may make order for inspection of 5769.
Written, when admitted in justice's court unless denied by verified answer 5770.
Issue, of fact, how tried in justice's court 5765.
Of law in justice's court must be tried by court 5764.

Justice's court, issue of fact—continued.
Regarding title to real property or legality of tax, impost, assessment, toll or municipal fine not to be tried in justice's court, transfer for of from justice's court to district court 5721.
Issues, in civil action in justice's court, disposition of 5756.
Of law and fact in justice's court defined 5761-5763.
Judge, when "justice" to be substituted for in sections relating to attachment 5752.
Judgment, after demurrer overruled and failure to answer in justice's court 5755.
By confession may be entered in justice's court 5771.
Entry of in justice's court docket 5800.
Final process on may be issued by justice of the peace to any part of county 5808.
How entered in civil action in justice's court 5775.
In justice's court, abstract filed in recorder's office creates lien on lands 5782.
Abstract of may be obtained and entered in docket of district court and execution issue to other counties 5779, 5780, 5781.
Form of abstract 5779.
If amount found due exceeds jurisdiction, party may remit excess 5776.
Taken by mistake, inadvertence or excusable neglect may be set aside 5742.
To be entered at close of trial if no jury 5774.
To be entered at once in conformity to verdict 5773.
To include costs 5778.
Waiver of objection that action is in wrong township 5772.
What notice of appeal must contain 5788.
In justice's court in civil action, to state arrest of defendant 5775.
Justice's court may enter on confession if amount does not exceed $300 exclusive of interest 5714.
Not invalid except on appeal when taken after overruling objection in justice's court that action is in wrong township 5772.
Of dismissal without prejudice may be entered in justice's court in certain cases 5772.
Offer to allow in justice's court not admissible in evidence when further costs not recoverable 5777.
On conviction of contempt in justice's court to be entered in docket 5799.
Rendered on appeal from justice's court has same force as other judgments in district court 5794.
Undertaking for payment of if adjournment for more than ten days in justice's court 5760.
When defendant fails to appear in justice's court 5754.
Justice's court, judgment—continued.
Jurisdiction, duties of justice of the peace and constable, local or special laws invalid (Nev. Const. art. iv, sec. 20) 278.
In justice's court, if amount found due exceeds, party may remit excess 5776.
Justice of the peace may act in behalf of another in case of sickness or absence 5811.
Justice's court to which civil action is transferred has same 5719, 5720.
Of action by county against person for support of poor kindred 2916, 2917.
Of action for collection of taxes where amount does not exceed $300, in justice's court 5714.
Of action for delinquent taxes for improvement of streets in unincorporated town 934.
Of action for possession of lands unlawfully obtained or withheld in justice's court 5714.
Of action involving title to real property does not lie in justice's court 5714.
Of action to enforce mechanic's lien, justice's court does not have 5714.
Of action to recover personal property where value does not exceed $300, in justice's court 5714.
Of action where relation of landlord and tenant exists in justice's court 5714.
Of district court on transfer of case from justice's court 5721.
Of justice's court in cases of forcible entry and detainer 5721.
Of justice's court in civil cases 5714.
Of justices of the peace (Nev. Const. art. vi, sec. 8) 323.
To enter judgment by confession when amount exclusive of interest does not exceed $300, in justice's court 5714.
What provisions of civil practice act are applicable to justice's court 5815.
Jurors' fees 2001, 2013.
Jurors, names of to be entered in justice's court docket 5800.
Jury, demand for, entry to be made in justice's court docket 5800.
Demand for in civil action in justice's court, postponement of trial 5757.
How summoned and challenged, number of challenges, in civil action in justice's court 5768.
In civil action in justice's court, parties may consent to number not more than twelve nor less than four 5678.
Three-fourths in civil cases may render verdict, but legislature by two-thirds vote may require unanimous (Nev. Const. art. i, sec. 3) 232.
Trial by secured but may be waived in civil cases (Nev. Const. art. i, sec 3) 232.
Trial, in civil action in justice s court, how waived 5766.
Trial, to be had in justice's court unless waived 5765.
Justice, duties imposed on extended to in actions for claim and delivery in justice's court 5753.

Justice's court—continued.
How to issue subpena requiring attendance out of court 5432.
May administer oath or affirmation 5483.
May take affidavit to be used in this state 5450.
"Justice," to be substituted for "judge" in proceedings supplementary to execution in justice's court 5787.
When to be substituted for "judge" in sections relating to attachment 5752.
When substituted for word "judge" in sections relating to publication of summons 5732.
Justice's court, abstract of judgment filed in recorder's office creates lien on lands 5782.
Abstract of judgment may be obtained and entered in docket of district court and execution issue to other counties 5779-5871.
Action, for claim and delivery 5124, 5135, 5753.
Action for possession of real property may be maintained on tax deed 3666.
Action, power of district court on appeal, dismissal, damages, costs 5794.
Action, who entitled to costs 5813.
Affidavit of evidence expected to be obtained on application for postponement in civil action 5759.
Amendment to pleadings, adjournment, costs, relief from judgment by denial 5742.
Answer and what to contain 5735, 5738.
Answer or demurrer allowed to amended pleadings 5743.
Appeal from disregarded upon failure of sureties to justify 5792.
Appeal on questions of fact or both law and fact, no statement but trial anew 5790.
Appeal to district court, when will be dismissed, D. C. rule xxxvii, p. 1430.
Arrest of defendant, must give undertaking before applying for postponement in civil action 5759.
Civil action, copy of note or instrument admitted unless denied by verified answer 5770.
Civil action, how commenced in 5722.
Civil action, to be continued without adjournment 5756.
Civil action, when consent to taking of testimony or admission that it would be given avoids postponement 5759.
Complaint defined and what to contain 5736.
Constable not to charge for written return 2041.
Conviction of contempt to be entered in docket 5799.
Court to which civil action may be changed 5718.
Defendant may waive summons 5724.
Demurrer to complaint in civil action 5735, 5737.
Deposit may be made in lieu of undertaking in all cases 5816.
Docket, alphabetical index required to be kept 5802.
Justice's court—continued.
Docket, another justice may attend and make entries in case of sickness or absence 5811.
Docket, entries to be made the time they occur 5801.
Docket, or certified transcript, entries prima facie evidence 5801.
Docket, what entries to be made 5800.
Entry of judgment after demurrer overruled and failure to answer 5755.
Entry to be made in docket of date of trial or hearing and mailing notice 5733.
Evidence regarding forcible entry and detainer may be given 5721.
Execution, duty of officer receiving 5786.
Execution may be renewed or alias issued 5785.
Execution to issue by county clerk to other counties on abstract of judgment from justice's court docketed in district court 5781.
Execution, what must contain 5784.
Execution, when may be issued, stay 5783.
Fees of jurors 2001.
How guardian ad litem appointed when necessary 5726.
How jury waived in civil action 5766.
How to enter judgment in civil action 5775.
If amount found due exceeds jurisdiction, party may remit excess 5776.
If defendant fails to set up counterclaim he cannot afterwards sue 5739.
If place of trial ordered changed, parties may agree upon court 5718.
In case of disability of justice another may attend in his behalf 5811.
In cases appealed from, district court has final appellate jurisdiction (Nev. Const. art. vi, sec. 6) 321.
Issue of fact to be tried by jury unless waived 5765.
Issues of law and fact defined 5761-5763.
Judgment by default 5754, 5755.
Judgment to include costs 5778.
Jurisdiction of (Nev. Const. art. vi, sec. 8) 323.
Jurisdiction of in action to foreclose lien 2227.
Jurisdiction of in cases of forcible entry and detainer 5721.
Jurisdiction in possessory actions on public lands 5855.
Legislature may prescribe method of appeal from (Nev. Const. art. vi, sec. 8) 323.
Limitation of service of summons in civil action 5731.
May allow amendment of complaint or answer 5741.
May be compelled by district court to transmit papers on appeal 5791.
May dismiss action without prejudice in certain cases 5772.
May enter judgment by confession in civil action 5771.
May issue alias summons, time for appearance 5729, 5730.

Justice's court—continued.
May issue subpenas and final process to any part of county 5808.
May order execution in officer's own name for unpaid fees 2027.
May require deposit or undertaking as security for costs before issuing summons 5812.
May set aside judgment taken by mistake, inadvertence or excusable neglect 5742.
Mileage of constable computed for actual distance traveled 2040.
No adjournment to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
Not to hear evidence regarding title of real property or legality of tax, impost, assessment, toll or municipal fine 5721.
Notice of hearing after service of summons or appearance 5733.
Notice of time of trial on change of place of in civil action 5719.
Offer to allow judgment not admissible in evidence, when further costs not recoverable 5777.
Parties entitled to one hour in which to appear after time fixed in notice 5733.
Parties may appear in person or by attorney 5725.
Per diem of jurors 2013.
Place of trial may be changed or another justice called in certain cases 5716, 5718.
Place of trial of civil actions 5715.
Place of trial, schedule of sections 5715.
Pleadings and form of, entry of substance of oral in docket 5734, 5735.
Postponement of trial by consent in civil action 5758.
Proceedings after order changing place of trial 5719.
Proceedings for contempt, immediate view and presence 5796.
Proceedings for contempt not in immediate view and presence 5797.
Proceedings on demurrer to complaint or answer 5741.
Provisions regarding witness fees 2000.
Provisions relating to supplementary proceedings in district court applicable 5787.
Publication of process or paper, officer to be paid cost in advance 2026.
Summoning and challenging of jurors in civil action 5768.
Summons in civil action, how issued, directed and what to contain 5727.
Summons, by whom and how served and returned 5732.
Summons, how served by publication 5732.
Summons to be served out of town to have certificate of county clerk under seal attached, how returned 5732.
Time to be specified in summons for appearance of defendant 5728.
To enter judgment at close of trial if no jury 5774.
Justice's court—continued.
To enter judgment at once in conformity to verdict 5773.
To fix time for trial of civil action 5733.
To indorse date of filing of complaint in civil action 5723.
To make order for summoning of jurors in civil action 5768.
To try issue of law 5764.
To which civil action is transferred has same jurisdiction 5719.
Transfer of cases to district court 5721.
Trial in civil action to proceed on failure of either party to appear 5767.
Voluntary appearance and pleadings of parties without summons 5715.
Waiver of objection that action is in wrong township 5772.
What acts punishable as contempts 5795.
What papers to be transmitted to district court on appeal 5791.
What provisions of civil practice act applicable 5815.
What punishment may be imposed for contempts 5798.
What statement on appeal on questions of law alone must contain amendments and settlement 5789.
When admission in civil action that evidence would be given avoids postponement 5759.
When and where held, always open, jurisdiction in civil cases 5714.
When defendant subject to arrest in civil action on execution 5759.
When may make order for inspection of written instrument and delivery of copy 5769.
When may of its own motion postpone trial in civil action 5757.
When place of trial cannot be changed more than once on motion of same party 5717.
When plaintiff may demur to answer 5740.
When postponement discharges defendant from arrest in civil action 5759.
When to certify pleadings, transfer of case to district court for trial 5721.
When to order defendant discharged on giving undertakings on application for postponement in civil action 5759.
When trial must be commenced and how continued 5756.
Writ of attachment, certain sections made applicable 5752.
Writ of attachment, for service in another county to have certificate of county clerk 5751.
Justice of the peace, court fee to be paid on appeal from 2031.
Disability of, may call other to act 4926. 5811.
Disobedience of writ is contempt 5394, 5395.
Disqualification to act, grounds of 4865.
Duties in relation to estray animals 2274-2282.

Justices of the peace—continued.
Election contest for member of the legislature, to issue subpena for taking depositions, may attach and fine witness, certification of testimony to county clerk 1819.
Fees in counties polling over 800 votes 2015.
Fees of in proceedings relating to apprentices 494.
Fees when not over 800 votes in county 2003.
Has jurisdiction, concurrent with district judge, in action for possession where relation of landlord and tenant exists or possession unlawfully withheld 5604.
Has jurisdiction in action on woodchoppers lien 2230.
Has jurisdiction of violation of city ordinances 886.
If material witness, place of trial of action in justice's court may be changed or another justice called 5716.
If two or more equally entitled district judge to certify who is successor 5807.
If vacancy by death or removal docket and papers to be delivered to other justice or county clerk 5804.
Jurisdiction of action by county against person for support of poor kindred 2916, 2917.
Jurisdiction of action for delinquent taxes for improvement of streets in unincorporated town 934.
Legislature to determine number and powers of, limitation of jurisdiction (Nev. Const. art. vi, sec. 8) 323.
Legislature to prescribe method of appeal from justice's court (Nev. Const. art. vi, sec. 8) 323.
Local or special laws relating to jurisdiction and duties invalid (Nev. Const. art. iv, sec. 20) 278.
May administer oath or affirmation 5483.
May certify to transcript of docket 5801.
May indorse order of arrest on summons in civil action 5744.
May issue alias process for restoration of possession of land after conviction of contempt for reentry 5394, 5395.
May issue citation for discovery of personal property on which taxes delinquent 3679.
May issue execution or other process on docket of predecessor 5805.
May take affidavit to be used in this state 5450.
May take and certify to affidavit for examination of books of assayer, mill or purchaser of ore, gold dust or bullion 2484.
May take deposition on postponement of civil action 5759.
Must deliver to successor docket and papers 5803.
Must fill blanks in all papers before issuance, except subpenas 5809.
Or judge of police court, jurisdiction in action against party failing to fence dangerous excavation 3235, 3237.
Justices of the peace—continued.
Out of state may take deposition 5459.
Proceedings before to set aside covenants of apprenticeship 493.
Recovery before of penalty for failure of officer to post table of fees 2025.
Successor of predecessor notwithstanding change of county boundary 5805.
To act in proceedings for erection of partition fences 3605, 3606.
To act in regard to breach of contract of apprenticeship 490-492.
To order proper credit on judgment on release of joint debtor 5848.
To receive all moneys collected by sheriff or constable and pay same to parties entitled 5810.
To summon master and jurors in action for abuse of apprentices 490, 491.
To take depositions on contest for members of the legislature 1818, 1819.
To transmit to clerk of district court money deposited in lieu of undertaking on appeal 5792.
When defendant arrested in civil action to be taken before, when before another justice 5746.
When may make order for inspection of mine by stockholder, registration, oath, fee 2492, 2495.
When may order child transferred to district court under juvenile court law 741.
When one may act for another, also as registry agent 4926.
When to issue writ of attachment in civil action 5749, 5750.
When to pay to county treasurer surplus money in action on lien for charges on animals 5500.
When to order arrest of defendant in civil action 5744.
Without jurisdiction if demand exceeds $300 exclusive of interest (Nev. Const. art. vi, sec. 8) 323.
Without jurisdiction if title to real estate, mining claim or boundaries to land involved or if case conflicts with jurisdiction of court of record (Nev. Const. art. vi, sec. 8) 323.
Who successor of 5806, 5807.
Justification of sureties on undertaking on appeal from justice's court 5792.
Justification of sureties to undertaking for attachment in justice's court 5750.
Landlord and tenant, action for possession, justice's court has jurisdiction 5714.
Landlord and tenant, where relation exists legislature may confer power on justice's courts in actions for possession or where possession has been unlawfully obtained or withheld (Nev. Const. art. vi, sec. 8) 323.
Lands and tenements, action for possession of where relation of landlord and tenant exists, justice's court has jurisdiction 5714.
Lands and tenements, legislature may confer power on justice's court in action for possession of where relation of landlord and tenant exists, or where possession has been unlawfully obtained or withheld (Nev. Const. art. vi, sec. 8) 323.

Justices of the peace—continued.
Land and tenements, unlawfully obtained or withheld, justice's court has jurisdiction 5714.
Law, issue of, how tried in justice's court 5764.
Law, issue of in justice's court defined 5761, 5763.
Law, raises issue of fact on allegation of new matter in answer in justice's court without reply 5763.
Legislature may confer on justice's court jurisdiction concurrent with district court in certain actions relating to mechanic's liens and for possession of lands and tenements where relation of landlord and tenant exists or possession unlawfully obtained or withheld (Nev. Const. art. vi, sec. 8) 323.
May prescribe regarding appeals from justice's court (Nev. Const. art. vi, sec. 8) 323.
Members of exempt from arrest under civil process during session and for fifteen days before (Nev. Const. art. iv, sec. 11) 269.
To determine number and powers of justices of the peace (Nev. Const. art. vi, sec. 8) 323.
Libel, if true and made with good motive jury may exonerate (Nev. Const. art. I, sec. 9) 238.
Lien, abstract of judgment in justice's court filed in recorder's office creates lien on lands 5782.
Lien, mechanic's, action for enforcement where amount does not exceed $300 exclusive of interest, justice's court does not have jurisdiction 5714.
Lien, mechanic's, legislature may confer power on justice's court to enforce in certain cases (Nev. Const. art vi, sec. 8) 323.
Lien on personal property, action to enforce in justice's court, limitation of service of summons 5731.
Mechanic's lien, action for enforcement where amount does not exceed $300 exclusive of interest, justice's court does not have jurisdiction 5714.
Mechanic's lien, legislature may confer power on justice's court to enforce in certain cases (Nev. Const. art. vi, sec. 8) 323.
Mining claim, action involving title, jurisdiction does not lie in justice's court 5714.
Mining claims, trial of title to, not within jurisdiction of justice's court (Nev. Const. art. vi, sec. 8) 323.
Money, collected by sheriff or constable, when to be paid to justice of the peace and by him to parties entitled 5810.
Money, entry of judgment upon by default in justice's court 5754.
Motion for change of place of trial in justice's court 5716.
Motion to change place of trial in justice's court, when cannot be more than once by same party 5717.
Motion, when justice's court may of its own postpone trial 5757.
Justices of the peace—continued.
Motions, minutes of to be entered in justice's court docket 5800.
Municipal fine, if legality of involved in justice's court, case to be transferred to district court for trial 5721.
New matter, in answer raises issue of fact in justice's court 5763.
New trial, when district court may order on appeal from justice's court 5794.
Note, copy of as complaint in justice's court 5736.
Note, promissory, or other instrument, when admitted in justice's court unless denied by verified answer 5770.
Notice of appeal, from judgment in justice's court, what must contain 5788.
Notice of appeal, receipt of, entry in justice's court docket 5800.
Notice of hearing in justice's court after service of summons or appearance 5733.
Notice of hearing in justice's court, parties entitled to one hour in which to appear after time fixed in 5733.
Notice of time and place of trial to be issued by justice's court on transfer of civil action, service 5719.
Notice on exception to or justification of sureties on undertaking on appeal in justice's court 5792.
Oath, answer under must specifically deny or written instrument will be admitted in justice's court 5770.
Oath, necessity for adjournment to be shown under on amendment of pleadings in justice's court 5742.
Oath or verified answer showing grounds for transfer of case from justice's court to district court 5721.
Objections made in justice's court, either party may have benefit of on appeal 5791.
Offer, to allow judgment in justice's court not admissible in evidence when further costs not recoverable 5777.
Oral, what pleadings may be in civil action in justice's court 5734.
Order, by district court for transmission of papers by justice's court on appeal, service, fine 5791.
Disobedience of punishable as contempt in justice's court 5795.
For inspection and furnishing copy of written instrument in justice's court 5759.
Of arrest, if indorsed on summons in justice's court to be returnable forthwith 5728.
Of arrest, in civil action to be entered in justice's docket 5800.
Of arrest of defendant in certain civil actions in justice's court 5744.
Of arrest of defendant in civil action in justice's court, affidavit and undertaking 5745.
Of court for payment of money transmitted in lieu of undertaking on appeal from justice's court 5792.
Of justice's court adjudging person guilty of contempt 5796.
Of justice's court for summoning jurors in civil action 5768.

Justices of the peace—continued.
Papers, all blanks must be filled in by justice of the peace before issuance except subpenas 5809.
District court may compel transmission of by justice's court on appeal, service of order, fine 5791.
Transmission of on change of place of trial of civil action in justice's court 5719.
What to be transmitted by justice's court on appeal to district court 5791.
Parties, infant or insane, how guardian ad litem appointed in civil action in justice's court 5726.
May agree to postponement of civil action in justice's court 5758.
May appear in person or by attorney in justice's court 5725.
May waive trial by jury in civil action in justice's court 5766.
Names of to be kept in alphabetical index to docket in justice's court 5802.
To action in justice's court, entitled to one hour in which to appear after time fixed in notice 5733.
Peace, breach of, when punishable as contempt in justice's court 5795.
Penalty, justice's court has jurisdiction if amount does not exceed $300, exception 5714.
Person, over 20 years of age and not party may serve summons in civil action in justice's court 5732.
Personal property, action for claim and delivery in justice's court 5124, 5135, 5753.
Personal property, action to recover, justice's court has jurisdiction if value does not exceed $300 5714.
Personal property, township in which action for to be brought in justice's court 5715.
Plaintiff, notice to be given to of arrest of defendant in civil action in justice's court 5747.
Pleading, defendant may file in justice's court and waive summons 5724.
In justice's court, issues of law and fact defined 5761, 5763.
In justice's court, what are and form of 5734, 5735.
Minute of to be entered in justice court docket 5800.
When postponement of trial allowed for amendment of in action in justice's court 5757.
When to be certified by justice's court on transfer of case to district court for trial 5721.
Without summons in justice's court 5715.
Possession of lands or tenements, legislature may confer power on justice's court in action for where relation of landlord and tenant exists or where possession has been unlawfully obtained or withheld (Nev. Const. art. vi. sec. 8) 323.
Possession, where relation of landlord and tenant exists or if unlawfully retained or withheld, justice's court has jurisdiction 5714.
Justices of the peace—continued.
Postponement, defendant under arrest in civil action in justice's court must give undertaking before applying for 5759.
In civil action in justice's court, consent to taking testimony of witness 5759.
In justice's court, not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
Of civil action in justice's court, affidavit of evidence expected to be obtained 5759.
Of civil action in justice's court, avoided by admission that evidence would be given 5759.
Of trial, by consent in civil action in justice's court 5758.
Of trial, in civil action in justice's court on court's own motion 5757.
Of trial, upon application of party in civil action in justice's court, grounds, procedure 5759.
When justice's court must order defendant discharged from arrest in civil action on giving undertaking 5759.
Proceedings, supplementary to execution, provisions relating to district court are applicable to justice's court 5787.
Process, civil, members of legislature exempt from arrest under during session and for fifteen days before (Nev. Const. art. iv, sec. 11) 269.
Justice of the peace may issue upon docket of predecessor 5805.
May be issued by justice of the peace to any part of county 5808.
Promissory note, or other instrument, when admitted in justice's court unless denied by verified answer 5770.
Provisional remedies in justice's courts 5744.
Public records, docket and papers must be delivered by justice of the peace to successor 5803.
Publication of summons in action in justice's court 5732.
Real property, action for possession where relation of landlord and tenant exists, justice's court has jurisdiction 5714.
Action involving title, jurisdiction does not lie in justice's court 5714.
Title of if involved in justice's court case to be transferred to district court for trial 5721.
Trial of title to, not within jurisdiction of justice's court (Nev. Const. art. vi, sec. 8) 323.
Relief, demand for to be contained in summons in justice's court 5727.
Religious belief, witness shall not be rendered incompetent on account of (Nev. Const. art. i, sec. 4) 233.
Renewal of execution, in justice's court 5785.
Reply not required in justice's court, law raises issue of fact upon new matter in answer 5763.
Return, on arrest of defendant in civil action in justice's court 5747.

Justices of the peace—continued.
Return on summons in justice's court served in another county 5732.
Seal and certificate of county clerk to be attached to summons to be served out of town in civil action in justice's court 5732.
Seal and certificate of county clerk, to writ of attachment in justice's court for service in another county 5751.
Search and seizure, not to take place except on probable cause supported by oath and particulars (Nev. Const. art i, sec. 18) 247.
Service, of notice of hearing in justice's court after service of summons or appearance 5755.
Of notice of time and place of trial on transfer of civil action in justice's court 5719.
Of summons by publication in justice's court 5732.
Of summons in action in justice's court, limitation on 5731.
Of summons in civil action in justice's court, if out of town certificate and seal of county to be attached 5732.
Of summons in justice's court, by whom and how made 5732.
Of summons, proof of before judgment by default in justice's court 5754.
Sheriff, duties of on receiving execution from justice's court 5786.
May serve summons in action in justice's court 5732.
Several writs of attachment in justice's court may be issued to different 5751.
To detain defendant arrested in civil action in justice's court until discharged by justice 5748.
To give notice and make return on arrest of defendant in civil action in justice's court 5747.
To pay moneys collected on execution of process to justice of the peace 5810.
When may arrest defendant in civil action in justice's court 5744.
When to relinquish property on stay of execution on appeal from justice's court 5793.
When to take defendant arrested in civil action in justice's court before another justice 5746.
"Sheriff," when word "constable" is to be substituted for in certain sections relating to attachment 5752.
Sickness of justice of the peace, another may attend on his behalf 5811.
Signature of makers of note or instrument admitted in justice's court unless denied by verified answer 5770.
Statement on appeal on questions of fact or both law and fact from justice's court, judgment not required 5790.
Statement on appeal on questions of law alone from judgment in justice's court, what must contain, amendments and settlement 5789.
Stay of execution, by undertaking or deposit on appeal from justice's court 5792
Stay of execution in justice's court 5783.
Justices of the peace—continued.
Stay of execution, when to be ordered by justice's court pending appeal, when officer to relinquish property 5793.
Subpena, disobedience of punishable as contempt in justice's court 5795.
Subpena may be issued by justice's court to any part of county 5808.
Successor of justice of the peace, who is 5806, 5807.
Summons, all blanks must be filled in by justice of the peace before issuance 5809.
Before issuing justice's court may require deposit or undertaking as security for costs 5812.
Date and return to be entered in justice's court docket 5800.
Defendant may waive in justice's court 5724.
In action in justice's court, how served by publication 5732.
In civil action in justice's court, alias summons may issue, time for appearance 5729, 5730.
In civil action in justice's court, how issued, directed and what to contain 5727.
In civil action in justice's court, limitation on service 5731.
In civil action in justice's court to specify time for appearance of defendant, indorsement 5728.
In justice's court, by whom and how served and returned 5732.
In justice's court, if out of town certificate and seal of county clerk to be attached 5732.
In justice's court, name of plaintiff's attorney to be indorsed on 5727.
Issuance of in justice's court 5722, 5723.
May issue within a year after filing of complaint in justice's court 5723.
Proof of service of before judgment by default in justice's court 5754.
When order of arrest may be indorsed on in civil action in justice's court 5744.
Supplementary proceedings to execution, relating to district court are applicable to justice's court 5787.
Sureties, on undertaking for attachment in justice's court, exception to, justification, waiver 5750.
On undertaking for payment of judgment when adjournment for more than ten days in justice's court 5760.
On undertaking on appeal from justice's court 5792.
Tax, if legality of involved in justice's court, case to be transferred to district court for trial 5721.
Taxes, action for collection of, justice's court has jurisdiction where amount does not exceed $300 5714.
Testimony, consent to taking in civil action in justice's court on postponement 5759.
May be taken by deposition before justice of the peace on postponement of civil action 5759.

Justices of the peace—continued.
Time required for obtaining ground for postponement of civil action in justice's court 5759.
Time, when trial must be commenced in justice's court 5756.
Title, of action to be entered in justice's court docket 5800.
Of summons in civil action in justice's court 5727.
To real property, if involved in justice's court, case to be transferred to district court for trial 5721.
To real property or mining claims, action involving, jurisdiction does not lie in justice's court 5714.
To real property or mining claims or questions of boundaries not to be tried in justice's court (Nev. Const. art. vi, sec. 8) 323.
Toll, if legality of involved in justice's court, case to be transferred to district court for trial 5721.
Township, in which action to be brought in justice's court 5715.
Transcript of docket to be certified on change of place of trial in justice's court 5719.
Transcript of oral pleadings to be certified by justice's court on transfer of civil action to district court for trial 5721.
Trial, by jury, demand for, entry to be made in justice's court docket 5800.
By jury, in civil action in justice's court, how waived 5766.
By jury, secured but may be waived in civil cases (Nev. Const. art. i, sec. 3) 232.
De novo in justice's court when appeal from justice's court on questions of fact or both law and fact 5790.
In civil cases three-fourths of jury may render verdict, but legislature by two-thirds vote may require unanimous (Nev. Const. art. i, sec. 3) 232.
In district court on appeal, either party may have benefit of objections made in justice's court 5791.
In justice's court in civil action, when may be postponed of court's own motion 5757.
In justice's court, judgment to be entered at close of if no jury 5774.
In justice's court, may proceed if either party fails to appear 5767.
New, when district court may order on appeal from justice's court 5794.
Notice of time of, to be issued by justice's court on transfer of place of trial in civil action 5719.
Of civil action in justice's court, change of place of 5716.
Of civil action in justice's court, time for to be fixed by justice 5733.
Of issue of fact in justice's court, by jury unless waived 5765.
On appeal from justice's court, powers of district court, dismissal, damages, costs, judgment 5794.
Postponement of by consent in civil action in justice's court 5758.
Justices of the peace—continued.
Postponement of on application of party in civil action in justice's court, grounds, procedure 5759.
Proceedings after order changing place of in civil action in justice's court 5719.
Provisions relating to change of place of, applicable to cases appealed to district court 5794.
When must be commenced and how continued in civil action in justice's court 5756.
Undertaking, action upon, justice's court has jurisdiction if amount does not exceed $300 5714.
For arrest of defendant in civil action in justice's court 5745.
For payment of judgment when adjournment for more than ten days in justice's court 5760.
For release of attachment in justice's court 5751.
In justice's court, deposit may be made in lieu of in all cases 5816.
On appeal from justice's court, requirements with or without stay, deposit, justification of sureties 5792.
On appeal, entry of in justice's court docket 5800.
On attachment in justice's court, exception to sureties, justification, waiver 5750.
Unlawful entry and detainer, evidence regarding may be given in justice's court 5721.
Vacancy in office of justice does not affect action 4884.
Venire, alias for jurors in civil action in justice's court 5768.
Venue, action brought in wrong in justice's court, when may be dismissed 5772.
In action in justice's court may be changed 5716, 5718.
Of action in justice's court, when cannot be changed more than once on motion of same party 5717.
Of civil actions in justice's courts 5715.
Overruling of objection that action in justice's court is in wrong, cause of reversal on appeal only 5772.
Provisions relating to change of applicable to trials on appeal in district court 5794.
Verdict, in justice's court, judgment to be entered at once in conformity to 5773.
Or disagreement of jury to be entered in justice's court docket 5800.
Verified answer or oath showing grounds for transfer of case from justice's court to district court 5721.
Verified denial in answer required in justice's court or written instrument will be admitted 5770.
Waiver, of objection that action in justice's court is in wrong township 5772.
Of objection to sureties to undertaking for attachment in justice's court 5750.
Of trial by jury in justice's court 5766.
Warrant, for arrest of person charged with contempt by justice's court 5797.

Justices of the peace, warrant—continued.
For search and seizure shall not issue but on probable cause supported by oath and particulars (Nev. Const. art. i, sec. 18) 247.
Witness, consent to taking of testimony in civil action in justice's court on postponement 5759.
Deposition taken on postponement of civil action in justice's court may be read 5759.
Fees 2000, 2012.
If justice of the peace material, when defendant arrested in civil action to be taken before another justice 5746.
Refusing to be sworn or answer, punishable for contempt in justice's court 5795.
Shall not be rendered incompetent on account of religious belief (Nev. Const. art. i, sec. 4) 233.
Sworn, name of to be entered in justice's court docket 5800.
Testimony of may be taken before justice of the peace for postponement of civil action 5759.
Writ of attachment, in civil action in justice's court, substance of, several may be issued to different counties 5751.
In justice's court, certain sections made applicable 5752.
In justice's court, for service in another county, to have certificate under seal of county clerk 5751.
Issuance of to be noted in justice's court docket 5800.
Written instruments, when admitted in justice's court unless denied by verified answer 5770.
When inspection may be ordered in justice's court 5769.
Justices of the supreme court, for reasonable cause may be removed on two-thirds vote of members elected to each branch of the legislature (Nev. Const. art. vii, sec. 3) 336.
May issue process for complete hearing of contest for state office 1823.
May issue writ of habeas corpus to any part of the state returnable before himself, supreme court or district court or judge (Nev. Const. art. vi, sec. 4) 319.
May make order for examination or taking deposition of prisoner 5442.
May order contestee to appear in contest for nomination under primary election law 1764.
May order correction of error or omission relating to primary election, disobedience contempt 1763.
May take acknowledgments and affidavits 4883.
Two may pronounce judgment, reargument if two do not agree 4837.
What original writs may issue 4834.
When in election contest may make order for arrest of person receiving fees 1815.
When to certify statement on appeal 5333.
Justification, of bail on arrest in civil action 5104, 5108.
Justification of sureties generally 5485.
In action on claim and delivery 5128.
Of defendant in action for claim and delivery 5130.
On bond to defendant when plaintiff permitted to occupy premises pending proceedings under eminent domain 5615.
On indemnifying bond to officer in action for claim and delivery 5134.
On undertaking for injunction 5140.
On undertaking for release of attachment 5164.
To undertaking for attachment in justice's court 5750.
To undertaking on appeal 5354.
To undertaking on appeal from justice's court 5792.
Juvenile court, district court to appoint probation officer 733.
Interference with order of, punishable as contempt 754.
May appoint counsel for child 742.
May cite guardian 740.
May dismiss petition and allow prosecution under criminal laws or make other order 737.
May order guardian to place child in hospital 738.
May release from custody or suspend sentence 758.
Petition, what to state 731.
Summons, publication, contempt, proceedings 732.
Trial, jury of six or twelve may be demanded or ordered 729.
Juvenile court law, appeal may be taken under to supreme court 753.
Bond for appearance of child may be given 742.
Guardian to report to judge 740.
Schedule of sections 728, 757.
Juvenile department of district court, separate book and entry of findings 730.
Kin, next of, when entitled to damages for death by negligence of common carrier, mill or mine operator 5650.
Kindred, liable for expenses of insane person, same lien on property of 2200.
May have damages for death by wrongful act 5648.
Of insane, may be ordered by district judge to pay charges for insane and order becomes lien upon property of 2200.
Labor, action on lien for 2222-2228.
Laborer, has preferred claim for wages 5493, 5494.
Land, action for condemnation of, for mines 2459.
Contest before U. S. land office as to mineral or agricultural character of land 2397.
Deed made under tax sale by treasurer not prima facie evidence of title in purchaser when record destroyed 5631.
Eminent domain may be used for purpose of reclaiming 5606.
Public, improvement required by claimant of possession 5852.
When may be taken under eminent domain 5606, 5608.

Land contest, before federal land office as to mineral or agricultural character of land 2397.
Land office, federal, contest before as to mineral or agricultural character of land 2397.
Land patent, when admissible in evidence 5415.
Landlord, to demand possession or lease of agricultural lands runs for another year 5589.
Landlord and tenant, action for possession, justice's court has jurisdiction 5714.
Possession of tenant deemed possession of landlord 4961.
When tenant may pay judgment in action for unlawful detainer and remain in possession 5599.
Where relation exists legislature may confer power on justice's courts in actions for possession or where possession has been unlawfully obtained or withheld (Nev. Const. art. vi, sec. 8) 323.
Lands and tenements, action for possession of where relation of landlord and tenant exists, justice's court has jurisdiction 5714.
Legislature may confer power on justice's court in action for possession of, where relation of landlord and tenant exists or where possession has been unlawfully obtained or withheld (Nev. Const. art. vi, sec. 8) 323.
Unlawfully obtained or withheld, justice's court has jurisdiction 5714.
Larceny, conviction of excludes from jury unless restored to civil rights (Nev. Const. art. iv, sec. 27) 285.
Law, due process of, person shall not be deprived of life, liberty or property without (Nev. Const. art. i, sec. 8) 237.
Impairing obligation of contracts or ex post facto not to be passed (Nev. Const. art. i, sec. 15) 244.
Issue of, arises upon demurrer when 5196.
Issue of defined 5195.
Issue of, how tried 5198.
Issue of, how tried in justice's court 5764.
Issue of in justice's court defined 5761, 5763.
Issue of to be first disposed of 5199.
Judge may declare to jury (Nev. Const. art. vi, sec. 12) 327.
Raises issue of fact on allegation of new matter in answer in justice's court without reply 5763.
Law and equity, may be administered in same action (Nev. Const. art. vi, sec. 14) 329.
Law day, in district court, on Saturday of each session law questions to be heard unless good cause shown for delay, rule v, p. 1426.
Laws, and judicial decisions to be free for publication 376.
Local or special in certain enumerated cases are invalid 278.
Printed copies of, from other states or foreign government, when presumed correct 5413.
To exclude from jury persons not qualified electors or who have been convicted of certain crimes, unless restored to civil rights (Nev. Const. art. iv, sec. 27) 285.
Laws—continued.
When to be general and of uniform operation throughout the state (Nev. Const. art. iv, sec. 21) 279.
Lease, of agricultural lands runs for another year if tenant not notified 5589.
Legal disability, time within which minor may bring action against sureties on bond of guardian 6185.
Legal title to real property, when holder presumed to be in possession 4955.
Legislative acts, authentication of under act of Congress 526.
Legislature, contest for member of 1818-1822.
May confer on justice's court jurisdiction concurrent with district court in certain actions relating to mechanics' liens and for possession of lands and tenements where relation of landlord and tenant exists or possession unlawfully obtained or withheld (Nev. Const. art. vi, sec. 8) 323.
May increase or diminish number of judicial districts and judges, change not to take effect except in case of vacancy or expiration of term (Nev. Const. art. vi, sec. 5) 320.
May prescribe regarding appeals from justice's court (Nev. Const. art. vi, sec. 8) 323.
May prescribe regulations for disposal of lots in townsites by district judge as trustee 1961, 1982.
May regulate rates of railroads, toll roads, ditch, flume and tunnel companies (Nev. Const. art. iv, sec. 20) 278.
Members of exempt from arrest under civil process during session and for 15 days before (Nev. Const. art. iv, sec. 11) 269.
Not to pass local or special laws in certain enumerated cases (Nev. Const. art. iv, sec. 20) 278.
To determine number and powers of justices of the peace (Nev. Const. art. vi, sec. 8) 323.
To prescribe powers and duties of municipal court so as not to conflict with courts of record (Nev. Const. art. vi. sec. 9) 324.
To provide for publication of statutes and decisions of supreme court 376.
Lessee of mine, when liable for improper working, damages, how assessed 5509.
Levy, tax, district court may order to meet obligations of city on disincorporation 873.
Liability, created by statute, other than penalty or forfeiture, action may be commenced within three years 4967.
For death by wrongful act 5647.
Not founded upon writing, action may be brought within four years 4967.
Or indebtedness of corporation or person to state, county or municipality, local or special law for release of, invalid (Nev. Const. art. iv, sec. 20) 278.
Libel, action for may be brought within two years 4967.
If true, and made with good motives, jury may exonerate (Nev. Const. art. i, sec. 9) 238.
Libel and slander, how pleaded, proof 5073.

Libel or slander, truth may be given in evidence 5074.
Libraries, certain exempt from execution 5288.
License, attachment for 3737.
Certain personal property may be sold for payment of 3742.
May be revoked for cause, complaint, proceedings 3867, 3868.
License collector, may be removed or suspended and another appointed to perform duties pending charges 3753.
Lien, abstract of judgment in justice's court filed in recorder's office creates lien on lands 5782.
Action to restore lost record of 5632.
And execution sale of animals for charges, owner to be paid surplus 5500.
And judgment in action for delinquent taxes 3665.
And mortgage upon growing crops 1080.
Attachment on live stock herded or grazed on lands of another, how preferred 2336.
By judgment, docket, how kept and what to contain 5275.
By judgment, entry, duration 5274.
Certificate of recorder showing none to be produced by plaintiff in action for 5535.
City tax against property assessed 937.
Costs of partition on shares of parceners 5574.
For attorneys' fees, not affected by settlement between parties 5376.
For charges on animals taken away from ranchman or person boarding same 2332.
For fee for inspection of horses bought to be shipped from state 2296.
For material or labor, rank or order 2223.
For nonpayment of city taxes or assessments, jurisdiction of municipal court 833.
For taxes attaches how 3619.
For taxes on mortgage and trust deed 3786, 3787.
Foreclosure of, affidavit of payment of taxes 3756.
Foreclosure of, how surplus money on sale paid or deposited 5502.
Holder of, in action for partition to be made party, and referee to ascertain may be appointed 5536.
Holder of, may redeem real property sold under execution 5299.
Holder of, need not be made party in action for partition 5529.
Holder of, to be notified to appear before referee in action for partition 5537.
Homestead may be liable for improvements or when lien given by consent of husband and wife (Nev. Const. art. iv, sec. 30) 288.
In action by majority owners against minority owners for expenditure on mine 2481.
In action for foreclosure, complaint to have affidavit of payment of taxes attached 3756.
In bankruptcy proceedings 609.
In favor of woodchoppers 2230.
Judgment entered after death of party, not lien on real property but payable in course of administration 5272.
Judgment on, exemptions from execution do not apply 5288.
Lien—continued.
Jurisdiction of justice's court in action to foreclose 2227.
Limitation of time for commencing action to foreclose 2220.
Lost and restored, limitation 5638.
Mechanic's, action for enforcement where amount does not exceed $300 exclusive of interest, justice's court does not have jurisdiction 5714.
Mechanic's, legislature may confer power on justice's court to enforce in certain cases (Nev. Const. art. vi, sec. 8) 323.
Not affected as preferred claim for wages 5494.
Not affected by homestead exemption 2143.
Not created by judgment in action against estate of deceased person 5974.
Of employees for wages preferred claim against insolvent corporation 1187.
Of judgment, obtained for damages 5510.
Of judgment, when property of debtor sold under execution not liable to 5306.
On bullion, attachment 5492.
On mine attaching prior to patent not to be impaired 2390.
On personal property, action to enforce in justice's court, limitation of service of summons 5731.
On unclaimed property left with jeweler 531.
On undivided interest becomes charge on individual's part after partition and payment of costs 5547.
Order of district judge that kindred pay expenses for insane, charge becomes lien on property of kindred 2200.
Order of payment in actions for partition, verified affidavit of amount due 5549.
Payable in installments, only sufficient property to be sold to pay amount due, court may order more sold when amounts become due, if property cannot be sold in portions more may be ordered sold 5503.
Penalty for failure to enter acknowledgment of satisfaction 2228.
Preferred, upon bullion from ore sold at reduction works 5492.
Publication of, notice in action to enforce 2227.
Taxes for school bonds 3439.
Taxes on proceeds of mine are on mine 3688.
To ranchmen or persons boarding animals 2232.
Transcript of judgment may be filed in any county 5277.
Upon animals for charges, suit, sale, fees 5499.
Waiver when not exhibited in action to enforce 2227.
When to be paid by redemptioner under execution sale 5300.
When wages are preferred claim 5493, 5494.
Liens, foreclosure, parties coming in under notice to file statement of facts, time for answer, rule xxxv, p. 1430.
On real and personal property, foreclosure of, sale, land in two counties, execution, judgment for deficiency, lien 5501.
On real property, venue on foreclosure 5011.

Liens—continued.
To mechanics, materialmen and others, action for 2222-2228.
Lien claimant, holding other securities may be required to first exhaust them in action for partition 5550.
Lienholder, proceeding when he becomes purchaser in action for partition 5564.
Lieutenant-governor, trial of impeachment, chief justice to preside over senate (Nev. Const. art. vii, sec. 1) 334.
Life estate, how set off in action for partition 5548.
Proceedings on termination of, notice, order 5584.
Life insurance, when exempt from execution 5288.
Limitation, action against sureties on guardian's bond to be commenced within three years 6185.
Action does not run during continuance of war when alien enemy is a party 4979.
Action for damages may be brought within one year after ouster in quo warranto of director of corporation 5669.
Adverse possession under claim of title without written instrument 4958, 4959, 4960.
Disability not available unless it existed when right of action accrued 4982.
Does not apply to recovery of money on deposit with bank or trust company 4974.
Does not run in favor of person out of the state 4975.
Does not run until coexisting liabilities are all removed 4983.
Evidence of new promise must be in writing 4985.
Failure of corporation to exercise franchise for two years, judgment for dissolution 5670.
Not to be plead in answer of party summoned after judgment in action on joint contract 5246.
Of action against corporation for penalty or forfeiture, or to enforce liability made by law 4984.
Of action against estate of deceased person 5968, 5969.
Of action arising in another state or foreign country 4947.
Of action by state for real property 4950.
Of action for real property or rents 4952, 4953.
Of action for recovery of estate sold by guardian 4963.
Of action for recovery of mining claims 4951.
Of action to recover estate sold by executor or administrator or to set aside sale 4964.
Of claim against county, funds assigned to payment if not collected within two years payable on other claims, new demand and reallowance necessary or claim barred 1536.
Of record of judgment restored 5645.
One year after issuance of letters not part of time for commencement of action if party dies out of the state 4978.
Provisions regarding apply to actions brought by the state 4971.
Limitation—continued.
Three months to bring action on claim against bank rejected by bank examiner 671.
Time for bringing action on claim against bank closed by bank examiner 671.
Time for bringing action to restore lost record 5632.
Time for commencement of contest for office other than state office 4973.
Time for commencing action on lien for material or labor 2220.
Time, how reckoned, when statute begins to run 4968, 4969.
Time within which action is stayed not included 4981.
Time within which action may be brought against sureties on bond of guardian 6185.
Time within which action must be brought against trustee of bankrupt 553.
When does not run during term of public official 2866.
When entry upon real estate is not sufficient 4954.
When judgment for plaintiff is reversed on appeal, or if he dies and cause of action survives, new action may be commenced within one year 4980.
When not otherwise provided, time for commencement of action is four years 4970.
Limitations, adverse possession not established unless taxes are paid 4960.
Affecting restored records 5638.
Foreign corporation may plead statute of 1355.
In general, in civil cases 4946.
Of actions other than for the recovery of real property 4967.
Of actions regarding real property 4948.
Other than real property, schedule of sections 4967.
Possession of tenant deemed possession of landlord 4961.
Regarding real property, schedule of sections 4948.
Schedule of miscellaneous sections 4974.
Time for commencement of contest for state office 4972.
Time within which action may be commenced by or against representative of deceased person 4977.
Time within which minors, married women or persons insane or in prison may sue 4966, 4976.
Under civil practice act continue to run as if former act had not been repealed 5819.
What constitutes adverse possession and occupancy 4957.
When statute does not apply to minors or persons under legal disability to sue 4965.
Lis pendens, in actions regarding real property 5021.
In actions to determine adverse claim to real property to be filed in office of county recorder 5522.
Proof of service to be made before entry of judgment by default in action to determine adverse claim to real property 5524.
Little & Brown's edition of United States laws are evidence 529.

Live stock, damages recoverable for spread of disease by 2268.
Herded or grazed on lands of another liable to attachment for damages, costs and attorneys' fees 2336.
Railroad to give notice of when killed 3600.
Trespassing on ground enclosed by lawful fence, damages 2332.
When statute of limitations begins to run against action for recovery 4967.
Livery-stable keeper, has lien upon animals for charges 5499.
Local or special laws, in certain enumerated cases are invalid (Nev. Const. art. iv, sec. 20) 278.
Local rules and customs, location and transfer of mines under, prior to 1863, 1102.
Location notice, of mine, duplicate in office of county recorder receivable in evidence same as original 2473.
Location of mines, before 1863 proved by local rules, regulations or customs of miners 1102.
Lodging-house, when and how baggage left at may be sold 2153.
Logs, eminent domain may be used for purpose of floating 5606.
Lost records, action to restore 5632.
Action to restore deed or will, parties 5633.
Action to restore may be brought in district court of county in which property is situated 5636, 5637.
Action to restore, what complaint to allege, summons, waiver, decree 5634.
Affecting real property, schedule of sections relating to restoration 5630.
Certified copy of validated 5639.
Citation and notice in proceeding to restore 5642.
Deed made under tax sale by treasurer not prima facie evidence of title in purchaser when record destroyed 5631.
Evidence which may be received in action to restore 5635.
How costs taxed in proceedings to restore 5646.
How may be re-recorded under date of original record, affidavit, force of copy 5630.
How re-recorded after division of county 5637.
Limitation of record of judgment restored 5645.
Not affecting real property may be restored 5640, 5641.
Proceedings to restore, contest how made, effect of judgment 5644.
Proceedings to restore, service on parties residing out of county 5643.
Restored, limitations affecting 5638.
Restored, validated 5639.
When deed made by sheriff, executor, administrator, guardian, assignee, receiver, trustee or commissioner is prima facie evidence of legality of sale 5631.
Lots, in federal townsite, appeal may be taken to supreme court from judgment on adverse claim in district court 1985.
In federal townsite, claimant to sign statement in writing 1983.
Lots—continued.
In federal townsite, entered by district judge as trustee, procedure for obtaining 1981-1988.
In federal townsite, execution of deed to, after trial of adverse claims in district court 1984.
In federal townsite, fees and expenses of district judge 1986.
In federal townsite, if adverse claimants, proceedings to be certified to district judge 1984.
In federal townsite, not conveyed within one year, to be sold 1987.
In federal townsite, procedure to obtain title 1983-1986.
In federal townsite, sale of unclaimed, disposition of proceeds 1993.
In federal townsite, when deed to be made to guardian or trustee of minor or insane person 1986.
"L. S." or word "seal" sufficient description of seal in telegraphing papers for service, and word "stamp" sufficient to indicate revenue stamp 5372.
Magistrate, when may order child transferred to district court under juvenile court law 741.
Mail, time for notice of motion when served by 5364.
When service of notices and papers may be made by 5370.
Maintenance, how state treasurer to set apart moneys received from occupant of public land for absence under act relating to possessory actions 5853.
Malfeasance in office, governor, state or judicial officer liable for (Nev. Const. art. vii, sec. 2) 335, 2851-2854, 3763.
Judgment of removal, copy of to be transmitted to governor or county commissioners 2853.
Judgment of removal of officer for, pending appeal office to be filled as in case of vacancy 2854.
Revenue officer may be suspended pending charges 3753.
When decree to be entered for removal of officer 2852.
When officer to be removed for 2851, 2852.
Mandamus, answer to writ may show cause, how made 5699.
Applicant may object to sufficiency of answer or introduce proof 5701.
Clerk to transmit verdict, when, argument, notice 5703.
Denominated writ of mandate 5694.
District court may require documentary evidence by, on contest for county or township office 1806.
District court or judge may issue 4840.
District judge may try and determine at chambers 4843.
Execution may issue to enforce judgment, damages and costs 5705.
Fine imposed on officer for refusal to obey writ may be retained from salary 5707.
If no answer filed case how heard, if answer filed how heard 5703.
In what cases and by what court or judge writ may issue, how returnable 5695.

Mandamus—continued.
May be issued by district court to compel registration of elector 1710, 1712.
New trial and appeal may be had as in civil cases 5713.
Officer guilty of misdemeanor in office for refusal to obey writ of 5707.
One new trial may be had, new jury to be summoned 5702.
Orders of public service commission may be enforced by 4545.
Penalty for refusal to obey writ 5707.
Peremptory writ to issue without delay after judgment 5705.
Provisions relating to civil actions are applicable to 5712.
Railroad commission may enforce orders by 4583.
Return and hearing may be had at any time 5711.
Schedule of sections relating to 5694.
Service of writ of upon majority of board sufficient 5707.
Supreme court empowered to issue writ (Nev. Const. art. vi, sec. 4) 319.
Supreme court or justice thereof may issue 4834.
When alternative or peremptory writ will issue, notice, default, hearing 5698.
When answer raises question of fact jury trial may be ordered and damages assessed 5700.
Writ of, district court or judge may issue (Nev. Const. art. vi, sec. 6) 321.
Writ of, how served 5706.
Writ of, may be issued by district court to compel registration 1710.
Writ of, must be either alternative or peremptory, form 5697.
Writ of, when and how issued 5696.
Map, lost and restored, validated 5639.
Mark, included in signature or subscription 5475.
When made as signature or subscription to be witnessed and if for acknowledgment or sworn statement by two witnesses 5475.
Marriage, action for annulment of 2357.
Communication made during, husband and wife cannot be required to testify 5424.
Debts of wife contracted before, property of husband not liable for 2170.
Dissolved by decree of divorce, how community property divided 2166.
District court may license minister of gospel to solemnize 2340.
May be annulled for fraud or want of consent 2355, 2356.
Of person under age of consent or insane, when not to be annulled 2356.
When word "affinity" signifies connection existing between each of the married persons and blood relatives of the other 5475.
Marriage certificate, or certified copy presumptive evidence 2350.
Marriage contract, completely dissolved by divorce, and name of female may be changed 5844.
Recording of, imparts notice 2183.
Married persons, not lawfully separated cannot adopt children without consent of both 5827.
Married woman, acting as sole trader, liable for maintenance of children 2193.
Action by or against, when husband must be joined 4989.
As sole trader, may sue or be sued alone 2192.
As sole trader, when husband not responsible for debts 2194.
District court may make order allowing her to carry on business in her own name, procedure 2191.
When statute of limitations does not run in civil action 4976.
Masculine gender, includes the feminine and neuter 5475.
Master, proceedings against, to determine whether breach of contract of apprenticeship 491.
To pay costs on proceeding to set aside covenants of apprenticeship 493.
Material, action on lien for 2222-2228.
Matrimony, divorce from bonds of, grounds for, verified complaint, venue 5838.
Measure of damages, for cutting timber for repair of highway or bridge 5507.
Mechanic, has preferred claim for wages 5493, 5494.
Tools and certain property of, exempt from execution 5288.
Mechanic's lien, action for enforcement where amount does not exceed $300 exclusive of interest, justice's court does not have jurisdiction 5714.
Action to restore lost record of 5632.
Legislature may confer power on justice's court to enforce in certain cases (Nev. Const. art. vi, sec. 8) 323.
Parties coming in under, notice to file statement of facts, time for answer, rule xxxv, p. 1430.
Medical examiners, board of, on refusal to grant certificate applicant may appeal to courts 2366.
Medicine, applicant for certificate to practice may appeal to courts from decision of board of medical examiners 2366.
Memorandum of exceptions upon motion for new trial, when to be filed 5322.
Metal-bearing ores, specimens exempt from execution 5822-5824.
Mileage, and per diem may be demanded by witness in advance 5431.
Of constable computed for actual distance traveled 2040.
Of jurors in counties polling over 425 votes 2013.
Of sheriff and other officers, how and from where computed 2040.
Sheriff, constable or coroner entitled to only one for serving more than one process in same action requiring only one journey 2037.
When paid garnishee 5189.
Militia, when members of exempt from arrest under civil process 4081.
Mill operator, liability for death or injury of employee 5650.

Mill operator—continued.
Liable for death or personal injury if caused by gross negligence notwithstanding slight negligence of employee 5651.
Mills, eminent domain may be used for supplying water 5606.
Mine owner, liable for death or personal injury if caused by gross negligence notwithstanding slight negligence of employee 5651.
Liability for death or injury of employee 5650.
Miner, cabin, tools, horses and certain other property of, exempt from execution 5288.
Has preferred claim for wages 5493, 5494.
Mineral cabinets, exempt from execution 5822-5824.
Mining claim, action involving title, jurisdiction does not lie in justice's court 5714. See Mines and Mining.
District court has jurisdiction in cases involving title or possession (Nev. Const. art. vi, sec. 6) 321.
Legal title by location or occupation 4951.
Limitation of action for recovery of 4951.
Marking off of part to party accepting smallest portion in action for partition 5580.
Material for use on not exceeding $1,000 exempt from execution 5288.
Not exceeding in value $1,000 exempt from execution 5288.
Postponement of trial may be granted to allow further development 5203.
Referee may be ordered to divide in action for partition 5576.
Trial of title to, not within jurisdiction of justice's court (Nev. Const. art. vi, sec. 8) 323.
What necessary to be shown in adverse action on application for patent 5526.
Mines, action by company or majority owners against minority owners for expenditures 2476-2482. See Mines and Mining.
Action for taxes on proceeds of, district attorney to begin, when and where, damages, penalties, form of complaint and answer 3707-3709.
Action for waste or trespass underground may be commenced within 3 years after discovery of facts 4967.
Action not to be maintained or defended by certain mining companies failing to file statements 1338.
Action on adverse claim to, on application for patent 2384.
Affidavit before justice of the peace or district judge for examination of books of assayer, mill or purchaser of ore, gold dust or bullion 2484.
Attorney-general may file suits against certain mining corporations failing to file statements 1338.
Certified copies of mining records to have same force in courts as originals 2467.
Certified copies of records relating to, may be read in evidence 1636.
Condemnation for mining purposes of improvements on lands sold by the state 2456.
Condemnation of land for 2459.
Mines—continued.
Contest before United States land office as to mineral or agricultural character of land 2397.
Court may appoint receiver in lieu of granting injunction 5145.
Customs of districts 4951.
Damages, how assessed for improper working, extraction of ore or trespass 5509.
District court has jurisdiction in cases involving title or possession (Nev. Const. art. vi, sec. 6) 321.
Duplicate notice of location in office of county recorder receivable in evidence same as original 2473.
Duty of superintendent to keep posted day of week on which authorized stockholders may inspect 2492.
Eminent domain may be used for supplying water 5606.
Foreclosure of mortgage on, holder entitled to recover expenditure made to prevent forfeiture 1091.
Grub-stake contracts acknowledged and recorded are prima facie evidence 2475.
Holder of mortgage may recover for expenditure made to prevent forfeiture 1091.
In actions for recovery of ore, gold dust or bullion, when failure to make entry or loss of books by purchaser no defense 2486.
In actions involving title or possession supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
Lien attaching prior to issuance of patent not to be impaired 2390.
Location and transfer of, before 1863 proved by local rules and regulations or customs of miners 1102.
Notice, application and order for underground survey, costs 5511.
On application for injunction opposing party may be required to give bond for payment of damages 5145.
Party obtaining underground survey liable for unnecessary injury 5511.
Proceedings for inspection of by stockholders 2492, 2495.
Records relating to impart notice 1635.
Taxes on proceeds of lien 3688.
When affidavit recorded or certified copy is prima facie evidence of annual assessment work 2431.
When notice or affidavit regarding annual work or payment, or certified copy thereof, is prima facie evidence 2432.
When survey and certificate of surveyor are prima facie evidence 2429.
Working of not to be interfered with by working of public lands 5849. See Mines and Mining.
Minister of the gospel, may be licensed by district court to solemnize marriage 2341.
Ministers of the gospel, libraries and certain property of, exempt from execution 5288.
Minister of the United States, may take affidavit in foreign country 5442.
Ministerial officers, when subject to control of court 4864.

Minor, action for death or injury, or seduction of female 4996.
Adoption of, requirements 5825.
Assessment of damages in action for abuse of apprentices 491.
District court may compel production of title papers in estate of 4849.
Guardian of, or trustee may apply for lot in federal townsite 1983.
May recover damages from master or mistress for breach of contract of apprenticeship 491.
Time within which may bring action against sureties on bond of guardian 6185.
When deed to lot in federal townsite to be made to guardian 1986.
Who may be appointed guardian ad litem, rules xxix-xxx, p. 1430.
Minors, act to provide for appointment of guardians, schedule of sections 6149. See Guardians and references thereto.
Estates of, district court has jurisdiction (Nev. Const. art. vi, sec. 6) 321.
Local or special law for sale of real estate belonging to, invalid (Nev. Const. art. iv, sec. 20) 278.
When and how may redeem property sold for delinquent taxes 3666.
When statute of limitations does not apply 4965; when does apply 4966.
Minutes of court, when motion for new trial may be made upon 5321.
Misdemeanor in office, for refusal to obey writ of mandamus 5707.
Misrepresentation, if workman caused to change place of employment by may have action for damages 1938.
Mistake, action on ground of may be commenced within three years after discovery of facts 4967.
In pleadings or proceedings may be ordered corrected 5084.
May be corrected, immaterial if not prejudicial 5080.
Relief may be given from upon payment of costs 5084.
Mistress, proceedings against to determine whether breach of contract of appprenticeship 491.
Modification of judgment, order or proceeding in district court not to be made unless upon notice within six months, rule xlv, p. 1431.
Money, certificate of sale to state kind in which redemption may be made 5298.
Collected by sheriff or constable, when to be paid to justice of the peace and by him to parties entitled 5810.
Entry of judgment upon by default in justice's court 5754.
Judgment may be in kind of specified in contract or obligation or received in fiduciary capacity 5269.
Kind of specified in judgment to be stated in execution 5281.
Order for payment of may be enforced by execution 5366.
Paid sheriff on redemption of real property sold under execution, to be of same kind specified in judgment 5302.
Money—continued.
Surplus on sale on foreclosure, how paid and deposited 5502.
Undertaking on appeal to provide for same kind as judgment 5347.
When included in word "personal property" and "property" 5475.
Mongolians, act relating to adoption of children does not apply 5834.
"Month," when means calendar month unless otherwise expressed 5475.
Mortgage, action to restore lost record of 5632.
County recorder to certify copy of assignment or payment as evidence 3789.
Court may enjoin injury to real property during foreclosure 5519.
Foreclosure of, affidavit of payment of taxes 3756.
Foreclosure of, exemptions from execution do not apply 5288.
Foreclosure on mines, holder entitled to recover expenditure made to prevent forfeiture 1091.
Foreclosure, practice in district court, reference, service by publication, rule xxiii, p. 1429.
Good against subsequent conveyances or incumbrances to parties having actual notice or notice by lis pendens 5021.
Holder of may redeem real property sold under execution 5299.
In action for foreclosure complaint to have affidavit of payment of taxes attached 3756.
Lis pendens in actions regarding 5021.
Lost and restored, limitation 5638.
May be taken by referees on sale in partition 5555.
Not affected by preferred claim for wages 5494.
Not of record, holder of need not be made party in action for partition 5529.
Of property of churches, associations and societies, district court may make order for 1369.
Of property of estates of deceased persons, district judge may make order authorizing 6146.
Of real property is not deemed conveyance without foreclosure 5518.
On mine, attaching prior to issuance of patent not to be impaired 2390.
On mine, holder of may recover expenditure made to prevent forfeiture 1091.
On real and personal property, foreclosure of, sale, land in two counties, execution, judgment for deficiency, lien 5501.
On real property, venue on foreclosure 5011.
On undivided interest, becomes charge on individual's part after partition and payment of costs 5547.
Order of payment in actions for partition, verified affidavit of amount due 5549.
Payable in installments only sufficient property to be sold to pay amount due, court may order more sold when amounts become due, if property cannot be sold in portions more may be ordered sold 5503.
Recorded in office of county recorder imparts notice 1093.
Sale for taxes on 3787.

Mortgage—continued.
When receiver may be appointed in action to foreclose 5193.
Mortgage lien, on homestead may be given by joint consent of husband and wife (Nev. Const. art. iv, sec. 30) 288.
Mortgaged personal property, subject to levy under attachment or execution 1080.
Mortgaged premises, undertaking on appeal to stay execution 5351.
Mortgagees may perform conditions after detainer and notice 5588.
Mortgagees, subsequent deemed to take with notice of conveyance acknowledged and recorded 1039.
Mother, consent of on adoption of children 5828.
May be witness in action to determine paternity of illegitimate child 765.
When entitled to damages for death by wrongful act 5648.
When may sue for seduction of daughter 4995.
Motion, and order, defined 5362.
Determined in district court, not to be reheard unless by leave, after notice, rule xi, p. 1427.
For change of place of trial in justice's court 5716.
For continuance and how made in district court, affidavits and counter-affidavits, service, rule xii, p. 1427.
For new trial, based on affidavits, counter-affidavits, service 5320, 5324.
For new trial, district judge may dispose of at chambers 4843.
For new trial, in district court, execution not to be stayed pending, except upon bond and notice, procedure, D. C. rule xxvi, p. 1429.
For new trial in mandamus proceedings 5702.
For new trial, when must be made before appeal, when not necessary 5328.
Hearing of, may be transferred to other judge 5365.
In district court, moving party entitled to have decided if opposing party does not appear, rule xi, p. 1427.
In district court, when five days' notice required, what notice to specify, what papers to be served with notice, court may shorten or enlarge time, rule x, p. 1427.
Manner of making and hearing in district court, rule xi, p. 1427.
Notice of in supreme court, five days unless time shortened, D. C. rule xxiv, p. 1425.
Notice of time of may be shortened by judge 5364.
Notice of when and where made, how for service by mail 5364.
Or proceeding, noticed in district court, or set for time certain, if not heard is continued without order and may be disposed of later, D. C. rule vi, p. 1426.
Or issue of law in district court, when may be heard orally at any place in state or submitted on briefs, D. C. rule vii, p. 1426.
Time for notice or hearing of may be shortened or enlarged in district court, rule x, p. 1427.
Motion—continued.
To change place of trial in justice's court, when cannot be made more than once by same party 5717.
To discharge writ of attachment for irregularity 5165.
To postpone trial for absence of evidence 5202.
To retax costs 5387.
To retax costs in the district court, party has five days after service of cost bill, rule xxxiv, p. 1439.
When another judge may hear 5365.
When justice's court may of its own postpone trial 5757.
Motion and orders, at chambers, where made 5363.
In civil action, schedule of sections 5362.
Motions, minute of, to be entered in justice's court docket 5800.
Municipal corporations, owing defendant may be garnished 5154.
Municipal court, appeal may be taken from to district court 837.
Jurisdiction of 832-835.
Powers and duties of to be fixed by law so as not to conflict with courts of record (Nev. Const. art. vi, sec. 9) 324.
Municipal fine, district court has jurisdiction of cases involving legality (Nev. Const. art. vi, sec. 6) 321.
If legality of involved in justice's court, case to be transferred to district court for trial 5721.
Municipality, affairs of, when may be closed by court 873.
May have contract declared void if public officer interested 2829.
Need not give undertaking on appeal 5346.
Music teachers, libraries and certain property of, exempt from execution 5288.
Name, if true not known defendant may be designated by any name; amendment of name 5085.
Of female may be changed in action for divorce 5844.
Names of persons, changing, notice of hearing, determination of objections, order and judgment 5837.
Of persons, changing, notice, what to state, publication 5836.
Of persons, changing, petition for, what to state, filing 5835.
Of persons, special or local law for changing, invalid (Nev. Const. art. iv, sec. 20) 278.
Naturalization, certified copies of papers or records are evidence 2541.
Congress has power to establish uniform laws relating to (U. S. Const.) 114.
Depositions admissible on hearing of application 2523.
Duties of clerk of court 2518, 2525.
Federal laws providing for 2506-2544.
Fees of clerk of court, half to be transmitted 2526.
Forms for use in proceedings for 2540.
Hearing to be in open court 2522.
In proceedings to restore lost records relating to citation unnecessary 5642.

Naturalization—continued.
Not to be ordered within thirty days prior to general election 2519.
Notice of application for to be given by clerk of court 2518.
Proceedings to set aside 2528.
Schedule of sections 2506, 2514.
When lost record of may be restored 5640.
Necessaries furnished wife, when reasonable value may be recovered from husband 2176.
Neglect, of husband to provide common necessaries of life, when ground for divorce 5838.
To perform official act, ground for removal from office 2851.
Negligence, injury caused by gross of common carrier, mill or mine operator, damages recoverable notwithstanding slight negligence of employee 5651.
Questions relating to for jury in actions for death or personal injury against common carrier, mine or mill operator 5651.
When common carrier, mill or mine operator liable for death or injury of employee 5650.
Negotiable instruments, parties and liability of in actions regarding, schedule of sections 2548. See Negotiable Instruments.
Neuter gender, included in the masculine 5475.
New certificate of stock of corporation, district court may order in lieu of one lost 1165.
New matter, allegation of not denied, taken as true 5075.
In answer raises issue of fact in justice's court 5763.
In plaintiff's reply to answer of garnishee deemed denied 5179.
In reply, deemed controverted 5075.
New trial, allowed in garnishment proceedings 5191.
Appeal from order denying and from judgment, one statement for both and what to contain 5332, 5333.
Appeal from order granting, time for statement and what to contain 5332, 5333.
Appeal from order granting or denying, when testimony to be reduced to narrative form in statement or amendments to proposed statement and when complete transcript may be furnished 5333.
Applicable to proceedings in eminent domain 5624.
Application for, how made and determined, verdict against evidence, when only two new trials 5321.
Civil practice in regard to applicable to certiorari, mandamus and prohibition 5713.
Court may grant of its own motion 5321.
Defined 5319.
For what causes granted 5320.
In civil action, schedule of sections 5319.
In district court execution not to be stayed pending motion for except upon bond and notice, procedure, D. C. rule xxvi, p. 1429.
New trial—continued.
In district court, if time enlarged for filing statement or affidavits, adverse party to have same extension for filing amendments or counter-affidavits, rule xxiv, p. 1429.
In district court, statement to be settled by referee who tried case, rule xxv, p. 1429.
In justice's court, schedule of sections 5788.
In proceedings to obtain right of way for railroad 3542.
Motion for, affidavit and counter-affidavits, service 5320, 5324.
Motion for, district judge may dispose of at chambers 4843.
Notice of to be filed and served, what to contain 5323.
On appeal supreme court may order 4835.
One may be granted in mandamus proceedings 5702.
Order granting or refusing, to state grounds 5321.
Time for appealing from an order granting or refusing 5329.
Verified memorandum of exceptions relied upon to be filed, when 5322.
Waiver of by appealing 5328.
When district court may order on appeal from justice's court 5794.
New trial, when motion for must be made before appeal, when not necessary 5328.
Newspaper, publication of notice in of taking testimony for perpetuation 5466. See Newspapers.
Nomination for office, contest for under primary election law 1764. See Elections.
Contestee required to appear under primary election law 1764. See Elections.
Nonjudicial days, enumerated, what business allowed, falling on Sunday, Monday following observed 4870.
When excluded in computation of time 5482.
Nonresident defendant, in divorce action to be notified, order, publication, service of summons 5839.
Dismissal of action upon failure to give security for payment of costs 5391.
Plaintiff, requirement of security for costs, stay of proceedings 5389.
When service may be made upon clerk or attorney 5375.
Nonsuit, in what cases granted and how entered 5237.
Not to be granted for nonjoinder of party in action for unlawful detainer 5592.
Notaries' fees, in counties polling over 800 votes 2018. See Notary Public.
Notaries public, seal, records and furniture of exempt from execution 5288, 2753. See Notary Public.
Notary public, certified copy of record of and of procedure, when evidence 2754, 2759.
Fees of when not over 800 votes in county 2004.
May administer oath or affirmation 5483.
May take affidavits to be used in this state 5450.

Notary public—continued.
May take affidavits and depositions in other state or territory 5451.
May take depositions of witnesses on continuance 5203.
May take depositions or affidavits to be used before any court, judge or officer 2750.
Out of state, may take deposition 5459.
Note, copy of as complaint in justice's court 5736.
Promissory, or other instrument, when admitted in justice's court unless denied by verified answer 5770.
Notice, and action on dispute of wages as preferred claim 5494.
And certification of wages as preferred claim against attachment or execution 5494.
And citation in proceedings to restore lost records 5642.
And undertaking on appeal, order of service immaterial 5330.
Application for order for payment of costs and alimony pendente lite in divorce action 5843.
Before sale by county treasurer of property to which he holds deed under sale for delinquent taxes 3767.
By bank examiner to persons holding claims against closed bank 671.
By district judge to stockholders of proceedings for removal of directors and officers of corporation, publication 1180.
By referee in district court of filing report, D. C. rule xxi, p. 1428.
Conveyance acknowledged and recorded is to subsequent purchasers and mortgagees 1039.
Courts to take judicial of change in class or organization of city 775.
Declining to admit amendments to statement on appeal, when waived 5335.
Failure to serve upon subtenant entering after action no defense in action for unlawful detainer 5592.
For presentation of claims against bank in hands of bank examiner 671.
For taking deposition in state 5455.
If given of motion or proceeding in district court not heard at time continued without order and may be disposed of later, D. C. rule vi, p. 1426.
If not given to tenant lease of agricultural lands runs for another year 5589.
Imparted by records in office of county recorder 1093.
In action by majority owners against minority owners for expenditures on mines 2478.
In cases of unlawful detainer, tenant or mortgagees may perform, condition 5588.
In delinquent tax suit, publication, posting and filing 3663.
Lienholders to appear before referee in action for partition 5537.
Mortgage good against subsequent conveyances or incumbrances to parties having actual notice or notice by lis pendens 5021.
Of acceptance of offer of compromise 5265.
Notice—continued.
Of action for divorce, order, publication 5839.
Of appeal from judgment in justice's court, what must contain 5788.
Of appeal, insufficient not grounds for dismissal 5358.
Of appeal, one sufficient on appeal from judgment and order granting or denying new trial, what to state 5330, 5348.
Of appeal, receipt of, entry in justice's court docket 5800.
Of appeal, to be furnished appellate court with transcript 5356.
Of appeal, what to state, how filed and served 5330.
Of appellant, declining to admit amendments to statement on appeal 5331.
Of application for discharge from arrest in civil action, service 5115, 5116.
Of application for naturalization to be given by clerk of court 2518.
Of application for order of court to convey homestead when wife insane 2146, 2147.
Of application for order to allow married woman to carry on business in her own name, publication 2191.
Of application for underground survey of mine 5511.
Of application for writ of mandamus 5698.
Of application of corporation for its own dissolution, to be published by clerk 1240.
Of application to amend pleading in district court, D. C. rule xvii, p. 1428.
Of application to change name of person, what to state, publication 5836.
Of application to dissolve injunction 5143.
Of application to file complaint in quo warranto 5664.
Of application to revise election of officers of corporation 1130.
Of application to take deposition out of state 5459.
Of argument in mandamus proceedings 5703.
Of calling up question in district court, may be heard on law day in absence of attorney, D. C. rule v, p. 1426.
Of change of attorney 509.
Of contest for member of the legislature, service by sheriff 1818.
Of contest in United States land office to determine mineral or agricultural character of land, how served 2397.
Of decision on demurrer in district court, time in which to amend or plead, D. C. rule viii, p. 1427.
Of decision on motion or issue of law in district court, when to be given, when need not be given, D. C. rule vii, p. 1426.
Of demand for inspection of book or writing 5416.
Of disincorporation of city to be given by district court 875.
Of election contest for county or township office to be given by clerk, service by sheriff 1808.
Of ex parte order extending time must be promptly given or order is invalid, how served, D. C. rule xxxvi, p. 1430.

Notice—continued.
Of filing abstract of title in actions for partition 5544.
Of finding or decision in lower court, when required to be given to curtail time for taking exception 5345.
Of hearing in justice's court after service of summons or appearance 5733.
Of hearing in justice's court, parties entitled to one hour in which to appear after time fixed in 5733.
Of hearing objections to changing name of person 5837.
Of hearing on refusal to obey writ of mandamus 5707.
Of interpleading of claimant in garnishment proceedings 5180.
Of location of mine, duplicate in office of county recorder receivable in evidence same as original 2473.
Of marriage contract, imparted by recording 2183.
Of motion, for new trial, in mandamus proceedings 5702.
Of motion, for new trial, to be filed and served, what to contain 5323.
Of motion, in district court, when five days required, what to contain, what papers to be served with, court may shorten or enlarge time, D. C. rule x, p. 1427.
Of motion, in supreme court, five days unless time shortened, S. C. rule xxiv, p. 1425.
Of motion, time for may be shortened by judge 5364.
Of motion, time may be shortened or enlarged by district court, D. C. rule x, p. 1427.
Of motion, to discharge writ of attachment for irregularity 5165.
Of motion, to permit plaintiff to occupy premises pending action under eminent domain 5615.
Of motion, to strike out part of pleading in district court to specify part, D. C. rule xviii, p. 1428.
On motion, when and where made, how for service by mail 5364.
Of pendency of action for partition to be filed with county recorder, deemed notice to all persons 5530.
Of pendency of action to determine adverse claim to real property, to be filed in office of county recorder 5522.
Of petition to revive judgment when purchaser fails to obtain real property sold 5306.
Of proceedings, attorney entitled to after appearance 5374.
Of proceedings before justice of the peace to set aside apprenticeship 493.
Of proposed modification of findings, service 5227.
Of rejection of claim against estate of deceased person, action to be brought within 30 days 5968.
Of sale of hogs found trespassing 2256.
Of sale of lots in federal townsite not conveyed within one year 1987.
Of sale of real property in action for partition 5553.
Notice—continued.
Of sale of unclaimed baggage left at hotel or lodging-house 2153.
Of sale of unclaimed property by jeweler 531.
Of sale of unclaimed property by railroad 539.
Of sale under execution, how given 5290.
Of taking deposition for perpetuation of testimony, proof of service to be filed with clerk 5468.
Of taking testimony for perpetuation, service 5466.
Of time and place of trial to be issued by justice's court on transfer of civil action, service 5719.
Of time of holding district court to be given by judge and clerk, rule iii, p. 1426.
On exception to or justification of sureties on undertaking on appeal in justice's court 5792.
On filing of petition for determination of life estate 5584.
On justification of sureties on undertaking on appeal 5354.
On justification of sureties on undertaking to release attachment 5164.
Order made out of court without may be vacated or modified without 5326.
Publication of in action to enforce lien 2227.
Records of instruments relating to mining claims impart 1635.
Records relating to mining claims impart 1635.
Required before injunction will issue after answer 5139.
Required before rehearing of motion determined in district court, rule xi, p. 1427.
Requiring demurrant interposing general demurrer in district court to furnish points and authorities, rule viii, p. 1427.
Service of and papers to be made upon defendant imprisoned 5374.
Service of in proceedings to restore lost records 5643.
Service upon garnishee and claimant in garnishee proceedings 5180.
To abate nuisance in unincorporated town 920.
To and payment by delinquent coowner regarding annual work on mine, how given, when prima facie evidence 2432.
To appoint attorney or appear when attorney dies or is removed 510.
To be given by district judge on obtaining patent as trustee for federal townsite 1982.
To intending purchaser in action for recovery of mine and ore 2489.
To present claims in proceeding for disincorporation of city 872.
To quit or surrender real property, how served 5591.
To show cause in contempt proceedings, when required 5397.
To sureties in actions against sheriff for official acts 5242.
To the world, of adoption of child by entering and recording of order 5832.
When imparted by record, of instrument in county recorder's office 1093.
When required for issuance of writ of mandamus 5698.

Notice—continued.
Without title or with defective title, when valid 5476.
Notices, and papers, how served 5367, 5373.
How served upon nonresident 5375.
May be served on county clerk when party has no office at county-seat 5369.
Service by mail, how made, time 5373.
When and how served 5369.
When may be served by mail 5370.
When may be served by telegraph 5371.
Notices, filing and service of papers in civil actions, schedule of sections 5367.
Nuisance, action for abatement of by county commissioners 1562.
Action for recovery of expense of abating in unincorporated town 921.
Action may be maintained for cost of removal 921.
Defined, actions for abatement of, judgment, damages 5504.
In incorporated city, jurisdiction of recorders' courts 4853.
In unincorporated towns may be abated 919, 921.
Within county, commissioners to order abated, district attorney to bring action 1562.
Number, singular includes plural 5475.
Numerals, permissible in court proceedings 4885.
Oath, affirmation may be taken instead of, form 5448.
And custody of jury 5208.
Answer to writ of mandamus to be under 5699.
Answer under must specifically deny or written instrument will be admitted in justice's court 5770.
Application for commitment of insane person to be under 2204.
Commissioner to be authorized by commission to administer in taking deposition out of state 5461.
Complaint for divorce to be under 5838.
Includes affirmation or declaration 5475.
May be administered by arbitrators in voluntary submission of dispute between employer and employee 1932.
May be administered by district judge in proceedings for removal of officers of corporation 1182.
Necessity for adjournment to be shown under on amendment of pleadings in justice's court 5742.
Of applicant before making order allowing married woman to carry on business as sole trader 2191.
Of arbitrators 5259.
Of office, to be administered to receivers and other officers without charge 2039.
Of persons appointed on probation committee 734.
Of viewers in proceeding for erection of partition fences 3607.
Or verified answer showing grounds for transfer of case from justice's court to district court 5721.
Persons to be examined under, appearing before district judge in proceedings for adoption of children 5829.
Oath—continued.
Refusal of witness to take, punishment 5438.
To be taken for discharge from arrest in civil action 5118.
To petition for changing name of person 5835.
When may be administered to witnesses by arbitrators 5258.
Who may administer 5483.
Objection, if made by taxpayer to claim against county, commissioners to defer action at least ten days to allow institution of proceedings to determine validity 1521.
Point of, need not be repeated in taking exception 5317.
To amendment to statement on appeal, when waived, time for may be enlarged 5335, 5336.
To form of interrogatory in testimony taken for perpetuation, when may be made at examination and before trial 5470.
To testimony certified by official court stenographer for use on subsequent trial 5472.
To witness or question in testimony taken for perpetuation, how made 5471.
Objection, certain, to complaint not taken by demurrer or answer waived 5045.
Made in justice's court, either party may have benefit of on appeal 5791.
Not apparent on face of complaint taken by answer 5044.
To instructions in district court, rule xl, p. 1431.
Which must be taken by reply 5056.
Obstetrics, applicant for certificate may appeal to courts from decision of board of medical examiners 2366.
Occupancy, and survey of public lands as basis for possessory action, recording, affidavit 5850, 5851.
Of lot in federal townsite as basis for obtaining title 1983.
Of premises pending action under eminent domain 5615.
Occupant, of public lands under act relating to possessory actions may pay fee and absent himself, when absence forfeits right 5853.
Of real property in relation to forcible detainer defined 5587.
Offer, to allow judgment in justice's court not admissible in evidence, when further costs not recoverable 5777.
Office, city, action to contest, how brought and determined 801.
Not to be held by persons convicted of bribery and certain other crimes (Nev. Const. art. iv, sec. 10) 268.
Officer, action against for escape of prisoner arrested on civil process may be brought within two years 4967.
Action against for money paid under protest as taxes may be commenced within one year 4967.
Action against for seizure of property may be brought within one year 4967.
As a party to action, when not required to give bond or undertaking 5487.

Officer—continued.
County or revenue, under presentment may be suspended from office by county commissioners 3753.
Custodian of public records of this state or the United States to certify or verify copy 5409.
Every authorized, to take testimony may administer oath or affirmation 5483.
Guilty of malfeasance to be cited by district court 2852.
Holding execution or deputy not to purchase at sale 5292.
Judgment of removal for malfeasance, pending appeal office to be filled as in case of vacancy 2854.
Making sale under execution to deliver personal property and certificate of sale to purchaser 5296.
May be removed for malfeasance 2851, 2852.
May have execution in own name if unpaid fees 2027.
May make deed for real estate sold by predecessor 1662, 1663.
May reject bid of person who has refused to pay bid at execution sale 5294.
May sell property again under execution if bidder refuses to pay 5293.
Of corporation may verify pleading 5064.
Of corporation owing debtor may be examined on proceedings supplementary to execution 5310.
On removal of for malfeasance, clerk to transmit copy of judgment to governor or county commissioners 2853.
Public, when statute of limitations does not run during term 2866.
Refusing to obey writ of mandamus, salary may be applied on fine 5707.
Removed for malfeasance, successor to be appointed by governor or board of county commissioners 2853.
Return of warrant of arrest and undertaking in contempt proceedings 5401.
Revenue, may be removed or suspended and another appointed to perform duties pending charges 3753.
Revenue, may be suspended and another appointed to perform duties pending charges 3753.
Selling property under execution without giving notice, damages and penalty 5291.
To be paid in advance, cost of publication of process or paper 2026.
To enter fee in book under title of proceeding, subject to inspection 2020.
To file duplicate certificate of sale under execution with county recorder 5298.
To serve and execute writs and papers sent by telegraph, liability 5371.
Unlawful to be interested in purchase at sale made officially 2828.
When decree to be entered against for removal for malfeasance 2852.
When excused from bringing person arrested in contempt proceedings 5407.
When liable for arresting in civil action witness subpenaed 5446.
Officer—continued.
When not liable for more than amount bid by second purchaser and amount collected from purchaser refusing to pay at sale under execution 5295.
Officers, liable to penalty for failure to post table of fees, recoverable before justice of the peace 2025.
Not to charge for administering oath of office to receivers and other officers 2039.
Of corporation liable in damages for making false report 1175.
Of the state, when may attack collaterally due incorporation of company 1154.
Provision to be made for removal of certain for malfeasance or nonfeasance (Nev. Const. art. vii, sec. 4) 337.
Public, fees and salaries of, subject to attachment and execution 2864.
Removal by impeachment, schedule of sections 6878. See Impeachment and reference thereto.
State or judicial, liable to impeachment for misdemeanor or malfeasance (Nev. Const. art. vii, sec. 2) 335.
To post table of fees 2025.
Official bond, how sureties may be released, liability 2880-2883.
May be furnished by surety company 2888.
To the state, action may be brought on by any person injured, in own name 2870.
When surety may be released on payment of proportion 2886.
Official court stenographer, when testimony taken by may be used on subsequent trial 5472.
When to certify testimony for use on subsequent trial 5372.
Oil pipe lines, and tanks or reservoirs, eminent domain may be used for purpose of building 5606.
Omission or error, in primary election may be ordered corrected by justice of supreme court or district judge, disobedience contempt 1763. See Elections.
Opinion, copy of, to be furnished appellate court on appeal 5356.
Of supreme court, decision not effective until opinion filed with clerk 376.
Of supreme court, to be forwarded with remittitur, S. C. rule xvi, p. 1424.
Opinions, of supreme court to be in writing and recorded 4839.
Of supreme court to be recorded, S. C. rule xiv, p. 1424.
Oral, what pleadings may be in civil action in justice's court 5734.
Oral evidence, of loss and contents of writing 5417.
Order, and motion, defined 5362.
Appeal from, transcript, of what to consist 5356.
Appealed from, may be reversed, affirmed or modified 5259.
Appealed from on certified copy of findings and order 5342.
Application for refused, not to be made again, except to judge of higher court, violation a contempt, order may be vacated 4881, 4882.

Order—continued.
Based on affidavit, appeal from, copy to be attached 5339.
Bill of exceptions may be settled at time of making 5343.
By county clerk or justice of the peace to admit stockholder to mine 2495.
By district court for transmission of papers by justice's court on appeal, service, fine 5791.
Damages may be added to when appeal taken for delay 5359.
Denying new trial, appeal from and from judgment, one statement for both and what to contain 5332, 5333.
Disobedience of in supplementary proceedings punishable as contempt 5314.
Disobedience of is contempt 5394.
Disobedience of, punishable as contempt in justice's court 5795.
District court or judge may make preliminary, regarding property pending action for divorce 5841.
Ex parte, extending time is invalid unless notice promptly given, rule xxxvi, p. 1430.
Fixing time for division of mining claims by referees in action for partition 5577.
For arrest in civil action. may be vacated 5113.
For arrest in civil action, requirements 5089, 5092.
For arrest of person for receiving fees in election contest 1815.
For bank examiner to show cause why he should not be enjoined 675.
For consolidation of actions 5478.
For delivery of property stolen or embezzled 7446-7448.
For disposition of proceeds if court directs sale of homestead when wife insane 2147.
For examination of debtor in proceedings supplementary to execution 5307, 5308.
For examination of witness for perpetuation of testimony to be filed with clerk 5468.
For inspection and furnishing copy of written instrument in justice's court 5769.
For jury trial in mandamus proceedings 5700.
For payment of money, may be enforced by execution same as judgment 5366.
For publication of notice in action for divorce 5839.
For publication of summons in action to determine adverse claim to real property 5523.
For transferring hearing of motion to other judge 5365.
For trial by jury of special issues 4945.
For underground survey of mine, how obtained 5511.
Granting or denying new trial, only one notice and undertaking required 5348.
Granting or denying new trial, to state grounds 5321.
If application for be made to one district judge not to be made to another unless upon written consent, rule xlii, p. 1431.
In civil action, how reviewed on appeal 5325.
In name of state, court, or judicial officer is "writ," when 5475.
Judgment of supreme court relating to on appeal to be entered in trial court 5360.
Order—continued.
Made out of court without notice may be vacated or modified without notice 5326.
May be made that money or thing be deposited in court 5192.
Of arrest if indorsed on summons in justice's court to be returnable forthwith 5728.
Of arrest in civil action to be entered in justice's court docket 5800.
Of arrest of defendant in certain civil actions in justice's court 5744.
Of arrest of defendant in civil action in justice's court, affidavit and undertaking 5745.
Of court for change of attorney 508.
Of court for payment of money transmitted in lieu of undertaking on appeal from justice's court 5792.
Of court in quo warranto, penalty for refusal to obey 5679.
Of discharge from arrest in civil action 5119.
Of district court for appointment of probation committee 734.
Of district court for changing name of person 5837.
Of district court for new election of officers of corporation 1130.
Of district court may be entered in term or vacation 4842.
Of district court not to be vacated, modified or corrected unless upon notice within six months, rule xlv, p. 1431.
Of district judge for adoption of child 5829, 5831.
Of district judge for dissolution of corporation on its own application 1240.
Of district judge for payment of expenses for insane from property or by kindred 2200.
Of district judge on adoption of child, to be entered in minutes and recorded in office of county recorder 5832.
Of district judge that books and papers of corporation be delivered to officers elect 1182.
Of judge of district court for permission to withdraw papers, rule xix, p. 1428.
Of justice's court adjudging person guilty of contempt 5796.
Of justice's court for summoning jurors in civil action 5768.
On publication for determination of life estate 5584.
Property lost under erroneous may be restored on appeal 5359.
Relief may be given from when obtained by mistake or inadvertence 5084.
Regarding redemption or partition, time for appealing from 5329.
Restraining, preventing defendant from interfering with work of plaintiff in proceedings under eminent domain 5615.
Shortening time for notice for taking deposition in state 5455.
Special made after final judgment, time for appealing from 5329.
That claimant be interpleaded in garnishment proceedings 5180.
To allow party to survey real property 5512, 5513.

Order—continued.
To permit plaintiff to occupy premises pending action under eminent domain 5615.
To show cause in contempt proceedings, when required 5397.
To show cause in proceedings to restore lost records 5642.
To show cause in prohibition 5710.
To show cause in writ of mandamus 5697.
To show cause, when another judge may hear 5365.
To show cause why writ of certiorari should not be granted 5685.
To stay execution pending motion for new trial in district court, procedure, rule xxvi, p. 1429.
Vacating award of arbitrators, when may be made 5261.
What ordered deemed excepted to 5318.
When another judge may hear 5365.
When appeal from to be accompanied by statement 5338.
When court below may proceed upon other matters, notwithstanding appeal 5352.
When may be served by telegraph 5371.
Orders, and motions at chambers, where made 5363.
And motions in civil actions, schedule of sections 5362.
Duty of sheriff to execute 1648, 1650.
Intermediate affecting judgment may be reviewed upon 5340.
Preliminary and final in divorce proceeding may be in such form as most effective 5842.
Ordinance, by city for special assessment, certified copy prima facie evidence 867.
Ores, damages for extraction of from mine, how assessed 5509.
Eminent domain may be used for supplying water for reduction 5606.
Metal-bearing exempt from execution 5822-5824.
Sold at reduction works preferred lien upon bullion 5492.
Original exhibit, when may be brought up on appeal 5344.
Original jurisdiction, supreme court has in contest for state office 1823.
Original writs, what may be issued by the supreme court and justices thereof 4834, 319.
Ormsby County, action may be brought in against the state for services or advances authorized by law 5653.
Ouster, judgment for in quo warranto 5667.
Paleontological remains, exempt from execution 5822-5823.
Paper, not to be withdrawn from district court without order of judge, original evidence not to be taken, rule xix, p. 1428.
Without title or with defective title, when valid 5476.
Papers, all blanks must be filled in by justice of the peace before issuance except subpenas 5809.
And documents in district court to be on legal cap, in proper form, and not to be amended by changing original without leave of court, rule ix, p. 1427.
Papers—continued.
And notices, how served upon nonresident 5375.
Appeal may be dismissed if requisite are not furnished 5356.
District court may compel transmission of by justice's court on appeal, service of order, fine 5791.
How served 5367-5373.
In civil action, filing and serving, schedule of sections 5367.
Not to be taken from supreme court without order, rule xvii, p. 1424.
Production may be required by arbitrators on voluntary submission of dispute between employer and employee 1932.
Tranmission of on change of trial of civil action in justice's court 5719.
What to be transmitted by justice's court on appeal to district court 5791.
When may be served by telegraph 5371.
Witness may be compelled to produce 5416.
Witness required to produce, under subpena 5436.
Parent, may give bond for appearance of child under juvenile court law 742.
Notice to, on proceeding before justice of the peace to set aside apprenticeship, costs 493.
On adoption of child, relieved of responsibility and rights over 5830.
Or guardian, may sue for death, injury or seduction 4995, 4996.
Person adopting child sustains legal relation of 5830.
Parks, eminent domain may be exercised for 5606.
Partial partition, actions for, who may bring 5527.
Parties, action in behalf of one ward on bond of guardian, other wards need not be made parties 6184.
Action may be brought against several claiming same office 1817.
All persons claiming estate or land under common title may unite in action to establish same 5000.
All persons having interest adverse to the plaintiff may be joined as defendants 4999.
All persons having interest in relief demanded may be joined as plaintiffs 4998.
All persons interested in estate to be made in proceeding for decree that executor or administrator convey real property under contract of decedent 6032.
And liability of in actions on negotiable instruments, schedule of sections 2548.
Are barred by service of summons in action for partition 5565.
Court may order others brought in 5008.
Defendants may be sued in name or style under which contract was made 5003.
Expected to be ready for trial when case is called in district court, may stipulate for day with approval of court, rule iv, p. 1426.
In action against partners only general to be, exception 2907.
In action by majority owners against minority owners for expenditures on mines 2478.

Parties—continued.
In action by or against executor, not necessary to join those who are not qualified 6027.
In case of death or disability action may be continued by or against representative 5004.
In civil action not originally summoned, schedule of sections 5243.
In civil actions, schedule of sections relating to 4986.
In interest, all may appear in eminent domain 5613.
In interest to be joined in action 5001.
Interested, citation and notice to issue to in proceedings to restore lost records 5642.
Infant or insane, how guardian ad litem appointed in civil action in justice's court 5726.
May agree to form interrogatories for taking deposition out of state or to taking without interrogatories 5460.
May agree to postponement of civil action in justice's court 5758.
May agree to referees 5232.
May agree upon person to take deposition out of state 5459.
May appear in person or by attorney in justice's court 5725.
May unite for purposes of division in action for partition and give notice 5579.
May waive trial by jury in civil action in justice's court 5766.
Names of to be kept in alphabetical index to docket in justice's court 5802.
Not summoned in action on joint contract may be summoned after judgment 5343.
Required to appear when court held at another place 4874.
Residing out of county, service on in proceedings to restore lost records 5643.
Settlement between, does not affect lien for attorneys' fees 5376.
Severally liable may be joined in same action 5002.
Substitution in case of death, disability or assignment 5004.
Substitution of claimant 5005.
To action in justice's court, entitled to one hour in which to appear after time fixed in notice 5733.
To action to restore lost will or deed 5633.
To action, when husband must be joined with wife 4989.
Unknown, served by publication, when bound by judgment in action for partition 5541.
When evidence taken for perpetuation may be introduced in action between 5470.
When residence determines place of trial 5014.
When to pay fees of court reporter 4913.
Who may intervene 5006.
Whose names are unknown may be served by publication 5030.
Partition, action for, schedule of sections 5527.
Action for, what complaint to set forth 5528.
Action for, when cost of abstract of title allowed, notice, abstract must be filed 5544.
Action for, when interest allowed on disbursements 5546.
Partition—continued.
Actions for, who may bring, partial partition 5527.
Allowance in action for of expenses previously incurred by cotenant 5543.
Conveyances must be recorded and are bar against parties 5565.
Court may appoint single referee on consent of parties 5575.
Court may fix time for division of mining claims 5577.
Court may order referee to divide mining claims 5576.
Court must direct terms of sale or credit, may direct investment of purchase money, when 5554.
Court must secure value of future interests 5559.
Court to order just sum paid to tenant on sale 5557.
Disposition of proceeds belonging to unknown owners 5566, 5567.
Division, how to be made by referees 5578, 5579.
Duties of clerk concerning investments 5569.
Expenses of referees apportioned among parties 5583.
Further pleading and testimony may be had before court or referee after sale 5552.
Guardian may consent to without action and execute release 5573.
How abstract of title made, verified and corrected 5545.
How may be made by referees in action for 5539.
If sale confirmed, conveyance must be executed, order for disposition of proceeds 5563.
In action for, all rights may be determined, proof, judgment 5534.
In action for, answer what to contain 5533.
In action for, lien claimant may be required to first exhaust other securities 5550.
In action for, lienholders not of record need not be made parties 5529.
In action for, lienholders to be made parties or referee to be appointed to ascertain regarding liens 5536.
In action for, lienholders to be notified to appear before referee 5537.
In action for, summons to be directed to all parties interested 5531.
In action for, lis pendens, must be filed by plaintiff, deemed notice to all persons 5530.
In action for, plaintiff to produce certificate of recorder showing no liens 5535.
Judgment in action for, does not affect tenant for less than ten years 5542.
Lien on individual interest, charge on owner's part 5547.
Marking off of part to party accepting smallest portion of mining claim 5580.
Of homestead of value over $5000, when may be had under execution 2144.
Of mining claim, remainder of bids after first bidder, how marked off 5581.
Of real estate, guardian may join in 6166.
Of real property, venue 5011.
Parties may unite for purposes of division, order of court 5579.

Partition—continued.
Proceeding if lienholder becomes purchaser 5564.
Proceeds of sale, how distributed or deposited 5551, 5552.
Proceeds of sale of encumbered property, how applied 5549.
Receipt for securities delivered to parties by referees to be filed with clerk 5568.
Referees must make report of sale to court 5562.
Report of referees, what to be returned with 5582.
Sale by referee, how made 5553.
Sale in, referees may take securities for purchase money 5555.
Security or investment of proceeds to be taken in name of clerk of county 5567.
Security taken by referees to be in name of parties when ascertained by agreement or order of court 5568.
Service of summons by publication, with description 5532.
Share of infant paid to guardian 5571.
Share of insane person to be received by guardian 5572.
Terms and manner of sale must be made known, and distinct lots must be sold separately 5560.
Tenant to receive compensation from proceeds of sale 5557.
Tenants whose estate is sold to receive compensation 5556, 5557.
Unknown tenants to be protected 5558.
When court may order sale in action for 5538.
When unequal made, compensation to equalize 5570.
Who bound by judgment in action for 5541.
Who may not be purchasers 5561.
Partition fences, proceedings for erection at joint expense 3604-3608.
Partners, cases relating to, members of limited partnership subject to same liabilities and rights as general partners 2909.
In action against, only general to be parties, exception 2907.
In action between, receiver may be appointed 5193.
Partnership, allegation of as a legal conclusion, when sufficient 5078.
Copies of entries of county clerk and affidavits of publication relating to partnership are prima facie evidence 2914.
Included in word "person" 5475.
Schedule of sections relating to the federal act 543.
Party, aggrieved, may bring action in district court to set aside damages awarded by viewers on opening of highway 3015.
Any who is injuriously affected may bring action to abate nuisance 5504.
Competent as a witness may be compelled to give testimony orally or by deposition 5420.
Cannot testify when other to transaction is dead 5419, 5423.
Death of after filing report of referee does not invalidate judgment in action for partition 5541.
Party—continued.
Either may bring issue to trial 5201.
Either may read in evidence on subsequent trial testimony certified by official court stenographer 5472.
Entitled to jury trial of issue of fact in action for divorce 5845.
Failure to obey or to be sworn or answer or to subscribe affidavit or deposition, complaint or answer may be stricken out 5438.
Having interest may apply to court to be brought in 5008.
In action for partition, holder of lien not of record need not be made 5529.
In interest, revival of judgment for when purchaser fails to obtain real property sold under execution 5306.
Irregularity of ground for new trial 5320.
Joint debtor released of his proportion not necessary 5847.
Jointly liable, how may be released from his proportion, effect 5846.
Liable for injury to real property surveyed under order 5513.
May object to referee, grounds 5233.
May subscribe to pleading 5060.
New corporation may be substituted in action by or against corporations consolidated 1148.
New may be made in case of counter-claim 5051.
Nonjoinder of, not ground for nonsuit in action for unlawful detainer 5592.
Not to include in statement on appeal any more of testimony or proceedings than necessary and not to recover costs for surplusage 5333.
Prevailing entitled to costs 5376, 5377.
Refusing to testify or give deposition, pleadings may be stricken out or judgment taken 5421.
To explain alteration in writing 5418.
Under legal disability bound in action to determine adverse claim to real property 5523.
Under order may enter upon real property with surveyors 5513.
What papers must be served upon 5375.
Who may bring action to quiet title 5514.
Passenger, injured on platform of car in violation of regulations of railroad company, not to recover damages 3560.
May recover against railroad company for refusal to transport 3559.
Rates, may be regulated by the legislature (Nev. Const. art. iv, sec 20) 278.
Patent, application for, for mining claim to be shown in adverse action 5526.
For mines, application for, suit on adverse claim 2384.
Of United States or state for land, when record or copy admissible in evidence 5415.
On mortgage or debt, county recorder to certify copy as evidence 3789.
Patents, when actions cannot be brought upon by grantee from the state 4948.
Patient, communication of, to physician not to be given without consent 5427.
Pauper, of another county, when county may recover for relief furnished 2922.

Payment, for property or easement in proceedings in eminent domain 5622.
Peace, breach of, when punishable as contempt in justice's court 5795.
Peace officer, duty to serve subpena requiring attendance before public service commission 4532.
Penalties, district attorney to prosecute action for 1598.
Penalty, action against public utility for in name of State of Nevada in district court 4544.
Action for, upon a statute, when may be brought within two years, exception 4967.
Against railroad for doing thing declared to be unlawful 4574.
And costs in action for delinquent taxes to be included in complaint, summons and judgment 3660.
For contempt 5403.
For failure of witness to obey subpena 5439.
For refusal to obey order of court in quo warranto 5679.
For refusal to obey writ of mandamus 5707.
In action for delinquent taxes, on proceeds of mines 3707.
Justice's court has jurisdiction if amount does not exceed $300, exception 5714.
May be imposed by district court on overruling demurrer 4845.
Per diem, for one day may be demanded by witness when served with subpena 5433.
Of jurors in counties polling over 425 votes 2013.
Of jurors, to be paid each day by party demanding jury, recovery from losing party 2013.
Perishable property, attached to be sold 5157.
Sale of, not stayed by appeal 5355.
Perjury, conviction of, excludes from jury, unless restored to civil rights (Nev. Const. art. iv, sec. 27) 285.
Perjury, false affirmation or declaration deemed 5448.
Perjury, witness testifying before public service commission not exempt from punishment for 4536.
Perpetuation of testimony 5464-5473.
Manner of taking deposition 5468.
"Person," includes a company, partnership, association or corporation as well as person 5475, 5479.
Person, over 21 years of age and not party may serve summons in civil action in justice's court 5732.
Person, shall not be deprived of life, liberty or property without due process of law (Nev. Const. art. i, sec. 8) 237.)
Personal injuries, action for 5649.
Action for, schedule of sections 5649.
Contract of insurance, indemnity or relief benefit will not bar recovery for 5652.
Liability of common carriers, mill or mine owners for, to employees 5650.
Personal property, action for claim and delivery 5124.
Action for claim and delivery in justice's court 5124, 5135, 5753.
Action for or for injury to, may be commenced within 3 years, exception regarding live stock 4967.
Personal property—continued.
Action to recover, justice's court has jurisdiction if value does not exceed $300 5714.
Executor or administrator may convey under contract of decedent 6147.
How attached 5152.
Lien for taxes attaches on real property 3619.
May be sold by assessor for delinquent taxes, certificate to purchaser, court may issue citation, fees, how collected 3679.
Mortgaged, how must be sold under execution 1080.
Of estate of deceased person, district judge may make order authorizing mortgaging of 6146.
One action for foreclosure of mortgage or lien upon 5501.
Township in which action for to be brought in justice's court 5715.
When includes money, goods, chattels, things in action and evidences of debt 5475.
When memorandum of sale made by auctioneer is deemed contract of sale 1077.
Petition, for changing name of person, what to state, verification, filing in district court 5835.
For revival of judgment, when purchaser fails to recover property sold under execution 5306.
For writ, rule or order made to one district judge not to be made to another unless upon written consent, rule xlii, p. 1431.
To juvenile court, what to state 731.
Verified for determination of life estate 5584.
Physician, library, and certain property of, exempt from execution 5288.
To examine person alleged to be insane 2204.
Physician's certificate, of commitment of insane person to be transmitted to asylum 2204.
Piers, eminent domain may be exercised for 5606.
Pipes, eminent domain may be exercised for 5606.
Pipe lines, pertaining to manufacture of beet sugar, eminent domain may be exercised 5606.
Place of trial of civil actions, schedule of sections relating to 5011.
Plaintiff, action for damages for death by wrongful act to be brought in name of representative of deceased person 5648.
Admits counter-claim by failure to demur or reply 5058.
All persons having interest in relief demanded may be joined 4998.
Deemed defendant when defendant applies for provisional remedies 5194.
In civil action defined 4944.
May be examined on oath on application for judgment after publication and default 5236.
Notice to be given to of arrest of defendant in civil action in justice's court 5747.
To file affidavit that he is without information regarding unknown heirs 5029.

Plaintiff—continued.
To pay jurors' fees if no verdict, but may recover as costs if he obtain judgment 2001.
When entitled to judgment for costs 5377.
When may apply for relief demanded in complaint after default 5236.
Plat, lost and destroyed, validated 5639.
Pleading, after decision on demurrer in district court, time in which to file, rule viii, p. 1427.
Amendment of in district court, if not of course notice and copy of amendment to be served, what to state, when to be verified, rule xvii, p. 1428.
By corporation as a party, how verified 5064.
Conditions precedent, what need not be stated 5071.
Defendant may file in justice's court and waive summons 5724.
Further may be had after sale in partition 5552.
In district court, notice of motion to strike out part to specify part, rule xviii, p. 1428.
Items of account need not be alleged, but copy may be required 5068.
Libel and slander, proof 5073.
New matter in reply deemed controverted 5075.
Rules of, in civil action, schedule of sections relating to 5065.
When answer construed in relation to default judgments to include any pleadings which raises an issue of law or fact 5236.
When postponement of trial allowed for amendment of in action in justice's court 5757.
Pleading judgment, what necessary to be stated 5070.
Pleading over, time for 5083.
Pleading private statutes, what sufficient; judicial notice 5072.
Pleadings, allegations not controverted taken as true; exception 5075, 5083.
Amendment of as of course 5083.
Amendment of may be ordered 5084.
And documents in district court to be on legal cap, in proper form, and not to be amended by changing original without leave of court, rule ix, p. 1427.
Corporate existence need not be proved unless affirmatively denied 5079.
Court may require to be made more specific; bill of particulars 5067.
Errors not affecting substantial rights to be disregarded 5066.
If name of defendant not known may be designated by any name; amendment of name 5085.
In civil action, rules regarding 5035, 5065.
In civil action, schedule of sections relating to various mistakes and amendments 5080.
In garnishment proceedings 5178, 5179.
In justice's court, issues of law and fact defined 5761-5763.
In justice's court, schedule of sections 5734.
In justice's court, what are and form of 5734, 5735.
Pleadings—continued.
In mandamus proceeding 5704.
In proceeding for disbarment of attorney 514, 519, 520.
In proceeding for divorce same as in action at law 5842.
In quo warranto same in supreme court as in district court 5681.
In quo warranto shall be as in other cases 5666.
May be amended to meet variance 5080.
May be made after time limited, or time for may be enlarged 5084.
Minute of to be entered in justice's court docket 5800.
Of party who refuses to testify or give deposition may be stricken out 5421.
Reference may be made to on motion for new trial 5321.
Sham and irrelevant matter may be stricken out 5067.
Subsequent to complaint to be filed and served 5077.
Supplemental complaint, answer and reply 5075.
Time for filing and serving in state land contest, rule xliv, p. 1431.
To be liberally construed 5065.
To be verified in action for forcible entry or unlawful detainer 5600.
What constitute when party summoned after judgment in action on joint contract 5247.
When allegation of corporation, partnership or representative capacity as a legal conclusion is sufficient 5078.
When may be verified by attorney 5064.
When to be certified by justice's court on transfer of case to district court for trial 5721.
Without summons in justice's court 5715.
Plural number, includes the singular 5475.
Police court, appeal may be taken from to district court 837.
Jurisdiction of 832-835.
Police magistrate, when may order child transferred to district court under juvenile court law 741.
Poll tax, summary collection, wages may be garnished, employer may be held responsible and his personal property sold for, liability of assessor 3718.
Poor, action by county against kindred for support of 2916, 2917.
When county may recover for relief furnished pauper of another county 2922.
Possession, if not demanded lease of agricultural lands runs for another year 5589.
Of lands or tenements, legislature may confer power on justice's court in action for where relation of landlord and tenant exists or where possession has been unlawfully obtained or withheld (Nev. Const. art. vi, sec. 8) 323.
Of lot in federal townsite as basis for obtaining title 1983.
Of public lands, right to by survey and marking metes and bounds and occupancy, recording, affidavit 5850, 5851.

Possession—continued.
Of real estate or mining claims, supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
Of real property, district court has jurisdiction in cases involving (Nev. Const. art. vi, sec. 6) 321.
Remaining in vendor of goods is conclusive evidence of fraud 1078.
Restored to defendants if money not made on execution in proceedings under eminent domain 5620.
Right of, not affected by descent 4962.
What bar in action for unlawful detainer 5595.
Where relation of landlord and tenant exists or if unlawfully retained or withheld, justice's court has jurisdiction 5714.
Possessory actions, for public lands 5849.
For public lands, when possessory right extends to boundaries of survey 5854.
On public lands, jurisdiction of justice of the peace 5855.
What deemed public lands, what entry unlawful and fraudulent 5855.
Possessory right, to public lands, improvement required 5852.
Postponement, costs may be imposed as condition 5383.
Defendant under arrest in civil action in justice's court must give undertaking before applying for 5759.
In civil action in justice's court, consent to taking testimony of witness 5759.
In justice's court, not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
In mandamus proceedings to allow trial by jury 5700.
May be granted to allow further development of mining claim 5203.
Of civil action in justice's court, affidavit of evidence expected to be obtained 5759.
Of civil action in justice's court, avoided by admission that evidence would be given 5759.
Of trial, 5202, 5203.
Of trial, by consent in civil action in justice's court 5758.
Of trial, in civil action in justice's court on court's own motion 5757.
Of trial, upon application of party in civil action in justice's court, grounds, procedure 5759.
Of trial, when for nonreturn of deposition taken out of state 5462.
Of trial when judge or juror called as witness 5429.
When justice's court must order defendant discharged from arrest in civil action on giving undertaking 5759.
Power company, may condemn for right of way 2138.
Power of attorney, recorded in office of county recorder imparts notice 1093.
Power lines and plants, when eminent domain may be used for 5606.
Powers of district judge, in vacation 4850.
Practice, civil, provisions relating to are applicable to certiorari, mandamus and prohibition 5712.
Practice, civil—continued.
Due incorporation of company, when cannot be attacked collaterally except by the state 1154.
For dismissal of case appealed from justice's court to district court, rule xxxviii, p. 1430.
For staying execution on appeal from district court, rule xxii, p. 1429.
For taking depositions in district court, rule xv, p. 1428.
In proceedings for divorce same as in actions at law 5842.
Of courts of justice, local or special laws relating to, invalid (Nev. Const. art. iv, sec. 20) 278.
On foreclosing mortgage in district court, rule xxiii, p. 1429.
"Precept," issued in name of state, court or judicial officer is "writ," when 5475.
Preferred claim, procedure for recovery of wages as 5494.
To extent of wages for death or injury under employers' liability act 1926.
Preferred claim, when wages are 5493, 5494.
Prejudice, exception to be disregarded unless prejudicial 5315.
Premises, occupation of pending proceedings under eminent domain 5615.
President of corporation, deposition may be taken 5454.
Presiding officer of legislature to give notice of receipt of depositions and papers in contest for member of the legislature 1821.
Presumption, as to value of ore extracted from mine 5509.
Primary election, justice of supreme court or district judge may order correction of error or omission, disobedience contempt 1763.
Printed papers, on appeal to supreme court, number of copies to be filed, rule xiii, p. 1424.
Printed or typewritten transcript, may be furnished on appeal 5357.
Printing, included in writing 5475.
Of documents on appeal to supreme court to be on similar paper, rule xii, p. 1424.
Or typewriting of statement on appeal, costs not allowed for surplusage 5333.
Testimony in statement on appeal, cost of not allowed in certain cases 5333.
Prisoner, as witness, how brought, deposition of 5442, 5445, 5444.
Private statutes, how pleaded; judicial notice 5072, 7063.
Private writings, how proved 5414-5415.
Probation committee, may be appointed by district court 734.
Members of to take oath 734.
Probation officer, to be appointed by district court 733.
Procedure, in district court in action to review order of public service commission 4540.
Same in supreme court as in district court in quo warranto 5681.
Proceedings, deposition of party to may be taken 5454
Supplementary to execution 5307, 5308.
Supplementary to execution, person owing debtor or having property of debtor may be examined 5310.

Proceedings—continued.
Supplementary to execution, provisions relating to district court are applicable to justice's court 5787.
Supplementary to execution, schedule of sections 5307.
Under civil practice act applicable to estates of deceased persons 6138.
Proceeds of mines, delinquent taxes on, action for, district attorney to bring, when and where, damages, penalties for, of complaint and answer 3707-3709.
Process, alias may issue for restoration of possession of land after ejection under judgment and conviction of contempt for reentry 5394, 5395.
Civil, elector not to be arrested under on election day (Nev. Const. art. ii, sec. 4) 253.
Civil, members of legislature exempt from arrest under during session and for 15 days before (Nev. Const. art. iv, sec. 11) 269.
Compulsory, in action for divorce if necessary to disposition of property of children 5839.
Disobedience to is contempt 5394.
Duty of sheriff to execute 1648, 1650.
Final, to have court seal affixed 4879.
How executed by sheriff 1648-1650.
How may be made upon corporation 1188.
How may be served against foreign corporation 5024, 5025.
How seal to be affixed 5481.
Issued by justice of the peace to be served by constable 1692.
Justice of the peace may issue upon docket of predecessor 5805.
Material furnished for building exempt from 2225.
May be executed by elisor 5496, 5498.
May be issued by justice of supreme court for complete hearing of contest for state office 1823.
May be issued by justice of the peace to any part of county 5808.
Sheriff after term of office may collect upon previously levied 1656.
Style of shall be "The State of Nevada" (Nev. Const. art. vi, sec. 13) 328.
When must be served upon party instead of attorney 5375.
When signifies a writ or summons issued in judicial proceedings 5475.
Prohibition, new trial and appeal may be had as in civil cases 5713.
Provision relating to civil actions are applicable to 5712.
Return and hearing may be had at any time 5711.
Supreme court empowered to issue writ of (Nev. Const. art. vi, sec. 4) 319.
Supreme court or justice thereof may issue 4834.
When, where and how issued, by supreme court only 5709.
Writ of defined 5708.
Writ of may be alternative or peremptory, form of 5710.
Promissory note, action by assignee before due, no right of set-off 4988.
Promissory note—continued.
Or other instrument, when admitted in justice's court unless denied by verified answer 5770.
Parties and liability of in actions on, schedule of sections 2548.
Proof, burden of, in action by railroad company against railroad commission to set aside rate 4546.
Failure of, distinguished from variance 5082.
Proof, in mandamus proceedings, applicant may introduce 5701.
In possessory action for public lands when possessory right extends to boundaries of survey 5854.
Of conditions precedent pleaded 5071.
Of contents of numerous accounts or documents 5417.
Of execution of conveyance, how made 1027-1034.
Of judgment pleaded 5070.
Of libel or slander 5073.
Of public writings, schedule of sections 5408.
Of service of summons, how made 5032, 5033.
Of value of premises in proceedings under eminent domain 5615.
Of will to have court seal affixed 4879.
On foreclosure of mortgage in district court, rule xxxiii, p. 1429.
Variance immaterial if not prejudicial 5080.
Property, attached may be ordered sold by court or judge 5158.
Community, how divided upon decree of divorce 2166.
Disposition of in action for divorce when wife obtains decree on ground of imprisonment or adultery of husband, and other cases 5843.
District court or judge may make preliminary order regarding pending action for divorce 5841.
Foreigner who is bona fide resident has same rights to as native-born citizens (Nev. Const. art. i, sec. 16) 245.
Lost, by erroneous judgment or order may be restored on appeal 5359.
Of children, if necessary to disposition of, compulsory process may be had to obtain appearance or answer in action for divorce 5839.
Of debtor, reasonable amount to be exempt from execution (Nev. Const. art. i, sec. 14) 243.
Person shall not be deprived of without due process of law (Nev. Const. art. i, sec. 8) 237.
Sale of perishable not stayed by appeal but proceedings to abide judgment of appellate court 5355.
Shall not be taken for public use without just compensation having been first made or secured, exception (Nev. Const. art. i, sec. 8) 237.
Specific, of husband may be ordered applied to payment of costs and alimony pendente lite 5843.

Property—continued.
Stolen or embezzled, proceedings for disposal of 7445-7450.
Subject to condemnation under eminent domain 5608.
Unclaimed stolen, when may be sold by county treasurer 7449.
Value over $300, supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
What considerations determine disposition of and how affected when not mentioned in divorce action 5841.
When includes both real and personal property 5475.
Prospector, cabin, tools, horses and certain other property of, exempt from execution 5288.
Protection, child adopted entitled to 5826, 5829.
Protestant Episcopal Church, district court may make order for sale of real estate 1431.
Provisional remedies, in justice's courts 5744-5753.
In justice's court, schedule of sections 5744.
On behalf of defendant 5194.
Public administrator, escheats of funds in hands of 1619.
May bring actions for protection of estates 1622.
Schedule of sections 1615.
To make verified written report to district judge semiannually 1618.
Public buildings and grounds, eminent domain may be exercised for 5606.
Public interest, when officer not required to disclose or testify regarding 5428.
Public lands, action for possession of 5849.
Action for unlawful enclosure 3174.
Fee for absence of occupant under act relating to possessory actions, disposal of 5853.
Improvement required by claimant of possession 5852.
Occupant under act relating to possessory actions may pay fee and absent himself, when absence forfeits right 5853.
Possession of not to interfere with working of mines 5849.
Right to possession of by survey and marking metes and bounds and occupancy, recording, affidavit 5850, 5851.
What are deemed in possessory actions 5855.
When claimant deemed to have right under survey under act relating to possessory actions 5855.
Public office, action for usurpation of, contents of complaint, judgment 5661.
Judgment of ouster in quo warranto 5667.
Proceeding in quo warranto may be brought against person holding 5657, 5660.
Public officer, unlawful to be interested in purchase at sale made officially 2828.
Public officer, when not required to testify as witness 5428.
When statute of limitations does not run during term 2866.
Public officers, fees and salaries of subject to attachment and execution 2864.
Public officers—continued.
Removal of otherwise than by impeachment 6894.
Public parks, eminent domain may be exercised for 5606.
Public record, of this state or the United States other than judicial in custody of public officer or certified or verified copy may be read in evidence 5409.
Public records, docket and papers must be delivered by justice of the peace to successor 5803.
Public safety, action against party failing to fence dangerous excavation 3235, 3237.
Writ of habeas corpus shall not be suspended unless necessary for in case of rebellion or invasion (Nev. Const. art. i, sec. 5) 234.
Public service commission, appeal from order of may be taken to district court 4540.
Attorney-general to be counsel in action by or against 4544.
Complaint and proceedings before 4531-4533.
Depositions of witnesses may be taken as in civil cases 4534.
May appoint stenographer to take down proceedings 4535.
May enforce orders by mandamus or injunction 4545.
May require production of books and papers 4529.
Proceedings in action in district court to review order of 4540.
Rates fixed by, prima facie lawful 4539, 4540.
When to cause certified copy of proceedings to be filed in court 4535.
Witnesses appearing before entitled to same mileage and fees as witnesses in civil cases 4531.
Public squares, local or special laws for vacating are invalid (Nev. Const. art. iv, sec. 20) 278.
Public use, for which eminent domain may be exercised 5606.
Property shall not be taken for without just compensation having been first made or secured, exception (Nev. Const. art. i, sec. 8) 237.
Public utility, action against for forfeiture of penalty 4544.
Public writing, proof of, schedule of sections relating to 5408.
Publication, and notice of sale under execution 5290.
And posting of notice in delinquent tax suit 3663.
By clerk of notice of application of corporation for its own dissolution 1240.
Of court rules 4845.
Of notice by district judge on obtaining patent as trustee for federal townsite 1982.
Of notice by district judge to stockholders of proceedings for removal of directors and officers of corporation 1180.
Of notice in action to enforce lien 2227.
Of notice in proceedings to restore lost records when parties reside out of state 5643.
Of notice of action for divorce 5839.

Publication—continued.
Of notice of application for order to allow married woman to carry on business in her own name 2191.
Of notice of application to change name of person 5836.
Of notice of contest in U. S. land office to determine mineral or agricultural character of land 2397.
Of notice of sale under execution, charge allowed for 5290.
Of notice of taking testimony for perpetuation 5466.
Of notice on filing of petition for determination of life estate 5584.
Of process or paper, officer to be paid cost in advance 2026.
Of service of summons, when and how may be made 5026, 5027.
Of statutes and decisions of supreme court, legislature to provide 376.
Of summons in action for partition, bars parties 5565.
Of summons in action for unlawful detainer 5593.
Of summons in action in justice's court 5732.
Of summons in juvenile court proceedings 732.
Of summons, proof of, how made 5032.
Of summons, when complete 5027.
Of summons with description in action for partition 5532.
Service of summons by, in actions to determine adverse claims to real property 5523.
Purchase money, recoverable notwithstanding homestead lien 2143.
Purchaser of personal property under execution sale to have delivery and certificate 5296.
Purchasers, subsequent deemed to take with notice of conveyance acknowledged and recorded 1039.
Qualifications, of bail, on arrest in civil action 5103.
Qualification, of successor of officer removed for malfeasance 2853.
Question of fact, fraudulent intent is 1086.
Quo warranto, action begun upon whose relation, security for costs 5659.
Action for damages within one year after judgment by person excluded as director of corporation 5669.
Action in name of state for usurpation of public office, bond 5660.
Action in, takes precedence of civil business 5680.
Action may be brought in name of state, against whom 5656, 5657.
Appeal may be taken from district court, but does not stay judgment of ouster 5682.
Application to file complaint, notice to defendant 2664.
Bond of trustee appointed on dissolution of corporation 5672.
Court may appoint trustee for dissolved corporation, compensation 5671.
Claimants to public office to be made defendants 5662.
Court may order books and effects delivered to trustee on dissolution of corporation 5675.
Quo warranto—continued.
District court or judge may issue 4840.
District judge may try and determine at chambers 4843.
For usurpation of public office, contents of complaint, judgment 5661.
Judgment for dissolution of restraint of corporation, usurpation or failure for two years to use franchise 5670.
Judgment of ouster, costs, delivery of books, violation by corporation 5667.
Jurisdiction of supreme and district court 5663.
Judgment ousting director of corporation 5668.
Liability of corporation directors, when judgment of ouster rendered 5678.
Penalty for refusal to obey order of court 5679.
Pleadings shall be as in other cases 5666.
Procedure in supreme court same as in district court 5681.
Schedule of sections relating to 5656.
Suit may be brought on bond of trustee appointed on dissolution of corporation 5673.
Summons, when issued, when unnecessary 5665.
Supreme court and justice thereof may issue 4834.
Supreme court empowered to issue writ (Nev. Const. art. vi, sec. 4) 319.
Supreme court may order issue of fact to be tried by jury in district court 5681.
Supreme court may order issue to be tried by jury in district court 5681.
To collect arrearage and forfeit franchise of toll road 3757.
To determine whether toll-road franchise has been forfeited 3049.
Trustee appointed on dissolution of corporation to sue for debts, responsibility 5677.
Trustee to collect debts and divide surplus on dissolution of corporation 5674.
Trustee to file sworn inventory with clerk on dissolution of corporation 5676.
Verdict of jury in district court may be certified to supreme court 5681.
When attorney-general shall commence action 5658.
When proceeding in may be commenced to forfeit franchise of toll road 3757.
Writ of, district court or judge may issue (Nev. Const. art. vi, sec. 6) 321.
Quorum, of supreme court, majority constitutes (Nev. Const. art. vi, sec. 2) 317.
Railroad, foreign or domestic, may exercise right of eminent domain 3574.
May institute action to set aside order of railroad commission, procedure, injunction, trial, judgment, appeal, burden of proof 4563, 4564.
Penalty for doing thing declared to be unlawful 4574.
Right of action against not affected by act relating to railroad commission 4582.
Testimony to fix damages in proceeding under eminent domain 5616.
To give notice of live stock killed 3600.

Railroad—continued.
To pay expense of changing wagon road through pass or canyon 5628.
When may sell unclaimed property 541.
Railroads, action for damages for failure to comply with act relating to 3581.
Eminent domain may be exercised for 5606.
Freight and passenger rates may be regulated by the legislature (Nev. Const. art. iv, sec. 20) 278.
Railroad commission, authorized to fix charges of railroad, sleeping-car, express, telegraph and telephone companies 4555, 4560, 4562.
Certified copy of order prima facie evidence 4565.
District court may by attachment compel obedience to subpena issued by 4561.
May enforce orders by mandamus or injunction 4583.
May sue to enforce penalty for failure of railroad company to obey summons, order or subpena for production of books, papers or accounts 4566.
Railroad company, authorized to enter upon land for making survey liable for damage 3533.
Condemnation under eminent domain, what may be condemned, procedure 5627.
Court to appoint commissioners to ascertain value of right of way 3539.
Insolvent, directors paying dividend liable for debt 3568.
Liable to pay $20 for failure to provide check for baggage 3553.
More than one having right of way over same pass or territory, change and expense of reconstruction of road 5628.
Not liable for damages to passenger injured on platform of car in violation of regulations 3560.
Person injuring property of liable in treble damages 3565.
Proceedings for acquiring right of way or lands 3535-3548.
Rates may be fixed by railroad commission 4555, 4560, 4562.
Refusing to check baggage to refund fare of passenger 3553.
To pay damages for refusal to transport passenger or property 3559.
To execute bond for building of fences in proceeding under eminent domain 5619.
When exonerated from payment of damages for right of way or for injuring stock 3551.
Ranchman, has lien upon animals for charges 5499.
Rates, fixed by public service commission prima facie lawful 4539, 4540.
Fixed by railroad commission are prima facie lawful 4563, 4564.
Of railroads, toll roads, ditch, flume and tunnel companies may be regulated by the legislature (Nev. Const. art. iv. sec. 20) 278.
Real estate, belonging to minor or person under legal disability, local or special law for sale of, invalid (Nev. Const. art. iv, sec. 20, as amended 1889) 278.
Real estate—continued.
Deed of sheriff, executor, administrator, guardian, assignee, receiver, trustee or commissioner is prima facie evidence of regularity of sale when record lost 5631.
In actions involving title or possession, supreme court has appellate jurisdiction (Nev. Const. art. vi. sec. 4) 319.
Judgment for deficiency docketed after sale on foreclosure becomes lien 5501.
May be condemned under eminent domain 5608.
Of churches, associations and societies, district court may make order for sale or mortgaging of 1369.
Record of acknowledged conveyance imparts notice to subsequent purchasers and mortgagees 1039.
Sale of, for taxes or under execution or order of sale, successor in office may execute deed with same effect as if by officer making sale 1662, 1663.
Sale of, under action for foreclosure of lien similar to execution 2227.
Subject to redemption, certificate of sale, what to state 5298.
Witnesses to execution of conveyances 1027, 1028.
Real party in interest, action must be prosecuted in name of, except as specified 4986, 4987.
Real property, action for partition 5527.
Action for possession where relation of landlord and tenant exists, justice's court has jurisdiction 5714.
Action for recovery not prejudiced by alienation pending suit 5521.
Action for recovery of, if plaintiff's right terminates during pendency, judgment according to fact, damages for withholding 5516.
Action for recovery of, improvements made in good faith as offset to damages 5519.
Action for, when patent void, seven years 4949.
Action involving title, jurisdiction does not lie in justice's court 5714.
Action regarding, where tried, change of venue 5011.
Action to determine adverse claim, how and by whom brought 5522.
Action to determine adverse claim, summons, what to contain, how served personally and by publication 5523.
Action to restore lost will or deed, parties 5633.
Action to restore lost records 5632.
Adverse possession for fifteen years as ground for action 5522.
Condemnation for right of way 2138.
Damages for injury to, after execution sale and before delivery 5520.
Deed derived from sale of, for delinquent taxes conclusive evidence of title, possession recoverable in justice's court 3666.
Deed under tax sale by treasurer not prima facie evidence of title in purchaser when record destroyed 5631.
District court has jurisdiction in cases involving title or possession (Nev. Const. vi, sec. 6) 321.

Real property—continued.
Executor or administrator may make conveyance under contract with decedent 6147.
How attached 5152.
How sold in action for partition 5553.
Injury to, may be enjoined during foreclosure 5519.
Judgment entered after death of party not lien on but payable in course of administration 5572.
Judgment in action to determine, how rendered and effect 5524.
Lien for taxes attaches, how 3619.
Limitation of action for by state 4950.
Limitations of actions 4948.
Limitations regarding, schedule of sections 4948.
Lis pendens in actions regarding 5021.
Mortgage is not conveyance without foreclosure 5518.
Occupant of in relation to forcible detainer defined 5587.
Of estate of deceased persons, district judge may make order authorizing mortgaging of 6146.
One action for foreclosure of mortgage or lien upon 5501.
Order to allow party to survey 5512, 5513.
Proceedings for acquiring right of way by railroad company 3535-3548.
Record regarding lost and destroyed validated 5639.
Restoration of lost records affecting 5630.
Restoration of lost records affecting, schedule of sections 5630.
Right of possession, when not affected by descent 4962.
Schedule of sections affecting lost records 5630.
Sold under execution, court may restrain waste during period of redemption 5304.
Sold under execution, redemption of 5301.
Sold under execution, subject to redemption, who may redeem 5299.
Sold under execution, waste during redemption period defined 5304.
Subject to judgment lien, 5274, 5277.
Title of, if involved in justice's court, case to be transferred to district court for trial 5721.
To be described by metes and bounds in complaint 5069.
Title to may be vested or conveyed by judgment 5241.
Title to not to be determined by arbitration 5255.
Trial of title to not within jurisdiction of justice's court (Nev. Const. art. vi, sec. 8) 323.
What possession allows party to hold in action for unlawful detainer 5595.
When coextensive with lands, tenements and hereditaments 5475.
When instrument affecting or copy may be read in evidence 5414.
When re-recorded copies of lost records have effect of original 5630.
When tenant guilty of unlawful detainer 5588.
Real property—continued.
Who bound by judgment in action for partition 5541.
Re-argument if two justices of supreme court do not agree 4837.
Receipt of district attorney or tax receiver for taxes and costs in action for delinquent taxes prima facie evidence 3665.
To be filed with clerk by referees in action for partition 5568.
Receiver, appointment of for corporation, duties, compensation 1194, 1199.
For corporation, publication of decree appointing 1196.
For corporation, when trustees or directors have the right to be preferred in the appointment 1195.
May be appointed 5193.
May be appointed on dissolution of corporation 1194, 1195.
May be appointed to take charge of mine or proceeds in lieu of granting injunction 5145.
May be ordered to sell property and franchise of corporation in lieu of dissolution 1197.
Of insolvent corporation, compensation 1199.
Time for appealing from order appointing or refusing to appoint 5329.
To file certified copy of appointment and decree of dissolution of corporation 1196.
When may be ordered to sell deteriorating property of insolvent corporation 1198.
When not to be appointed on dissolution of cooperative association 1258.
Reclamation, eminent domain may be used for purposes of 5606.
Recognizance, attorney not to be received as surety in district court, rule xiv, p. 1428.
Forfeited, district attorney to prosecute action 1598.
Record, supreme and district courts and such other as the legislature may designate are courts of (Nev. Const. art. vi, sec. 8) 323.
Record, copy of to have court seal affixed 4879.
In office of county recorder, when imparts notice 1093.
Judicial, of foreign country, how certified and proved 5411.
Lost, action to restore, what complaint to allege, summons, waiver, decree 5634.
Lost, how costs taxed in proceedings to restore 5646.
Lost, limitation of record of judgment restored 5645.
Of acknowledged conveyance imparts notice to subsequent purchasers and mortgagees 1039.
Of certificate of marriage is presumptive evidence 2350.
Of conveyance, certified copy of may be read in evidence 1044.
Of foreign country, when admissible as evidence 5412.
Of instruments of mining claims, impart notice and may be read in evidence 1635, 1636.
Of judgment restored, limitation 5645,
Of land patent, when admissible in evidence 5415.

Record—continued.
Of notary public or of procedure, when certified copy is evidence 2754, 2759.
Of order changing name of person has effect of judgment 5837.
Of this state or the United States other than judicial in custody of public officer, or certified or verified copy, when may be read 5409.
On appeal to supreme court, diminution, objections to transcript or papers, how noted, rule viii, p. 1423.
On appeal to supreme court, how may be typewritten and bound, rule xxv, p. 1425.
On appeal to supreme court, when to be filed, S. C. rule ii, p. 1421.
Restored, of same effect as original 5644.
Records, authentication of under act of Congress 526-529.
How proved under act of Congress 526-529.
In office of county recorder impart notice 1093.
Judicial of this state or the United States proved by original or certified copy 5408.
Left unsigned by district judge may be signed by successor 4923.
Lost, action to restore 5632.
Lost, action to restore deed or will, parties 5633.
Lost, action to restore may be brought in district court of county in which property is situated 5636, 5637.
Lost, certified copy of validated 5639.
Lost, citation and notice in proceeding to restore 5642.
Lost, deed made under tax sale by treasurer not prima facie evidence of title in purchaser when record destroyed 5631.
Lost, evidence which may be received in action to restore 5635.
Lost, how may be re-recorded under date of original record, affidavit, force of copy 5630.
Lost, how re-recorded after division of county 5637.
Lost, not affecting real estate, procedure for restoration 5641.
Lost, not affecting real property may be restored 5640.
Lost, proceedings to restore, contest, how made, effect of judgment 5644.
Lost, proceedings to restore, service on parties residing out of county 5643.
Lost, restoration of, affecting real property 5630.
Lost, restored, limitations affecting 5638.
Lost, restored, validated 5639.
Lost, when re-recorded copies have effect of original 5630.
May be signed by district judge after expiration of term 5489.
Of court, reference may be made to on motion for new trial 5321.
Of courts of other states or territories, how certified and proved 5410.
Relating to mining claims, certified copies of may be read in evidence 1636.
Relating to mining claims impart notice 1635.
Relating to mines, certified copies of to have same force in courts as original 2467.
Records—continued.
Searcher of, may make and verify abstract of title in action for partition 5545.
Signed by judge after expiration of term, have legal effect 5490.
Recorder, fees for filing affidavit of publication of notice in delinquent tax suit 3663.
Of other county may file transcript of judgment as lien 5277.
To file and note certificate of redemption of real property sold under execution 5301.
Recorders, fees of in counties polling over 800 votes 2008.
Fees, when not over 800 votes in county 1996.
Recorders' courts, in incorporated cities, jurisdiction 4853.
Recount of votes, time for after election 1895.
Redemption, from county treasurer of property sold for delinquent taxes 3667.
From execution sale, time and conditions of 5300.
Of real property sold for delinquent taxes, how made 3666.
Of real property sold under execution, certificate of sale, what to state 5298.
Of real property sold under execution, during period of redemption, court may restrain waste 5304.
Of real property sold under execution, payment of money, how made 5302.
Of real property sold under execution, payment to be made in same kind of money specified in execution 5302.
Of real property sold under execution, rents and profits during period allowed for, how disposed of 5305.
Of real property sold under execution, sheriff to pay money over 5302.
Of real property sold under execution, what necessary to redeem 5303.
Of real property sold under execution, what papers must be served with notice 5302, 5303.
Of real property sold under execution, who may redeem 5299.
Subsequent, of real property sold under execution, how made, sheriff's deed, who entitled 5301.
Redemption money, how allowed and paid in action for delinquent taxes 3665.
Redemptioners, how may redeem real property sold at execution sale 5300.
Under execution sale, who are termed 5299.
Reduction works, preferred lien on ore sold to 5492.
Reenactment, reference in statutes to provisions reenacted in civil practice act to be construed as applying to such provisions as reenacted 5817.
Referee, disobedience of order in supplementary proceedings punishable as contempt 5314.
Findings of, deemed excepted to 5318.
Hearing of objections to appointment 5234.
How to issue subpena requiring attendance out of court 5432.
In action for partition lienholders to appear before, report of referee 5537.
In district court, what to state in report and to serve notice of filing, rule xxi, p. 1428.

Referee—continued.
Irregularity of, ground for new trial 5320.
May be appointed to ascertain liens in action for partition 5536.
May be appointed to examine defendant in proceedings supplementary to execution 5307, 5308.
May correct statement on appeal 5335.
May determine value of real property, judgment, costs 5377.
May extend time for filing statement and papers on appeal 5336.
May hear testimony in proceedings under eminent domain 5616.
May impose costs as condition of postponement 5383.
May order property to be applied on execution in supplementary proceedings 5312.
Objections may be made to appointment of, grounds 5233.
Qualifications of 5232, 5233.
Refusal of, to settle statement on appeal in accordance with facts, same may be settled by supreme court 5333.
Single, may be appointed on consent of parties in action for partition 5575.
When to settle statement on appeal before or after he ceases to act 5334.
Who tried case to settle statement on motion for new trial in district court, rule xxv, p. 1429.
Referees, decision of, may be reviewed as if made by court 5235.
Expenses of, in action for partition apportioned among parties 5583.
Fees of 5382.
How to divide property in action for partition 5539.
How to make division in action for partition 5578, 5579.
How to make sale in action for partition 5553.
How to partition mining claim after first bidder's portion has been marked off 5581.
In action for partition, marking off of part of mining claim to party accepting smallest portion 5580.
Insolent behavior toward is contempt 5294.
Majority of may act 5488.
May be appointed to take testimony in proceeding for disbarment of attorney 522.
May be ordered to divide mining claims in action for partition 5576.
May take receipt of lienholder purchasing at sale in partition 5564.
May take securities for purchase money on sale in action for partition 5555.
Must make report of sale to court in action for partition 5562.
Number, appointment, qualifications 5232.
Parties may agree for 5232.
Payment of fees may be specified in judgment for partition 5574.
Report of in action for partition 5540.
Report of may be modified, set aside or affirmed in action for partition 5541.
Report of to stand as decision of court 5235.
Statement of facts by, on proceedings for contempt 5396.
Time for division of mining claim in action for partition 5577.
Referees—continued.
To acknowledge attorneys in fact and guardians in actions for partition 5579.
To divide property, when court may appoint in action for partition 5538.
When three, all shall meet, but two may act 5232.
What to be returned with report of in action for partition 5582.
When to take and to deliver security to parties on sale in partition and file receipt 5568.
Reference, and report of referee on foreclosure of mortgage in district court, rule xxiii, p. 1429.
May be ordered by court without agreement of parties in certain cases 5231.
May be ordered to determine damages or account after default 5236.
May be ordered upon agreement of parties in certain cases 5230.
To report facts, report has effect of special verdict 5235.
References, and trials by referees, schedule of sections 5230.
Constitutional, relating to civil practice 4943, p. 1433.
Refunding money, paid into state or county treasury, local or special law invalid (Nev. Const. art. iv, sec. 20) 278.
Register of actions to be kept by clerk 5480.
Registration, elector may apply to district court for writ of mandamus to compel 1710, 1712.
Rehearing, in supreme court, reply, rule xv, p. 1424.
Rejected claims, against the state, for services or advances authorized by law, when action may be brought 5653.
Release, of indebtedness or liability of corporation or person to state, county or municipality, local or special laws invalid (Nev. Const. art. iv, sec. 20) 278.
Relief, affirmative, defendant asking may have provisional remedies 5194.
Affirmative may be given defendant in judgment 5268.
Demand for to be contained in summons in justice's court 5727.
Relief benefit, not bar or defense to action for death or personal injury 5652.
Religion, witness may be sworn according to peculiar ceremonies 5447.
Religious belief, does not disqualify witness 5420.
Witness shall not be rendered incompetent on account of (Nev. Const. art. i, sec. 4) 233.
Remainder, and contingent remainder, to be alleged in complaint in action for partition 5528.
Remedies, provisional on behalf of defendant 5194.
Remittitur, in supreme court, when to issue, rule xv, p. 1424.
When filed in lower court execution for costs to issue 5361.
Removal from office, for malfeasance or nonfeasance, provision to be made by law for in certain cases (Nev. Const. art. vii, sec. 4) 337.

Removal from office, for malfeasance 2851, 2852.
Removal, of officers and directors of corporation, district judge may act 1179-1182.
Of officers otherwise than by impeachment, schedule of sections 6894.
Renewal of execution, in justice's court 5785.
Rent, may be paid and tenant remain in possession in action for forcible entry or unlawful detainer 5599.
Rents and profits of real property sold under execution during period of redemption, how disposed of 5305.
Repeal, by civil practice act, limitations continue to run as if former act had not been repealed 5819.
Of certain provisions relating to civil practice, schedule of acts 5817, 5821.
Of law by civil practice act does not affect act, right or proceeding commenced before repeal 5818.
Replevin, judgment in, may be for return of property to defendant 5269.
Replevin, judgment to be in alternative and with damages 5269.
Reply, demurrer to, what facts deemed denied 5083.
In civil action, what to contain 5037, 5057.
In mandamus proceedings 5704.
May be demurred to for insufficiency 5059.
May be made after time limited, or time for may be enlarged 5084.
New matter in, deemed controverted 5075.
Not required in justice's court, law raises issue of fact upon new matter in answer 5763.
Of party who refuses to testify or give deposition, may be stricken out 5421.
Time for after amendment 5083.
Time for may be enlarged 5084.
To answer of garnishee 5178.
To answer to supplemental complaint 5076.
To counter-claim, may be filed after demurrer overruled 5083.
To counter-claim, what to contain 5057.
To counter-claim, when must be filed and served 5057.
To part of counter-claims, demurrer to others 5055.
Verification of 5064.
Report, directors and officers of corporation liable in damages for making false 1175.
Of referees in action for partition 5540.
Of referee in district court, what to contain, rule xxi, p. 1428.
Of referees, may be modified, set aside or affirmed in action for partition 5541.
Of referees, to stand as decision of court 5235.
Of referees, what to be returned with in action for partition 5582.
On examination under order for underground survey of mine 5511.
Subject to lien for attorneys' fees 5376.
Reporter, when testimony stenographically taken by, may be used on subsequent trial 5472.
Reporter's fees, when may be taxed as costs 4913.
Reservoirs, eminent domain may be exercised for 5606.
Residence, legal, defined, how retained or lost 3609-3616.
Of parties, when determines place of trial 5014.
Persons not electors excluded from juries 285.
Required to constitute elector (Nev. Const. art. ii, secs. 1, 2) 250, 251.
Resident, bona fide, although foreigner, has same property rights as native born citizens (Nev. Const. art. i, sec. 16) 245.
Respondent and appellant defined 5327.
Restitution, form of writ in action for forcible entry or unlawful detainer 5605.
Judgment in action for forcible entry or unlawful detainer, form, when tenant may pay and remain in possession 5599.
Restoration, of lost records, not affecting real estate 5641.
Of possession of land, alias process may issue for after conviction of contempt for reentry 5394, 5395.
Of record of judgment, limitation 5645.
Restoration to civil rights, allows person convicted of crime to serve as juror (Nev. Const. art. iv, sec. 27) 285.
Restraining order, in prohibition 5710.
On issuance of writ of certiorari 5687.
Pending hearing before granting injunction 5141.
Preventing defendant from interfering with work of plaintiff in proceedings under eminent domain 5615.
Until decision granting or refusing injunction 5139.
Restraint, of corporation, action for 5670.
Retaxing costs, in district court, party against whom judgment is entered has five days after service of cost bill in which to move for, rule xxxiv, p. 1430.
Return, of execution, time for 5283.
Of writ of certiorari 5684, 5686.
Of writs of mandamus, certiorari and prohibition may be set for any time 5711.
On arrest of defendant in civil action in justice's court 5747.
On summons in justice's court served in another county 5732.
Written, fees not to be charged for 2041.
Revenue, action to be brought by district attorney for delinquent taxes exceeding $300 3659. See Revenue.
Costs not to be charged to city or town in actions for delinquent taxes 999.
District court may order levy of taxes to meet obligations of city on disincorporation 873.
District attorney to bring action for delinquent taxes for improvements of streets in unincorporated town 934.
For maintenance of insane, how state treasurer to set apart moneys received from occupant of public land for absence under act relating to possessory actions 5853.
Homestead not exempt from sale for taxes 2149.
Land ceded to the United States exempt from taxation 1950, 1952.

Revenue—continued.
Officer, may be removed or suspended and another appointed to perform duties pending charges 3753.
Revival of judgment, for price paid if purchaser fails to obtain real property sold under execution 5306.
Right of action, commenced before repeal of law by civil practice act not affected by such repeal 5818.
Right of way, for railroad, conflicting claims to land, determination 3541.
For railroad, court may order clerk to pay money to claimant entitled 3548.
For railroad, proceedings for acquiring 3535-3548.
Not to be appropriated to use of corporation until compensation is made or secured 344.
Obtained under eminent domain, crossings and culverts to be kept in repair 5626.
Riot, in case of property may be taken for public use, compensation made afterward (Nev. Const. art. i, sec. 8) 237.
Road, right of way for with railroads through canyon 5628.
Roads, eminent domain may be exercised for 5606.
Local or special laws for vacating are invalid (Nev. Const. art. iv, sec. 20) 278.
Rule of court may provide how cases shall be entered on calendar 5200.
Rule of decision to be in accordance with common law of England, when not repugnant to our laws 5474.
Rule of district court may provide penalty on overruling demurrer 4845.
Rules of district court, p. 1425.
Rules of pleading in civil action, schedule of sections relating to 5065.
Rules of supreme court, pp. 1421-1425.
Salaries, of county and township officers, legislature may regulate (Nev. Const. art. iv, sec. 20) 278.
Of public officers subject to attachment and execution 2864.
Salary, of officer refusing to obey writ of mandamus may be applied on fine 5707.
Of public officer if garnished may be paid into court by treasurer or disbursing officer 2865.
Sale, at public auction of hogs trespassing, how to be made, notice 2256.
By assessor of personal property for delinquent taxes, certificate to purchaser 3679.
By receiver of bank of real estate 656.
By referee, how made in action for partition 5553.
By vendor in possession of goods without delivery conclusive of fraud 1078.
Certificate of, to include all property sold for taxes bid in by county treasurer, recording 3669.
Corporate property by court 1197, 1198.
Estates of deceased persons 5985, 6020.
For delinquent taxes amounting to less than $300 3651.
For taxes, deed of treasurer not prima facie evidence of title in purchaser when record destroyed 5631.
For taxes, homestead not exempt 2149.
Sale—continued.
For taxes on mortgage or deed of trust 3787.
For taxes, personal property 3679.
Forced, of homestead when not to take place (Nev. Const. art. iv, sec. 30) 288.
In action for partition, who may not be purchasers 5561.
In partition, court to direct terms and may direct investment of purchase money, when 5554.
In partition, disposition of proceeds belonging to unknown owners 5566, 5567.
In partition, proceeds of, how distributed or deposited 5551, 5552.
In partition, terms and manner of sale must be made known and distinct lots must be sold separately 5560.
Of animals under lien and judgment for charges, owner to be paid surplus 5500.
Of baggage left at hotel or lodging-house 2152, 2153.
Of deteriorating property of insolvent corporation, when court may order 1198.
Of encumbered property on proceedings to enforce mortgage or lien 5501.
Of franchise, organization of new corporation 1151, 1152.
Of goods at auction, when memorandum of auctioneer is contract of sale 1077.
Of homestead under execution, $5,000 exempt 2144.
Of lots in federal townsite not conveyed within one year 1987.
Of mortgaged personal property under execution 1080.
Of perishable property, not stayed by appeal 5355.
Of property for delinquent taxes, only smallest portion that will pay judgment and costs to be sold, redemption, how made by minors or others 3666.
Of property of churches, associations and societies, district court may make order for 1369.
Of property to which county assessor holds deed under delinquent tax sale, when and how may be made 3767.
Of real estate belonging to minors or persons under legal disability, local or special law invalid (Nev. Const. art. iv, sec. 20, as amended 1889) 278.
Of real estate for taxes or under execution or order of sale, successor in office may execute deed with same effect as if by officer making sale 1662, 1663.
Of real estate under execution, certificate of, what to state 5298.
Of real estate under execution for foreclosure of lien 2227.
Of real property under execution, certificate of redemption to be recorded and noted by recorder 5301.
Of real property under execution, eviction of purchaser or redemptioner, liability of judgment creditor for price paid 5306.
Of real property under execution, failure of purchaser to recover possession, revival of original judgment for amount paid by purchaser with interest 5306.
Of unclaimed lots in federal townsite, disposition of proceeds 1993.

Sale—continued.
Of unclaimed property 530-542.
Of unclaimed property to pay freight 541.
Of unclaimed stolen property, when may be made by county treasurer 7449.
On execution, after and before conveyance court may enjoin injury to real property 5519.
On execution, damages for injury to real property before delivery 5520.
Referees must make report of in actions for partition 5562.
To be absolute in action by majority owners against minority owners for expenditure on mine 2482.
Under execution, debtor may direct order in which property may be sold 5292.
Under execution, duplicate of certificate to be filed with county recorder 5298.
Under execution, how made 5292.
Under execution, gold dust and bullion to be returned as money 5287.
Under execution, notice of, how given 5290.
Under execution, of animals held for charges 5499.
Under execution, of personal property to be in view of those who attend the sale of real property at the court house 5292.
Under execution, of real property in two counties, notice to be given in both 5292.
Under execution or other process, sheriff not to purchase at 1655.
Under execution, proceedings against party refusing to pay bid 5294.
Under execution, purchaser refusing to pay bid liable for loss and costs 5293.
Under execution, sheriff to pay over money paid for redemption 5302.
Unless in good faith, fees and salaries of public officers are subject to attachment and execution 2864.
When court may order, in action for partition 5538.
When evidence of fraud 1078, 1079.
Sales of merchandise, requirements 3908-3912.
Salesman, has preferred claim for wages 5493, 5494.
Satisfaction of judgment, in action for delinquent taxes not to be entered until costs and penalties are paid 3660.
Of judgment, method and entry 5279.
Of judgment, when may be made by attorney 507.
Of lien, penalty for failure to enter acknowledgment of 2228.
Of mortgage, a lien 3755.
Schedule, of acts and sections relating to estates of deceased persons 5857. See Estates of Deceased Persons and references thereto.
Of acts, repealed by civil practice act 5821.
Schedule of chapters, in main civil practice act 4943, p. 1433.
Schedule of sections, relating to action for personal injuries 5649.
Action, manner of commencing 5016.
Action, manner of commencing in justice's court 5722.
Action, to quiet title 5514.
Adoption of children 5825.
Affidavits 5450.
Schedule of sections—continued.
Amendments to pleadings 5080.
Answer 5046.
Appeals 5325.
Appeals from justice's court 5788.
Arbitration 5255.
Arrest and bail in civil cases 5087.
Arrest in civil action, discharge from 5114.
Attachment 5147.
Attachment in justice's court 5749, 5752.
Bankruptcy 543.
Certiorari 5683.
Claim and delivery 5124.
Common-law and miscellaneous provisions 5474.
Contempt 5394.
Contempt and general provisions in justice's court 5795.
Costs 5376.
Court reporter 4908.
Courts and court officers 4828.
Definitions, common-law and miscellaneous provisions 5474.
Demurrer to answer 5053.
Demurrer to complaint 5040.
Depositions taken outside of state 5458.
Depositions taken within state 5454.
Discharge from arrest in civil action 5114.
Divorce 5838.
Eminent domain 5606.
Estates of deceased persons 5857.
Evidence, proof of public writings 5408.
Exceptions 5315.
Execution 5280.
Execution in justice's court 5783.
Execution, proceedings supplementary to 5307.
Federal bankrupt act 543.
Fees 1994-2005.
Forcible entry and detainer 5585.
Garnishment 5169.
Guardians 7149.
Habeas corpus 6226.
Injunction 5136.
Issues, mode of trial 5195.
Judgment, in general 5238.
Judgment in justice's court 5754.
Judgment, manner of giving and entering 5266.
Jurors and juries 4929-4942.
Jury trial 5204.
Justice's court pleadings 5734.
Juvenile court 728.
Limitations, miscellaneous provisions 4974.
Limitations, of actions not relating to real property 4967.
Limitations, pertaining to real property 4948.
Lost records affecting real property, restoration 5630.
Mandamus 5694.
Manner of commencing action 5016.
Manner of commencing action in justice's court 5722.
Manner of giving and entering judgment 5266.
Motions and orders 5362.
Municipal court 767, 831, 832.
New trials 5319.
New trials and appeals in justice's court 5788.
Notices, filing and serving papers 5367.

Schedule of sections—continued.
Nuisance and waste 5504.
Orders and motions 5362.
Papers, filing and serving 5367.
Parties 4986.
Parties not originally summoned 5243.
Partition 5527.
Perpetuating testimony 5464.
Personal injuries 5649.
Place of trial 5011.
Place of trial in justice's court 5715.
Pleadings in justice's court 5734.
Pleadings, rules of 5065.
Pleadings, variance, mistakes and amendments 5080.
Pleadings, verification of 5060.
Possessory actions 5849.
Postponement of trial 5195.
Proceedings supplementary to execution 5307.
Proof of public writings 5408.
Provisional remedies in justice's court 5744.
Public writings, proof of 5408.
Quo warranto 5656.
Real property, restoration of lost records affecting 5630.
References and trial by referees 5230.
Repeal of certain provisions relating to civil practice 5817.
Restoration of lost records affecting real property 5630.
Rules of pleading 5065.
Supplementary proceedings to execution 5307.
Testimony, perpetuation of 5464.
Title, action to quiet 5514.
Trial by court 5226.
Trial by jury 5204.
Trial, place of 5011.
Trial, place of, in justice's court 5715.
Trials and judgments in justice's court 5754.
Verdict 5221.
Verification of pleadings 5060.
Venue, in justice's court 5715.
Waste and nuisance 5504.
Witnesses 5419.
School bond taxes, lien enforcible as other taxes 3439.
School teachers, libraries and certain property of exempt from execution 5288.
School uses, eminent domain may be exercised for 5606.
Schools, when to receive surplus on sale of animals on lien for charges 5500.
Seal, and certificate of county clerk to be attached to summons to be served out of town in civil action in justice's court 5732.
And certificate of county clerk to writ of attachment in justice's court for service in another county 5751.
And certificate to attest records of other states 5410.
Genuineness of signature of judge taking affidavit out of state to be certified under by clerk 5453.
How to be affixed 5481.
Of court, attached to certificate to copy of records of this state or the United States 5408, 5409.
Of court, how may be affixed 4880.
Seal—continued.
Of court, to what papers or proceedings to be affixed 4879.
Of supreme and district courts to have 4875.
When private, of clerk of court may be used 4877.
"Seal" or letters "L. S." sufficient description of seal in telegraphing papers for service and word "stamp" sufficient to indicate revenue stamp 5372.
Sealed verdict 5217.
Search and seizure, not to take place except on probable cause supported by oath and particulars (Nev. Const. art. i, sec. 18) 247.
Searcher of records, may make and verify abstract of title in action for partition 5545.
Search warrants, schedule of sections 7415. See Search Warrants and references.
Seat of government, terms of supreme court to be held at (Nev. Const. art. vi, sec. 7)322.
Secretary of corporation, deposition of, may be taken 5454.
Secretary of state, bond of guardian of insane person to be given for payment of expenses in advance to 2201.
Certified copy of decree of dissolution of corporation and appointment of receiver to be filed with 1196.
Foreign corporation to file certificate of appointment of resident agent 5024.
May certify to certificate of incorporation 1221.
On certification from district judge that property of insane person is exhausted, shall transfer insane person to indigent list 2201.
To receive depositions and papers on contest for members of the legislature and deliver to presiding officer 1820-1822.
When to advise governor to have action brought against foreign corporation for doing business without filing certificate 1350.
"Section," used in civil practice act means section of that act unless otherwise specified 5475.
Security for costs in action in quo warranto 5659.
Security for obedience to order regarding children in action for divorce 5840.
Seduction, action for may be brought within two years 4967.
When father, mother or guardian may sue 4995.
When unmarried female may sue 4994.
Self-incrimination, not excuse for failure to testify before public service commission 4536.
Senate, chief justice to preside over on trial of impeachment of governor or lieutenant-governor (Nev. Const. art. vii, sec. 1) 334.
To try impeachments, oath of senators, concurrence of two-thirds elected necessary (Nev. Const. art. vii. sec. 1) 334.
Sentence, on indictment for contemptuous conduct 5405.
Separate property, defined 289, 2155.
Of husband not liable for debts of wife contracted before marriage 2170.
Of wife, failure to file inventory is prima facie evidence that it is not separate property 2159.

Separate property—continued.
Of wife, filing inventory with county recorder is notice of title 2158.
Of wife, not liable for debts of husband 2171.
Probate proceedings, inventory to show 5944.
Separation of husband and wife, contract of 2175.
Servant, has preferred claim for wages 5493, 5494.
Service, after judgment against parties not summoned before judgment in action on joint contract, what to contain, to be accompanied by affidavit 5244, 5245.
By sheriff, of process or papers, when to deliver copy to party served 1649.
Of affidavits and counter-affidavits, on motion for new trial 5324.
Of amended complaint, may be made upon attorney or party 5043.
Of complaint and summons in action for unlawful detainer 5593.
Of copy of order shortening time for notice for taking deposition in state 5455.
Of cost bill and motion to retax 5387.
Of cross-complaint on codefendant 5052.
Of notice and undertaking on appeal, order of immaterial 5330.
Of notice by bank examiner to persons holding claims against closed bank 671.
Of notice, failure to make upon subtenant entering after action, no defense in action for unlawful detainer 5592.
Of notice for taking deposition for perpetuation of testimony, proof of, to be filed with clerk 5468.
Of notice in case of unlawful detainer, tenant or mortgagee may perform condition 5588.
Of notice of affidavit for taking deposition in state 5455.
Of notice of appeal 5330.
Of notice of application for discharge from arrest in civil action 5116.
Of notice of contest in U. S. land office to determine mineral or agricultural character of land 2397.
Of notice of hearing in justice's court after service of summons or appearance 5733.
Of notice of motion to permit plaintiff to occupy premises pending action under eminent domain 5615.
Of notice of proposed modification of findings 5227.
Of notice of taking testimony for perpetuation 5466.
Of notice of time and place of trial on transfer of civil action in justice's court 5719.
Of notices and papers 5367-5373.
Of notices and papers by mail, how made, time 5373.
Of notices and papers, may be made on county clerk when party has no office at county-seat 5369.
Of notices and papers not applicable to contempt in certain cases 5368.
Of notices and papers, when and how made 5369.
Of notices and papers, when may be made by mail 5370.
Service—continued.
Of process, may be on land ceded to United States 1949, 1951.
Of process on corporation, how may be made 1188.
Of statement on appeal 5331.
Of subpena, how made 5433.
Of subpena if witness be concealed 5434.
Of summons by publication in justice's court 5732.
Of summons by publication on unknown heirs 5028.
Of summons, how made 5023.
Of summons in action by majority owners against minority owners for expenditure on mine 2480.
Of summons in action in justice's court, limitation on 5731.
Of summons in action to restore lost records 5634.
Of summons in civil action in justice's court, if out of town, certificate and seal of county clerk to be attached 5732.
Of summons in justice's court, by whom and how made 5732.
Of summons, proof of, before judgment by default in justice's court 5754.
Of summons, proof of, how made 5032, 5033.
Of summons, proof of to be made before entry of judgment by default in action to determine adverse claim to real property 5524.
Of summons upon controller in action against the state for services or advances authorized by law 5653.
Of summons, when required in quo warranto 5665.
Of writ of certiorari 5689.
Of writ of garnishment 5172, 5173.
Of writ of mandamus, how made 5706.
Of writ of mandamus upon majority of board sufficient 5707.
Of writ or papers sent by telegraph, original to be filed with court 5371.
On nonresident, when to be on attorney or clerk 5375.
On parties residing out of county in proceedings to restore lost records 5643.
On sheriff, how made 1660.
Session of district court, duties of sheriff during, rule xxxix, p. 1431.
Set-off. See Counter-claim.
Settlement, between parties, does not affect lien for attorneys' fees 5376.
Of instructions in district court, rule xl, p. 1431.
Of statement on appeal 5331.
Sewerage, when eminent domain may be exercised for 5606.
Shares of corporation, subject to attachment 5151, 5152, 5287.
Sham and irrelevant matter, to be stricken out of pleadings 5067.
Sheep, damages for herding on lands of another or within one mile of ranch house 2319, 2320.
Sheriff. See Sheriff.
Action against for escape of prisoner arrested on civil process may be brought within two years 4967.

Sheriff—continued.
Action against for official acts, notice to sureties 4957, 5242.
Action against for official misconduct may be commenced within two years 4967.
Affidavit or certificate of service of summons 5032, 5033.
And sureties liable for failure to pay over money 1652.
Arrest, civil action, liability 5092-5094, 5098, 5106, 5111, 5308, 5446, 5744-5748.
Attachment, how to execute 5150-5157, 5168, 5169, 5173.
Bond of indemnity, may demand 1659.
Claim against, by other person for property in action for claim and delivery not valid unless supported by affidavit 5134.
Collection made, liability 1652.
Disposal of property received from garnishee after payment or performance 5187.
District court, may adjourn, when 4872.
Duties, during session of district court, rule xxxix, p. 1431.
Duty in regard to abatement of nuisances in unincorporated towns 920.
Duties on receiving execution from justice's court 5786.
Duty on stay of execution pending motion for new trial in district court, rule xxvi, p. 1429.
Duty to attend court, judicial officers and coroner and execute orders and process 1648, 1650.
Duty to serve subpena requiring attendance before public service commission 4532.
Elisor, appointed to act for 5495.
Entitled to only one mileage for serving more than one process in same action requiring only one journey 2037.
Execution may be issued to in different counties 5286.
Execution to be directed to, how to be satisfied by 5281.
Fees of, for selling animals on execution under judgment for charges 5499.
Fees of, in contested election for county or township office same as in district court 1811.
Fees of, in counties polling over 800 votes 2009, 2919; in counties polling not over 800 votes 1997.
Garnishment, disposal of property 5185-5187.
Has same power in county attached to another county for judicial purposes 1658.
Holding execution, not to purchase at sale 1655, 5292.
How confined upon being arrested by elisor 5497.
How service made upon 1660.
How to attach credits and property in possession of another 5153, 5169.
How to execute writ of attachment 5150, 5152.
How to give notice of sale under execution 5290.
How to sell mortgaged property in two or more counties on foreclosure, return for deficiency 5501.
How to serve copies in action for claim and delivery of personal property 5127.
Sheriff—continued.
How to serve subpena on concealed witness 5434.
If party to civil action, how other party arrested, may be confined 5497.
In charge of jury, duty 4942, 5208, 5213.
In contempt proceedings must detain person until discharged 5399.
Indemnifying bond, when may demand 1659.
Jury, provide food and lodging for 4942, 5208, 5213.
Jury, to have charge of 5208.
Jury, to summons 4930-4939.
Liable as bail on arrest in civil action 5110.
Liable for defendant's sureties until they justify in action for claim and delivery 5130.
Liable on official bond for escape of defendant arrested in civil action 5111.
Liability of, for neglect to execute writ of execution or attachment or pay over collections 1651, 1652.
Making sale under execution to deliver personal property and certificate of sale to purchaser 5296.
May arrest defendant who has been released from arrest in civil action 5098.
May be removed or suspended and another appointed to perform duties pending charges 3753.
May call power of county to take property in action for claim and delivery 5132.
May collect after term of office on execution in process previously levied 1656.
May make deed for real estate sold by predecessor 1662, 1663.
May reject bid of person who has refused to pay bid at execution sale 5294.
May sell certain personal property for payment of licenses 3742.
May sell property again under execution if bidder refuses to pay 5293.
May serve summons in action in justice's court 5732.
Mileage of, computed from court house 2040.
Must pay into court deposit on arrest in civil action, liability on sheriff's bond 5107.
Need not keep property claimed by other person in action for claim and delivery unless indemnified by undertaking 5134.
Need not return writ of attachment before serving garnishment 5173.
Not liable for damages for failure to make service unless fees paid 1659.
Not to charge for written return 2041.
Not to purchase at sale under execution or other process 1655, 5292.
Payment on redemption of real property sold under execution to be made to 5302.
Practice of law by, prohibited 1646.
Railroad commission, papers to serve 4565.
Redemption 5302, 5303.
Required to take personal property on claim and delivery 5126, 5127.
Return of warrant of arrest and undertaking in contempt proceedings 5401.
Sale under execution, not to purchase, duties 1655, 2828, 5292-5296, 5301.

Sheriff—continued.
Selling property under execution without giving notice, damages and penalty 5291.
Service of summons in civil action 5016-5022, 5032, 5033.
Service on, how made 1660.
Successor may execute deed 1662-1663.
Sureties liable for failure to pay over money 1652.
Summons, service of 5016-5022, 5032, 5033.
Table of fees, to post 2025.
Term expired, power 1656.
To collect balance on execution if attached property insufficient to satisfy judgment 5160.
To deliver property to plaintiff in action for claim and delivery if defendant's sureties fail to justify 5130.
To deliver to defendant remaining property attached after satisfaction of judgment 5160.
To detain defendant arrested in civil action in justice's court until discharged by justice 5748.
To execute certificate of redemption of real property sold under execution 5301.
To execute process under act to regulate railroad and other rates 4565.
To execute warrant of arrest for disobedience of witness 5441.
To execute writ of execution 5289.
To file notice, undertaking and affidavit in action for claim and delivery 5135.
To give certificate of deposit and discharge defendant arrested in civil action 5106.
To give notice and make return on arrest of defendant in civil action in justice's court 5747.
To give receipt for debt garnished 5157.
To indorse date of receipt of process or papers for service and deliver copy to party served 1649.
To levy on such property as judgment debtor indicates when there is excess 5289.
To make inventory of property attached 5156.
To pay moneys collected on execution of process to justice of the peace 5810.
To pay over money paid for redemption of real property sold under execution 5302.
To pay wages as preferred claim against attachment or execution 5494.
To receive and deliver copy of affidavit and order on arrest of defendant in civil action 5093.
To receive property from garnishee 5155, 5175.
To receive property from garnishee, sale 5175.
To receive property pledged to garnishee on payment to garnishee or performance 5185, 5186.
To return execution, when 5283.
To satisfy judgment from proceeds of sale of property attached 5159.
To serve and execute writs and papers sent by telegraph, liability 5371.
To serve notice of election contest for county or township office 1808.
To serve notice of contest for member of the legislature 1818.
Sheriff—continued.
To serve subpenas in contest for county or township office 1809.
To take and deliver property on payment of fees in action for claim and delivery 5133.
Under attachment to sell personal property and collect debts 5157.
Unlawful to be interested in purchase at sale made officially 2828.
Wages, preferred claim, to pay over 5494.
What papers must be served with notice to on redemption of real property sold under execution 5302, 5303.
When elisor may be appointed to act instead of 5495.
When excused from bringing person arrested in contempt proceedings 5407.
When liable for arresting in civil action witness subpenaed 5446.
When may adjourn court 4872.
When may arrest and bring defaulting witness 5440.
When may arrest defendant in civil action in justice's court 5754.
When may be ordered to arrest debtor on proceedings supplementary to execution 5308.
When not liable for more than amount bid by second purchaser and amount collected from purchaser refusing to pay at sale under execution 5295.
When required to arrest defendant in civil action 5092, 5094.
When to relinquish property on stay of execution on appeal from justice's court 5793.
When to return and indorse writ of attachment 5168.
When to return and stay execution pending appeal in district court, rule xxii, p. 1429.
When to take defendant arrested in civil action in justice's court before another justice 5746.
Writ of attachment or execution, liability to creditors 1651-1652.
"Sheriff," when word "constable" is to be substituted for in certain sections relating to attachment 5752.
Sheriffs, several writs of attachment in justice's court may be issued to different 5751.
Sheriff's deed under execution sale and redemption, who entitled 5301.
Fees when not over 800 votes in county 1997.
Receipt, discharge when debtor or judgment debtor pays creditor 5309.
Sickness, of justice of the peace, another may attend on his behalf 5811.
Signature, of makers of note or instrument admitted in justice's court unless denied by verified answer 5770.
Or subscription includes mark 5475.
When made by mark to be witnessed, and if for acknowledgment or sworn statement by two witnesses 5475.
Singular number includes the plural 5475.
Sister, when entitled to damages for death by wrongful act 5648.
Sites, for electric light and power plants, when eminent domain may be exercised for 5606.

Slander, action for may be brought within two years 4967.
How pleaded, proof 5073.
Truth may be given in evidence 5074.
Sleeping-car company, rates may be fixed by railroad commission 4555, 4560, 4562.
Smelters, eminent domain may be used for and for land for erection of 5606.
Smoke, when eminent domain may be used for disposition of 5606.
Society, district court may make order for sale or mortgaging of property of 1369.
Sole trader, copy of order making to be recorded 2191.
Liable for maintenance of children 2193.
May sue or be sued alone 2192.
Not to have business superintended by husband 2192.
Procedure in district court and order allowing married woman to carry on business in her own name 2191.
Rights and liabilities of 2192.
When husband not responsible for debts of wife as 2194.
Special administrator 5936-5932.
Special issues, when may be tried by jury 4945.
Special or local laws, in certain enumerated cases are invalid (Nev. Const. art. iv, sec. 20) 278.
Special verdict, defined, when required, inconsistent with general 5221, 5222.
Specifications, of error, matter within may be reviewed on appeal 5340.
Of grounds, on contest for state office, filing and verification 1823.
Specific performance, of contract of decedent for conveyance of real property, when decree may be made by district court 6032, 6033, 6147.
Specific performance of contracts 1073.
Specimen cabinets, exempt from execution 5822-5824.
"Stamp," sufficient to indicate revenue stamp when telegraphing papers for service 5372.
State, action against for services or advances authorized by law, attorney-general to defend, controller to produce evidence and may appeal 5654.
Action against may be brought for services or advances authorized by law 5653.
Action by subject to statute of limitations 4971.
Action in quo warranto may be brought in name of 5656, 5657, 5660.
As a party to action when not required to give bond or undertaking 5487.
In action by attorney-general pleadings need not be verified 5064.
Indebtedness or liability to, local or special law releasing, invalid (Nev. Const. art. iv, sec. 20) 278.
May have contract declared void if public officer interested 2829.
Need not give undertaking on appeal 5346.
Provision may be made by general law for bringing action against (Nev. Const. art. iv. sec. 22) 280.
Records of other authentication under act of Congress 526-529.
Shall not deprive any person of due process of law 185.
State—continued.
When includes District of Columbia and territories 5475.
When losing party costs payable out of state treasury 5392.
When may attack collaterally due incorporation of company 1154.
When not bound by judgment in action to determine adverse claim to real property 5524.
State land contest, time for filing and serving pleadings, rule xliv, p. 1431.
To be determined by district judge 3208.
State land patent, when copy of admissible in evidence 5415.
State militia, copies of records or papers certified by adjutant-general are evidence 4081.
Horses and property exempt from execution 4086.
When members exempt from arrest under civil process 4081.
State office, time for commencement of contest 4972.
State officer, liable to impeachment for misdemeanor or malfeasance (Nev. Const. art. vii, sec. 2) 335.
May be removed for malfeasance 2851, 2852.
State of Nevada, action may be brought in name of against public utility for forfeiture or penalty 4544.
Official bond to, any person injured may bring suit in own name 2870.
State public uses, eminent domain may be exercised for 5606.
State treasurer, how to set apart money received from occupant of public lands for absence under act relating to possessory actions, 5853.
State treasury, local or special law refunding money paid into, invalid (Nev. Const. art. iv, sec. 20) 278.
Statement, directors and officers of corporation liable in damages for making false 1175.
In contest for county or township office, not to be rejected for want of form 1807.
Of facts by parties coming in under notice in action to enforce liens, rule xxxv, p. 1430.
Of facts by referees or arbitrators on proceedings for contempt 5396.
On appeal, appeal may be taken without, and on bill of exceptions settled at time of decision, order or ruling 5343.
On appeal, copy of to be annexed to copy of judgment roll 5338.
On appeal, costs for printing or typewriting not to be allowed for surplusage 5333.
On appeal, effect of testimony may be stated preferably 5333.
On appeal, facts may be approved and settled by supreme court if judge or referee refuses 5333.
On appeal, failure of party to embody fair portion of testimony essential for presentation of exception, opposite party allowed costs 5333.
On appeal from order granting new trial, time for and what to contain 5332, 5333.

Statement—continued.
On appeal, how prepared, served, filed, amended and settled 5331.
On appeal, if there be one, to be furnished appellate court on appeal 5356.
On appeal, intermediate orders involving merits may be reviewed 5340.
On appeal, judge or referee may correct 5335.
On appeal, may be certified by respective attorneys or by the clerk 5356.
On appeal, not necessary on appeal from agreed statement of facts 5341.
On appeal, on ground that the evidence does not support verdict or decision, testimony may be inserted at cost of party losing on this ground 5333.
On appeal, on questions of fact or both law and fact from justice's court, judgment not required 5790.
On appeal, on questions of law alone from judgment in justice's court, what must contain, amendments and settlement 5789.
On appeal, time for filing may be enlarged 5336.
On appeal, what to contain 5332, 5333.
On appeal, when abstract of testimony must be filed in supreme court 5333.
On appeal, when may be settled as directed by supreme court 5334.
On appeal, when may be settled by judge, referee or attorneys and filed 5337.
On appeal, when party must allow testimony inserted in statement at his own expense unless in narrative form 5333.
On appeal, when presumption that evidence supports the verdict and decision and when insertion of testimony unnecessary 5333.
On appeal, when right to make or amend is deemed waived 5335.
On appeal, when to be settled by judge or referee before or after he ceases to act 5334.
On confession of judgment, costs 5250, 5251.
On motion for new trial 5321.
On motion for new trial in district court, if time enlarged, adverse party to have same extension for filing amendments or counter-affidavits, rule xxiv, p. 1429.
On motion for new trial in district court, to be settled by referee who tried case, rule xxv, p. 1429.
Or complaint in contest for member of the legislature, how to be forwarded 1820, 1821.
Or complaint in contest for member of the legislature, to be verified 1818.
Statute of frauds 1069-1092. See Conveyances.
Statute of limitations, not to be plead in answer of party summoned after judgment in action on joint contract 5246.
When does not run during term of public official 2866.
Statutes, and decisions of supreme court, legislature to provide for publication 376.
Printed copies of, from other states or territories or foreign country presumed to be correct 5413.
Private, how pleaded, judicial notice 5072.
Statutes—continued.
Reference in to provisions of law revised and reenacted in civil practice act to be construed as applying to these provisions 5817.
To be free for publication 376.
Stay bond on appeal 5347-5355.
Stay, of execution, by undertaking or deposit on appeal from justice's court 5792.
Of execution, does not result from appeal from judgment of ouster in quo warranto 5682.
Of execution, from judgment or order directing execution of conveyance 5350.
Of execution, how obtained in action for forcible entry or unlawful detainer 5601.
Of execution, in district court, not to be granted pending motion for new trial except upon bond and notice, procedure, rule xxvi, p. 1429.
Of execution, in justice's court 5783.
Of execution, on payment of judgment by tenant in action for unlawful detainer 5599.
Of execution, pending appeal, sureties may be required to justify 5354.
Of execution, when to be ordered by justice's court pending appeal, when officer to relinquish property 5793.
Of foreclosure proceedings on motion of defendant until affidavit filed showing payment of taxes 3756.
Of proceedings, order for in certiorari 5687, 5688.
Stenographer, may be appointed by public service commission to take down proceedings 4535.
Of attorney, when not to testify regarding communication 5425.
Stenographic notes, reference may be made to on motion for new trial 5321.
Stipulation, in district court not to be regarded unless in writing and signed, rule xxvii, p. 1429.
Stock certificate, of corporation, district court may order new in lieu of one lost 1165.
Stock in corporation, how attached 5152, 5287.
Stockholders in mining company, proceedings for inspection of mine by 2492, 2495.
Limitations of action against for penalty or forfeiture 4984.
Majority of may dissolve corporation 1240.
May apply for appointment of receiver and dissolution of corporation 1194, 1195.
Of bank, liability to creditors 627.
Responsibility to of trustee appointed on dissolution of corporation in quo warranto 5677.
Trustee of to be appointed on dissolution of corporation in quo warranto 5671.
Store account, action for any article charged may be brought within four years 4967.
Street railways, eminent domain may be exercised for 5606.
May condemn for right of way 2138.
Streets, eminent domain may be exercised for 5606.
Local or special laws for vacating are invalid (Nev. Const. art. iv, sec. 20) 278.
Of cities and towns, when not affected by proceedings in eminent domain 5625.

Style of process, shall be "The State of Nevada" (Nev. Const. art. vi, sec. 13) 328.
Subcontractor, when liable to workmen and owner under employers' liability act 1924.
Submitting controversy without action 5252-5254.
Subpena, damages for failure of witness to obey 5439.
Disobedience of is contempt 5394.
Disobedience of punishable as contempt in justice's court 5795.
How issued 5432.
How served, if witness be concealed 5434.
How served, witness may demand fees 5433.
Issued by railroad commission, district court may compel obedience to by attachment 4561.
May be issued by clerk of district court requiring attendance before public service commission 4532.
May be issued by justice's court to any part of county 5808.
May be issued by officer taking acknowledgment for witness to prove execution of conveyance 1033.
May issue for interpreter, contempt 5430.
May require witness to bring books 5431.
Person present compelled to testify as if served 5435.
Person served with, when immune from civil arrest 5445.
Punishment for disobedience to 5438.
When arrest void in civil action and arrresting officer liable for service of 5446.
When witness required to produce papers 5436.
Witness disobeying, sheriff may arrest and bring 5440.
Witness concealed, how served 5434.
Witness served, may demand fees 5433.
Subpenas, and certain writs must be served upon party instead of attorney 5375.
And subpenas duces tecum to be issued by clerk in contest for county or township office 1809.
Subscription, includes mark 5475.
When made by mark to be witnessed and if for acknowledgment or sworn statement by two witnesses 5475.
Substitution, in action by or against corporations consolidated 1148.
In case of death on appeal to supreme court, rule ix, p. 1423.
Of claimant as a party 5005.
Of parties in case of death, disability or assignment 5004.
Subtenant, entering after commencement of action bound by judgment in action for unlawful detainer 5592.
Notice to quit, how to be served upon 5591.
When to be made party in action for unlawful detainer 5592.
Successor, of justice of the peace, who is 5806, 5807.
Of officer removed for malfeasance, to be appointed and to qualify 2853.
Suit, bringing or instigating false is misdemeanor 6366.
For delinquent taxes exceeding $300 to be brought by district attorney 3659.
Suit—continued.
In name of another without authority is gross misdemeanor 6372.
Provision may be made by general law for bringing against the state (Nev. Const. art. iv, sec. 22) 280. See Action.
Summary administration 6127, 6128.
Sum payable on negotiable instrument defined 2549.
Summoning and impaneling grand and petty juries and providing for their compensation, local or special laws are invalid (Nev. Const. art. iv, sec. 20) 278.
Summons, affidavit and answer when constitute pleadings in action on joint contract where party summoned after judgment 5247.
After judgment against parties not summoned before judgment in action on joint contract, what to contain, how served, to be accompanied by affidavit 5244, 5245.
Against foreign corporation may be served on secretary of state if resident agent is not appointed 5024.
All blanks must be filled in by justice of the peace before issuance 5809.
Before issuing, justice's court may require deposit or undertaking as security for costs 5812.
Date and return to be entered in justice's court docket 5800.
Defendant may waive in justice's court 5724.
Foreign corporation to appoint resident agent upon whom process may be served 5024.
How for answering by foreign corporation when service is made on secretary of state 5025.
How served 5023.
If not personally served defendant may answer to merits after judgment 5084.
In action by majority owners against minority owners for expenditures on mines, what to specify, how served 2479, 2480.
In action for delinquent taxes, to demand costs and penalties 3660.
In action for delinquent taxes, what to state and require, publication, posting and filing notice, fees 3663.
In action for delinquent taxes, when to contain more certain description than included in assessment roll 3662.
In action for partition, to be directed to all parties interested 5531.
In action for unlawful detainer, what to state, service 5593.
In action to restore lost records, service, waiver 5634.
In action in justice's court, alias summons may issue, time for appearance 5729, 5730.
In action in justice's court, how issued, directed and what to contain 5727.
In action in justice's court, limitation on service 5731.
In action in justice's court to specify time for appearance of defendant, indorsement 5728.
In action in justice's court, how served, personally or by publication 5732.

Summons—continued.
In action in justice's court, if out of town, certificate and seal of county clerk to be attached 5732.
In action in justice's court, name of plaintiff's attorney to be endorsed on 5727.
In juvenile court proceedings 732.
In quo warranto, when to be issued, when unnecessary 5665.
Issuance of alias, in civil action 5017.
Issuance of, in justice's court 5722, 5723.
May be amended in action for forcible entry or unlawful detainer 5602.
May be served by publication against parties whose names are unknown 5030.
May be served on one or more members of association 5007.
May issue within a year after filing of complaint in justice's court 5723.
May require interpreter to attend and be sworn 5430.
Of claimant interpleaded in garnishment proceedings 5180.
Proof of service of before judgment by default in justice's court 5754.
Proof of service of, how made 5032, 5033.
Proof of service or publication must be made before entry of judgment by default in action to determine adverse claim to real property 5524.
Service by publication on unknown heirs 5028.
Service by sheriff or other person 5016, 5022.
Service of, by publication in action for partition bars parties 5565.
Service of, by publication or out of state after publication, when complete 5027.
Service of, in civil action gives jurisdiction 5034.
Service of, upon garnishee 5177.
Service on additional parties ordered brought in by the court 5008.
Service on part of defendants jointly liable 5031.
To be served upon controller in action against the state for services or advances authorized by law 5653.
What to contain and how to be posted and served personally and by publication in action to determine adverse claim to real property 5523.
What to state and how endorsed 5018, 5020.
When and how service of, may be made by publication 5026, 5027.
When not served on some defendants, satisfaction of judgment on joint contract 5282.
When order of arrest may be indorsed on in civil action in justice's court 5744.
When to be mailed to defendant in case of publication 5027.
When to have court seal affixed 4879.
When to require defendant to answer 5019.
Summons or writ, when "process" if issued in judicial proceedings 5475.
Sunday or nonjudicial day, when excluded in computation of time 5482.
Supersedeas, practice for staying execution pending appeal from district court, rule xxii, p. 1429.
Supersedeas—continued.
Writ of error operates as, when, rule xix, p. 1424.
Supplemental complaint, answer and reply 5075.
Supplementary proceedings, debtor may be ordered to give undertaking to appear in 5308.
Disobedience of orders punishable as contempt 5314.
Judge may order property applied in satisfaction of execution 5312.
To execution, relating to district court are applicable to justice's court 5787.
Witnesses required to appear and testify when execution unsatisfied 5311.
Support, child adopted entitled to 5826, 5829.
Of husband by wife, when required 2178.
Of wife, when not required by husband if she abandons him 2177.
Supreme court. See Supreme Court.
Appeal may be taken to from judgment of district court in quo warranto 5682.
Appeal may be taken to from order of district court authorizing sale of homestead when wife insane 2148.
Appeal may be taken to in action on adverse claim to lot in federal townsite 1985.
Appeal may be taken to under juvenile court law 753.
Appellate jurisdiction 4832, 4833.
Calendar, what cases to be placed on, rule x, p. 1423.
Clerk has same power to issue process in quo warranto as clerk in district court 5681.
Court fee on appeal 2032.
Decisions, legislature to provide for publication 376.
Entry in trial court of judgment of on appeal 5360.
Fees of clerk 2006.
Has original jurisdiction in contest for state office 1823.
How constituted, quorum, concurrence of majority necessary to render decision (Nev. Const. art. vi, sec. 2) 317.
Is court of record (Nev. Const. art. vi, sec. 8) 323.
Judges and clerk of may take acknowledgements and affidavits 4883.
Judgment not effective until opinion filed with clerk (Nev. Const. art. xv, sec. 8) 376.
Jurisdiction defined (Nev. Const. art. vi, sec. 4) 319.
Jurisdiction of, in quo warranto 5663.
Justice of may order correction of error or omission relating to primary election, disobedience contempt 1763.
Justice thereof may make writ of habeas corpus returnable before (Nev. Const. art. vi, sec. 4) 319.
May add costs and damages when appeal for delay 5359.
May allow amendment of error on appeal on terms 5358.
May hear proof and settle exception when not properly allowed by judge 5316.
May issue writ of certiorari 5684.
May issue writ of mandamus 5695.

Supreme court—continued.
Not to issue writ of error or certiorari except upon order after showing, rule xviii, p. 1424.
Of United States, jurisdiction (U. S. Const.) 155.
Only to issue writ of prohibition 5709.
Opinion to be forwarded with remittitur, rule xvi, p. 1424.
Opinions and decisions shall be in writing and recorded 4839.
Opinions and decisions to be recorded, rule xiv, p. 1424.
Paper not to be taken from without order, rule xvii, p. 1424.
Power of on appeal 4835.
Rules, pp. 1421-1425.
Sessions to be held at capitol 4838.
To have seal 4875.
To hear case on appeal from judgment of district court reviewing order of public service commission 4540(d).
Two justices may pronounce judgment, reargument if two do not agree 4837.
Verdict of jury in district court may be certified to in quo warranto 5681.
What original writs may issue 4834.
When judge of may make order for arrest of person receiving fees in election contest 1815.
When may direct settlement of statement on appeal 5334.
When may order original exhibits sent up on appeal 5344.
When writ of error returnable, rule xx, p. 1424.
Supreme law of the land defined 168.
Sureties, affidavit and number of to undertakings 5484.
Affidavit of justification of to undertaking on appeal 5354.
Exception to, justification of, in action on claim and delivery 5128.
For district attorney, action may be brought against by county treasurer 1601.
Justification of generally 5485.
Justification of in action for claim and delivery 5131.
Justification of on undertaking for arrest in civil action 5091.
Justification of on undertaking for release of attachment 5164.
May be joined in action 5002.
Notice to in actions against sheriff for official acts 5242.
Of assessor, action against for underassessing or failure to assess land 3839, 3840.
Of assessor, liable for poll taxes and property not assessed 3625, 3718.
Of defendant in action for claim and delivery, justification, 5130.
Of sheriff liable for his failure to pay over money 1652.
On bail exonerated on commitment for insanity of person accused of crime 7391.
On bond to defendant when plaintiff permitted to occupy premises pending proceedings in eminent domain, justification 5615.
On bond of guardian, time within which action may be brought against 6185.
Sureties—continued.
On bond of guardian ad litem, rule xxxi, p. 1430.
On guardian's bond, action to be commenced against within 3 years 6185.
On official bond to State of Nevada, any person injured may bring suit in own name 2870.
On official or statutory bond, how may be released, liability of 2880-2883.
On undertaking for attachment in justice's court, exception to, justification, waiver 5750.
On undertaking for payment of judgment when adjournment for more than ten days in justice's court 5760.
On undertaking for stay of execution pending motion for new trial in district court, rule xxvi, p. 1429.
On undertaking on appeal from justice's court 5792.
On undertaking on attachment 5149.
To make affidavit to undertaking for payment of costs by nonresident or foreign corporation 539.
When bound by judgment in actions for official acts 5242.
When judgment may be ordered against them in actions against sheriff for official acts 5242.
Surety, attorney not to be received as in district court, rule xiv, p. 1428.
May bring action to compel one to satisfy debt due another 5479.
Surety company, bonding company or cash may be deposited in place of personal sureties 5486.
Estoppel and evidence regarding 698, 700.
May act as sole surety on bonds and undertakings in court proceeding 695.
May be surety on official bond 2888.
Surgery, applicant for certificate may appeal to courts from decision of board of medical examiners 2366.
Surplus money on sale on foreclosure, how paid and deposited 5502.
Surrender of defendant, after release from arrest in civil action 5097.
Survey, and marking of public lands as basis for possessory action, occupancy, recording, affidavit 5850, 5851.
By railroad companies in proceedings for condemnation under eminent domain 5627.
For right of way by railroad company, damage 3533.
Made by county surveyor or by mutual consent may be admitted in evidence 1667.
Of mine by surveyor, when prima facie evidence 2429.
Of public lands as basis for possessory action, plat to be recorded 5851.
Of real property, court may order 5512, 5513.
Right to enter, to make under eminent domain 5610.
Underground of mine, notice, application and order for, costs 5511.
Surveyor, may be employed by referee in action for partition 5439.
Surveyor's fees 2017.
Survival of actions 5004.

Sworn statement, by party making mark must have two witnesses 5475.
Tailings, eminent domain may be used for deposit of 5606.
Tanks for oil, eminent domain may be used for purpose of 5606.
Tax, city, lien against property assessed 937.
District court has jurisdiction of cases involving legality (Nev. Const. art. vi, sec. 6) 321.
If legality of, involved in justice's court, case to be transferred to district court for trial 5721.
In action involving legality, supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
Taxation, land ceded to United States exempt from 1950, 1952.
Taxpayer, may file objection to allowance of claim against county, commissioners to defer action at least ten days to permit institution of proceedings to determine validity 1521.
Tax collector, action for money paid under protest, may be commenced against within one year 4967.
Tax receiver, may be removed or suspended and another appointed to perform duties pending charges 3753.
Tax sale, deed of treasurer not prima facie evidence of title in purchaser when record lost 5631.
Taxes, action against county recorder for entering satisfaction of mortgage without affidavit that taxes are paid 3755.
Action for collection of, justice's court has jurisdiction where amount does not exceed $300 5714.
Action for delinquent on proceeds of mines, district attorney to begin when and where, damages, penalties, form of complaint and answer 3707-3709.
Action for, not to be begun by district attorney after service of receipt 3655.
Affidavit of payment of on mortgage or lien to be attached to complaint before entry of judgment in foreclosure 3756.
Delinquent, action for, complaint, summons and judgment to include costs and penalty 3660.
Delinquent, action for, delinquent list or certified copy is evidence 3658.
Delinquent, action for, fee of district attorney 3677.
Delinquent, action for, judgment, how entered, costs and penalties to be included, is lien on same and other property, default, redemption money, how paid, receipt of district attorney, evidence, execution 3665.
Delinquent, action for recovery of, money from redemption and from rental or sale of property bid in by county treasurer, how distributed, no fees from county 3671.
Delinquent, action for, summons, what to contain and require, publication, posting and filing notice, fees 3663.
Delinquent, action for, treasurer to buy in property if no other bidders, when county commissioners may order redemption 3667.
Taxes—continued.
Delinquent, action for, what answer may set up 3664.
Delinquent, action for, when judgment and execution to contain more certain description than included in assessment roll 3662.
Delinquent, assessor may force collection by sale of personal property, may give absolute title, fees 3700.
Delinquent, assessor may sell on summary process, certificate to purchaser, court may issue citation, fees, how collected 3679.
Delinquent, deed derived from sale of real property for conclusive evidence of title, possession recoverable in justice's court 3666.
Delinquent, duties of district attorney on collection of 3674, 3675, 3681.
Delinquent, exceeding $300, action for to be brought by district attorney 3659.
Delinquent, fees of officers and costs in action for, how taxed, when payable 3673.
Delinquent, form of complaint in action for 3661.
Delinquent, more certain description may be included in summons and complaint 3662.
Delinquent, officer selling property for to embrace in one certificate of sale all property bid off by county treasurer, recording 3669.
Delinquent, only smallest portion of property that will pay judgment and costs to be sold, redemption, how made 3666.
Delinquent personal, liable for costs if receipt not served on district attorney 3665.
Delinquent, when process may be served upon executor, administrator, father, mother or guardian of minor or insane person in action for 3666.
District court may order levy to meet obligations of city on disincorporation 873.
Failure of assessor to make settlement, district attorney to bring suit against him and sureties, no credit for delinquent 3704.
For improvement of streets in unincorporated town, district attorney to bring action for 934.
For school bonds, lien enforcible as other taxes 3439.
For state, county or township purposes, local or special law for collection or assessment, invalid (Nev. Const. art. iv, sec. 20) 278.
Homestead liable for (Nev. Const. art. iv, sec. 30) 288.
Homestead not exempt from sale for 2149.
In actions for delinquent costs not to be charged to city or town 999.
Liability of county treasurer for failure to settle with auditor 3650.
Lien for attaches how 3619.
Municipal, jurisdiction of municipal court 833.
Must be paid to establish adverse possession 4960.
On mortgage and trust deed are lien 3786, 3787.

Taxes—continued.
On mortgage or deed of trust, deed for 3787.
On proceeds of mine, lien on mine 3688.
Sale for delinquent amounting to less than $300 3651.
Sale of real estate for, deed may be executed by successor of officer making sale 1662, 1663.
To be paid by redemptioner under execution sale 5300.
To have been paid for five years in actions to determine adverse claims to real property 5522.
When action may be brought for delinquent 3659.
Telegraph, in service of papers by, not necessary to describe seal 5372.
Sending of papers by for service may be from original or certified copy 5371.
When eminent domain may be used for 5606.
Telegraph company, may condemn for right of way 2138.
Telephone, when eminent domain may be used for 5606.
Telephone company, may condemn for right of way 2138.
Rates may be fixed by railroad commission 4555, 4560, 4562.
Tenant, and subtenant only need be made defendants in action for unlawful detainer, exception 5592.
For less than ten years not affected by judgment in action for partition 5542.
Has remedies against subtenant 5590.
May perform condition after unlawful detainer and notice 5586.
Of agricultural lands may hold over if not notified 5589.
Of real property, when guilty of unlawful detainer 5588.
When may pay judgment in action for unlawful detainer and remain in possession 5599.
Tenant in common, and other tenant may be sued for treble damages for commission of waste 5505.
When action may be brought against minority owners for expenditures on mines 2478.
Tenants, and reversioners, bound by judgment in action for partition 5541.
May unite for purposes of division in action for partition and give notice 5579.
Unknown to be protected in action for partition, 5558.
Whose estate is sold in partition to receive compensation 5556, 5557.
Tenants in common, and joint tenants, may bring actions for partition 5527.
May unite in action to establish common title 5000.
To be joined in action 5001.
Tender, in action for recovery of money, when costs not recoverable 5384.
Of appraised value of land on construction of toll road 3052.
Tense, includes the present as well as the future 5475.
Terms and words defined 5475.
Terms of court, district court always open for business 4906.
Terms of court—continued.
Times of holding supreme and district to be as fixed by law 322.
Territory, when included in word "state" and words "United States" 5475.
"Testify," embraces every oral statement under oath or affirmation 5475.
Testimony, abstract of, when must be filed in supreme court 5333.
And depositions of witnesses in divorce proceedings same as in actions at law 5842.
Application to take for perpetuation 5465.
By deposition, before whom and how may be taken in state 5455, 5456.
By deposition, how and by whom taken out of state 5459, 5460.
By deposition, when objection to form of interrogatories not available 5456.
Consent to taking in civil action in justice's court on postponement 5759.
For perpetuation to be taken before judge 5467.
How subpena may be issued for the taking of 5432.
If no reporter court may order clerk to take down 5473.
In civil action, schedule of sections relating to perpetuation 5464.
In district court, when attorney not to comment on own, rule xiii, p. 1428.
In proceedings under eminent domain 5616.
Interrogatories direct and cross for taking deposition out of state 5460.
Judge may state to jury (Nev. Const. art. vi, sec. 12) 327.
Judge to designate officer to take testimony for perpetuation and prescribe notice 5466.
May be taken by deposition before justice of the peace on postponement of civil action 5759.
May be taken by district judge in proceedings for removal of officers of corporation 1182.
Of witness, consent for taking may be required on continuance 5203.
Of witness in state may be taken by deposition in certain cases 5454.
Of witness may be taken and perpetuated 5464-5473.
Of witness taken by deposition on contest for member of the legislature 1818, 1819.
Officially reported, when may be used on subsequent trial 5472.
Persons excluded from giving 5423.
Physician as witness 5427.
Proof by affidavit or oral on trial laying foundation for introduction of deposition 5456.
Regarding illegal votes, when not to be given in election contest unless specified in list served 1806.
Taken by deposition, manner of transmission of 5456.
Taken by deposition may be used by either party on trial 5456, 5457.
Taken by deposition out of state, commission to authorize commissioner to administer oath 5461.
Taken by deposition out of state may be read by either party 5463.

Testimony—continued.
Time required for obtaining ground for postponement of civil action in justice's court 5759.
Transcript of official reporter duly certified is prima facie evidence 4912.
What part to be set out by question and answer in statement on appeal 5333.
When all of may be inserted in statement on appeal, at expense of party unless in narrative form 5333.
When may be taken by deposition out of state 5458.
When taken for perpetuation may be used on trial, certified copy, form of interrogatories 5470.
When to be reduced to narrative form in statement on appeal or amendments to proposed statement on appeal 5333.
When unnecessary in statement on appeal 5333.
Witness need not testify unless paid fee, if demanded 2012.
Witness required to give in answer to legal and pertinent questions 5437.
Things in action, when included in words "personal property" and "property" 5475.
Timber, action in trespass for cutting, treble damages 5506.
Timber, measure of damages for cutting for repair of public highway or bridge 5507.
Time, for answer, reply or demurrer may be granted 5084.
For complying with decision on motion or issue of law in district court, when commences to run, rule vii, p. 1426.
For filing papers on appeal from justice's court to district court, failure ground for dismissal, rule xxxvii, p. 1430.
For filing papers on transfer of case from justice's court to district court, under sec. 5721, rule xxxviii, p. 1430.
Further not to be granted by any district judge excepting one having charge of case or proceeding, unless absent or unable to act, exception, rule xliii, p. 1431.
How computed, what days to be included and excluded 5482.
Of notice of motion, may be shortened by judge 5364.
To amend answer or reply runs from service of notice, exception 5086.
When trial must be commenced in justice's court 5756.
When enlarged for filing statement or affidavits for new trial in district court, adverse party to have same extension for filing amendments or counter-affidavits, rule xxiv, p. 1429.
Title, action to quiet, by whom may be brought 5514.
Action to quiet, costs not recoverable if defendant disclaims interest 5515.
Action to quiet, schedule of sections 5514.
Deed derived from sale of real property for delinquent taxes conclusive evidence of 3666.
Of action, to be entered in justice's court docket 5800.
Of summons, in civil action in justice's court 5727.
Title—continued.
Omitted or defective, when paper valid 5476.
To lot in federal townsite, procedure to obtain 1983-1986.
To real estate or mining claims, in action involving, supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
To real property, court may order party or clerk to convey 5241.
To real property, district court has jurisdiction in cases involving (Nev. Const. art. vi, sec. 6) 321.
To real property, if involved in justice's court, case to be transferred to district court for trial 5721.
To real property, may be vested or conveyed by judgment 5241.
To real property or mining claims, action involving, jurisdiction does not lie in justice's court 5714.
To real property or mining claims or questions of boundaries not to be tried in justice's court (Nev. Const. art. vi, sec. 8) 323.
Title papers of estate of minor, district court may compel production 4849.
Toll, if legality of involved in justice's court, case to be transferred to district court for trial 5721.
Toll, in action involving legality supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
Toll, district court has jurisdiction of cases involving legality (Nev. Const. art. vi, sec. 6) 321.
Toll rates, may be regulated by the legislature (Nev. Const. art. iv, sec. 20) 278.
Toll road, eminent domain may be exercised for 5606.
Franchise, action in quo warranto to determine whether forfeited 3049.
Person constructing may condemn private land 3052.
Rates may be regulated by the legislature (Nev. Const. art. iv, sec. 20) 278.
When proceedings may be commenced in quo warranto to forfeit franchise 3757.
Tort, making of claim under employers' liability act operates as assignment of assignable cause of action in 1927.
Town, action against on rejected claim must be commenced within one year after rejection thereof 4967.
As a party to action, when not required to give bond or undertaking 5487.
Indedtedness or liability to, local or special law releasing, invalid (Nev. Const. art. iv, sec. 20) 278.
May have contract declared void if public officer interested 2829.
Need not give undertaking on appeal 5346.
Rights of, for street purposes, when affected by eminent domain 5625.
Unincorporated, action for recovery of expense of abatement of nuisance in 921.
Unincorporated, action for recovery of tax for improvement of streets 934.
Uses, eminent domain may be exercised for 5606.

Township, in which action to be brought in justice's court 5715.
Business, local or special law regulating, invalid (Nev. Const. art. iv, sec. 20) 278.
Office, time for beginning election contest 4973.
Officers, legislature may regulate fees and compensation (Nev. Const. art. iv, sec. 20) 278.
Townsite, appeal may be taken to supreme court from judgment in district court on adverse claim to lot 1985.
Federal, claimant to lot to sign statement in writing 1983.
Federal, in case of death or disability of trustee, district judge or corporate authorities may act 1991.
Federal, when deed to lot to be made to guardian or trustee of minor or insane person 1986.
Fees and expenses of district judge for for patent and deeds 1986.
Townsites, entered by district judge as trustee, procedure for acquiring lots 1981-1988.
Federal, deed to lot, execution of after trial of adverse claims in district court 1984.
Federal, district judge to dispose of lots under legislative authority 1961.
Federal, lots not conveyed within one year to be sold 1987.
Federal, sale of unclaimed lots, disposition of proceeds 1993.
Townsites, on public lands, district judge may enter as trustee 1961.
Transcript, of docket to be certified on change of place of trial in justice's court 5719.
Of judgment may be filed in any county and become lien 5277.
Of official reporter duly certified is prima facie evidence of testimony in court proceedings 4912.
Of oral pleadings, to be certified by justice's court on transfer of civil action to district court for trial 5721.
Of record to be returned on proceedings in certiorari 6787.
On appeal from final judgment or order, of what to consist 5356.
On appeal to supreme court, correction of error or defect, rule vii, p. 1423.
On appeal to supreme court, how may be typewritten and bound, rule xxv, p. 1425.
On appeal to supreme court, how to be printed or prepared, rules iv, v, p. 1422.
On appeal, may be either printed or typewritten, rule of costs 5357.
Transfer of case, from justice's court to district court under sec. 5721, dismissal for failure to file papers in time, rule xxxviii, p. 1430.
Transfer of mines before 1863 proved by local rules, regulations or customs of miners 1102.
Translators' fees 2016.
Treasurer, if fee or salary of public officer is garnished, may pay into court 2865.
May be removed or suspended and another appointed to perform duties pending charges 3753.
Of corporation, deposition of may be taken 5454.
Treaties, published by Little & Brown, are evidence 529.
Trees, action in trespass for cutting or injuring, treble damages 5506.
Measure of damages for cutting, for repair of public highway or bridge 5507.
Trespass, for cutting timber, action for, treble damages 5506.
Measure of damages for extraction of ore from mine 5509.
Of animals on grounds enclosed by lawful fence, damages 2332.
Of live stock, damages and attorneys' fees recoverable 2335-2337.
On mine, application for underground survey 5511.
On real property, action for may be commenced within three years, but if in underground mine within three years after discovery of facts 4967.
Trial, by court 5226.
By court in civil action, schedule of sections 5226.
By jury, demand for, entry to be made in justice's court docket 5800.
By jury, in civil action in justice's court, how waived 5766.
By jury, secured but may be waived in civil cases (Nev. Const. art. i, sec. 3) 232.
Continuance of avoided by admission that evidence alleged in affidavit would be given 5202.
Continuance of for absence of evidence 5202.
De novo in justice's court when appeal from justice's court on questions of fact or both law and fact 5790.
Either party entitled to jury to try issue of fact in action for divorce 5845.
Exclusion of witnesses during 5449.
In civil cases three-fourths of jury may render verdict, but legislature by two-thirds vote may require unanimous (Nev. Const. art. i, sec. 3) 232.
In district court on appeal, either party may have benefit of objection made in justice's court 5791.
In district court, to be had early if demurrer not interposed in good faith, rule viii, 1427.
In garnishment proceedings 5179.
In justice's court in civil action, when may be postponed of court's own motion 5757.
In justice's court, judgment to be entered at close of if no jury 5774.
In justice's court may proceed if either party fails to appear 5767.
In justice's court, schedule of sections 5754.
In juvenile court, jury of 6 or 12 may be demanded or ordered 729.
In quo warranto same in supreme court as in district court 5681.
May be had again if verdict not given 5216.
New, when district court may order on appeal from justice's court 5794.
Notice of time of to be issued by justice's court on transfer of place of trial in civil action 5719.
Of action of railroad company against railroad commission to set aside rate 4564.

Trial—continued.
Of civil action in justice's court, change of place of 5716.
Of civil action in justice's court, time for to be fixed by justice 5733.
Of issue of fact in justice's court, by jury unless waived 5765.
On appeal from justice's court, powers of district court, dismissal, damages, costs, judgment 5794.
Parties expected to be ready for when case is called in district court, may stipulate for day with approval of court, rule iv, p. 1426.
Place of in justice's court, schedule of sections 5715.
Place of, time for appealing from order changing or refusing to change 5329.
Postponement of by consent in civil action in justice's court 5758.
Postponement of on application of party in civil action in justice's court, grounds, procedure 5759.
Proceedings after order changing place of in civil action in justice's court 5719.
Provisions relating to change of place of, applicable to cases appealed to district court 5794.
Speedy, may be demanded in quo warranto 5680.
Upon reference in district court, what referee to state in report, trial not concluded until after service of notice, rule xxi, p. 1428.
When any district judge has entered upon trial or hearing or made ruling no other judge to act unless upon written request, rule xli, p. 1431.
When may be begun anew if juror sick 5209.
When must be commenced and how continued in civil action in justice's court 5756.
When postponed for reason of nonreturn of deposition taken out of state 5462.
Trial by jury 5204.
Charge to be in writing 5212.
In civil action, schedule of selections 5204.
May be waived when and how 5226.
Order of, evidence, defense, instructions, argument 5210.
Tribunal, inferior, in cases appealed from, district court has final appellate jurisdiction (Nev. Const. art. vi, sec. 6) 321.
When writ may be directed to and how returnable 5686.
Trustee, appointed on dissolution of corporation in quo warranto, suit may be brought on bond 5673.
Appointed on dissolution of corporation in quo warranto to sue for debts, responsibility 5677.
Bond of, appointed on dissolution of corporation in quo warranto 5672.
Costs in action by or against and how chargeable 5385.
Court may appoint when corporation dissolved in quo warranto, compensation 5671.
District judge as, of federal townsite may act after term 1988.
Trustee—continued.
May be ordered to deposit money or thing in court 5192.
Of bankrupt, may prosecute or defend 553.
Of corporation, when has the right to be preferred in appointment of receiver 1195.
Of express trust, includes person in whose name contract is made for benefit of another 4987.
Of minor or insane person, may apply for lot in federal townsite 1983.
Of minor or insane person, when deed to be made to for lot in federal townsite 1986.
Of person authorized by statute, may sue without joining beneficiary 4987.
When, may have execution stayed on appeal without giving stay bond 5352.
Trustees, and officers of corporation, district judge may act in relation to removal and election of 1179-1182.
To pay preferred claim for wages 5493.
To prosecute or defend actions on disincorporation of city or town incorporated under the laws of the Territory of Nevada 971.
Truth may be given in evidence in actions for libel and slander 5074.
Tunnel companies, rates may be fixed by the legislature (Nev. Const. art. iv, sec. 20) 278.
Typewriting, included in writing 5475.
Typewriting or printing of statement on appeal, costs not allowed for surplusage 5333.
Typewriting, testimony in statement on appeal, costs not allowed in certain cases 5333.
Typewritten or printed transcript may be furnished on appeal 5357.
Undertaking, action upon, justice's court has jurisdiction if amount does not exceed $300 5714.
Additional on attachment in district court may be required or attachment dissolved, rule xx, p. 1428.
And notice on appeal, order of service immaterial 5330.
Before arrest in civil action, requirements, justification, sureties 5091.
Bond of surety company or deposit sufficient 5486.
By defendant on arrest in civil action, form and requirements 5096.
For arrest of defendant in civil action in justice's court 5745.
For obedience to order regarding children in action for divorce 5840.
For payment of judgment when adjournment for more than ten days in justice's court 5760.
For release of attachment in justice's court 5751.
For release of attachment, justification of sureties, notice 5150, 5163, 5164.
For release of person arrested in contempt proceedings 5400.
For stay of execution pending motion for new trial, in district court, rule xxvi, p. 1429.
For writ of attachment, sureties, amount 5149.

Undertaking—continued.
In action in quo warranto for usurpation of public office 5660.
In justice's court, deposit may be made in lieu of in all cases 5816.
Justification of sureties generally 5485.
May be prosecuted if defendant in contempt proceedings fails to appear on return day, measure of damages 5406.
New, on arrest in civil action 5102.
Not required of state, municipality or public officer as party to action 5487.
Number of sureties generally and what affidavit required 5483.
Official or statutory, how sureties may be released, liability 2880-2883.
On appeal, affidavit of sureties, waiver, deposit in lieu of, exception to sureties 5354.
On appeal, entry of in justice's court docket 5800.
On appeal from judgment for money or order dissolving attachment 5347.
On appeal from judgment or order granting or denying new trial, only one undertaking required 5348.
On appeal from justice's court, requirements with or without stay, deposit, justification of sureties 5792.
On appeal from order or judgment directing delivery of personal property 5349.
On appeal in action for forcible entry or unlawful detainer 5601.
On appeal, insufficient not ground for dismissal if proper one furnished before hearing motion 5358.
On appeal, may be waived 5330.
On appeal, to be filed or deposit made with clerk 5330.
On appeal, when may be in one or several instruments 5353.
On appointment of elisor 5495.
On arrest in civil action, may be substituted for deposit 5108.
On arrest in civil action, notice of, justification of bail 5102.
On attachment, additional may be required 5149.
On attachment in justice's court, exception to sureties, justification, waiver 5750.
On attachment, to be delivered to defendant if he recovers judgment 5162.
On claim and delivery of personal property 5127.
On injunction, exception to sureties 5140.
On redelivery to defendant in action for claim and delivery 5129.
On writ of attachment, amendment of 5167.
Or deposit for payment of costs, when required from nonresident or foreign corporation, stay of proceedings 5389.
Or deposit on appeal, required 5346.
Required to stay execution on appeal from judgment or order directing sale or delivery of property 5351.
Required upon injunction, exceptions 5140.
Surety company may act as sole surety 695.
To be given by guardian on receipt of share of infant 5571.
To be given by guardian on receipt of share of insane person in action for partition 5572.
Undertaking—continued.
To stay execution of judgment or order pending appeal 5351.
When plaintiff occupies premises pending proceedings in eminent domain 5615.
United States, records of, how may be proved 5408, 5409.
Revised Statutes of, relating to authentication of records 526-529.
When not bound by judgment in action to determine adverse claim to real property 5524.
"United States," may include District of Columbia, territories and insular possessions 5475.
United States consul, minister or embassador, to certify to judicial record of foreign country 5411.
United States district attorney, when to bring action for unlawful enclosure of public lands 3174.
United States land office, contest to determine mineral or agricultural character of land 2397.
United States land patent, record of copy of when admissible in evidence 5415.
United States laws, published by Little & Brown, to be evidence 529.
United States public uses, eminent domain may be exercised for 5606.
United States statutes, relating to naturalization 2506-2544.
Unknown defendants, how to be described in complaint to determine adverse claim to real property 5522.
Unknown heirs, may be made parties in action regarding real property 5009, 5010.
Unknown heirs, service of summons by publication 5028.
Unknown owners, disposition of proceeds belonging to in actions for partition 5566, 5567.
Unknown parties, may be served with summons by publication 5030.
Unlawful detainer, action for, appeal, undertaking, stay 5601.
Action for, continuance, when may be had and for how long, bond 5597.
Action for, court not to quash proceedings for want of form 5602.
Action for, not to abate by omission of party 5592.
Action for, what proof required of respective parties, what possession a bar 5595.
Complaint and summons, what to contain, service 5593.
Defined 5588.
District court has jurisdiction (Nev. Const. art. vi, sec. 6) 321.
Evidence and amendments to complaint in action for, continuance 5596.
Failure to serve notice on subtenants entering after action no defense 5592.
Issue of fact to be tried by jury unless waived 5594.
Judgment in action for, restitution, rent, treble damages, stay of execution, when tenant may remain in possession on payment of judgment 5599.
Justice of the peace has jurisdiction in action for possession where relation of landlord and tenant exists or possession unlawfully withheld 5604.

Unlawful detainer—continued.
No continuance in action for when admission that evidence would be given 5598.
Nonsuit not to be granted for nonjoinder of party in action for 5592.
Notice to quit, how served 5591.
Only tenant and subtenant need be made defendants in action for, exception 5592.
Other provisions relative to civil actions, appeals, and new trials applicable 5603.
Service of notice, tenant or mortgagee may perform condition 5588.
Tenant has remedies against subtenant 5590.
Tenant of agricultural lands may hold over if not notified 5589.
Unlawful entry and detainer, evidence regarding may be given in justice's court 5721.
Uses, for which eminent domain may be used 5606.
Vacancy in office, of judge or failure of term not to affect action 4884.
Vacancy in office, to be filled pending appeal from judgment removing officer for malfeasance 2854.
Vacating roads, streets, public squares or plats, local or special laws are invalid (Nev. Const. art. iv, sec. 20) 278.
Vacation, of judgment, order or proceeding not to be made in district court unless upon notice within six months, rule xlv, p. 1431.
Validation, of restored records 5639.
Value, of land condemned for mines, basis for determining 2462.
Variance, amendment may be made in pleading to meet 5080.
Court may direct finding in accordance with evidence, or order amendment 5081.
Failure of proof distinguished from 5082.
Mistakes in pleadings and amendments 5080.
Not prejudicial deemed immaterial 5080.
Venire, alias, for jurors in civil action in justice's court 5768.
Justice of the peace to issue in action for abuse of apprentices 491.
Venue, action brought in wrong in justice's court, when may be dismissed 5772.
Appeal from order granting or denying change, notice and time for hearing, D. C. rule xviii, p. 1425.
Grounds for change of 5015.
In action by majority owners against minority owners for expenditures on mine 2480.
In action for divorce 5838.
In action in justice's court may be changed 5716, 5718.
In action regarding real property 5011.
In justices' courts, schedule of sections 5715.
Local or special laws for changing are invalid (Nev. Const. art. iv, sec. 20) 278.
Of action in justice's court, when cannot be changed more than once on motion of same party 5717.
Of civil actions 5011.
Of civil actions in justices' courts 5715.
Overruling of objection that action in justice's court is in wrong, cause of reversal on appeal only 5772.
Provisions relating to change of, applicable to trials on appeal in district court 5794.
Time for appealing from order changing or refusing to change 5329.
Verdict, according to fact if plaintiff's right terminates during pendency of action for recovery of real property 5516.
Against garnishee 5177.
Against evidence, is ground for new trial 5321.
And judgment in action for abuse of apprentice 492.
Deemed excepted to 5318.
Entry of general and special 5225.
General and special defined 5221.
How declared 5218.
In action for recovery of money or on counter-claim 5223.
In action to recover specific property 5224.
In civil action, schedule of sections 5221.
In district court may be certified to supreme court in quo warranto 5681.
In justice's court, judgment to be entered at once in conformity to 5773.
In mandamus proceedings, argument, notice 5703.
Judgment may be entered on after death of party 5272.
May be vacated and new trial granted, when 5320.
Not to be entered until expense of board and lodging jurors paid by prevailing party 2035.
Not to be entered until expense of jury is paid 4942.
Of jury in mandamus proceedings, certification to court 5700.
Of jury may be received on nonjudicial day 4870.
On adverse claim to mine when either party establishes right 2384.
Or disagreement of jury to be entered in justice's court docket 5800.
Second in favor of same party precludes second new trial in mandamus proceedings 5702.
Special controls general 5222.
Subject to lien for attorneys' fees 5376.
To be corrected by clerk, jury to assent 5220.
When general or special may be rendered, entry in minutes 5222.
When insufficient may be corrected by jury 5219.
When parties in action on joint contract are not summoned until after judgment 5248.
Verification, in civil action, schedule of sections relating to 5060.
Necessary, or genuineness of instrument copied into complaint is deemed admitted 5062.
Of answer in action for delinquent taxes 3664.
Of answer to writ of mandamus 5699.
Of complaint for removal of officer for malfeasance 2852.
Of complaint in action to determine adverse claim to real property 5522.
Of complaint in proceedings under eminent domain 5511.
Of complaint, or specification of grounds on contest for state office 1823.
Of pleadings by corporation as a party 5064.
Of pleadings in action for forcible entry and unlawful detainer 5600.

Verification—continued.
Of pleadings, when not required in action by state 5064.
Of proposed amendment to pleading in district court, when required, rule xvii, p. 1428.
To petition for changing name of person 5835.
To pleadings in civil action 5060, 5064.
When may be omitted 5061.
Verified answer or oath, showing grounds for transfer of case from justice's court to district court 5721.
Verified denial in answer required in justice's court or written instrument will be admitted 5770.
Vice-president of corporation, deposition of may be taken 5454.
View of property or premises by jury 5211.
Viewers, to be employed in proceeding for erection of partition fences 3604-3608.
Votes, illegal, what sufficient allegation in regard to in complaint for contesting county office, when list to be given opposite party 1806.
Wages, are preferred claims against estates of deceased persons 6145.
As preferred claim, notice and action on dispute of 5494.
Employee of insolvent corporation has preferred lien 1187.
Liable for poll tax 3718.
Preferred claim against attachment 5494.
Preferred claim, when 5493, 5494.
Procedure for recovery, as preferred claim against execution or attachment 5494.
Waiver, filing supplemental complaint does not waive former pleadings 5076.
None by filing demurrer, answer or reply at same time 5083.
Objections not taken by demurrer or answer waived except to jurisdiction or failure of complaint to state sufficient facts 5045.
Of certain objections not taken by reply 5056.
Of findings, how may be made 5228.
Of jury in action for unlawful detainer 5594.
Of jury trial 5226.
Of lien, by failure to exhibit in action to enforce 2227.
Of objection that action in justice's court is in wrong township 5772.
Of objection to sufficiency of sureties in action for claim and delivery 5128.
Of objection to sureties on undertaking for attachment in justice's court 5750.
Of objection to sureties on undertaking for injunction by failure to except 5140.
Of right to make statement on appeal or to amend or object to amendments 5335.
Of right to move for new trial by appealing 5328.
Of summons by appearance, answer or demurrer 5016, 5034.
Of summons in action to restore lost records 5634.
Of trial by jury in justice's court 5766.
Of undertaking on appeal 5330, 5354.
War, in case of, property may be taken for public use, compensation to be made afterward (Nev. Const. art. i, sec. 8) 237.
Ward, action for seduction of or injury to 4995, 4996.
Action to be commenced on guardian's bond within three years 6185.
Guardian may join in partition of real estate 6166.
Warrant, against county not presented for payment within six months after notice that it is payable, funds may be paid for other purposes, but demand becomes due again on re-presentation 1563.
Duty of sheriff to execute 1648, 1650.
For arrest of person charged with contempt by justice's court 5797.
For search and seizure shall not issue but on probable cause supported by oath and particulars (Nev. Const. art. i, sec. 18) 247.
In contempt proceedings, may have indorsement for bail 5398.
May issue to bring witness, when 5440.
May issue to sheriff to bring defaulting witness 5440.
Of arrest in contempt proceedings, return of 5401.
Of attachment in contempt proceedings, how defendant to be held in custody 5397, 5407.
Of commitment for disobedience of witness must specify cause 5441.
Of commitment in contempt proceedings 5397.
Of commitment in contempt proceedings, to specify act to be performed 5404.
Waste, during period allowed for redemption of real property sold under execution, defined 5304.
On real property, action for may be commenced within 3 years 4967.
Water, on application for injunction opposing party may be required to give bond for payment of damages 5145.
Water company, may condemn for right of way 2138.
Water rights, action to restore lost will or deed 5633.
Eminent domain may be exercised for 5606, 4770.
Lost record may be rerecorded and have effect 5630.
Record regarding lost and destroyed validated 5639.
Weights and measures, action by party injured under act fixing standard 4812.
Right of action for damages under act relating to, prima facie evidence of representation by vendor 4812.
Wharves, eminent domain may be exercised for 5606.
Widow, when homestead and exempt property to be set apart for use of 2165, 3621.
Widower, when entitled to damages for death of wife by negligence of common carrier, mill or mine operator 5650.
Wife, abandoning husband, when not entitled to support 2177.
And husband, age and requirements on adoption of children 5825.
As sole trader, rights and liabilities of 2192.
District court may make order allowing her to carry on business in her own name, procedure 2191.

Wife—continued.
Earnings of not liable for debts of husband 2167.
Homestead not to be alienated without consent of (Nev. Const. art. iv, sec. 30) 288.
If insane, husband may obtain order of court to convey homestead, disposition of proceeds 2146, 2147.
Insane, husband as witness, when consent unnecessary 5422.
Living separate and apart from husband may sue and be sued alone 2179.
May defend action with husband or separately 4990.
May have order for payment of costs and alimony pendente lite in action for divorce 5843.
Necessaries furnished, when reasonable value may be recovered from husband 2176.
Not lawfully separated from husband cannot adopt child without consent of husband 5827.
Obtaining decree of divorce, what disposition of property to be made 5843.
Proceeds from sale of homestead under execution to be paid out on joint receipt of husband and wife 2144.
Separate property of, failure to file inventory is prima facie evidence that it is not 2159.
Separate property of, not liable for debts of husband 2171.
When cannot be witness against husband 5424.
When deserted by husband may prosecute or defend action in his name 4991.
When entitled to damages for death of husband by wrongful act 5648.
When may apply for lot in federal townsite 1983.
When required to support husband 2178.
Wilful desertion, for one year, is ground for divorce 5838.
Will, certified copy of to be admitted in evidence 5877. See Wills.
Contest of probate of, issue of fact, how tried 5874.
Invalid, local or special law giving effect to, invalid (Nev. Const. art. iv, sec. 20, as amended 1889) 278.
Proof of to have court seal affixed 4879.
"Will," includes codicil 5475, 6222.
Wills, schedule of sections 6202.
Withdrawal of papers, in district court not to be made without order of judge, original evidence not to be taken, rule xix, p. 1428.
Witness, application, affidavit and interrogatories for taking deposition in district court, rule xv, p. 1428.
Application to take testimony of for perpetuation 5465.
Attorney, client or attorney's secretary, when not to be 5425.
Clergyman not to testify regarding confession without consent 5426.
Commission to authorize administration of oath when deposition taken out of state 5461.
Consent of husband or wife to allow testimony of other 5422, 7452.
Witness—continued.
Consent to taking of testimony in civil action in justice's court on postponement 5759.
Costs of not more than two to be allowed for same facts 2000.
Deposition of taken for perpetuation of testimony may be read with same effect as oral testimony, objection to witness or question 5471.
Deposition of, may be taken in state in certain cases 5454.
Deposition taken on postponement of civil action in justice's court may be read 5759.
Duty of to testify, produce papers and remain pending hearing 5436.
Failing to appear before public service commission guilty of contempt 4532.
Failure of party to obey and answer or to subscribe affidavit of deposition, complaint or answer may be stricken out 5438.
Fees of in action for abuse of apprentice 494.
Giving false answer or evading answer before public service commission, penalty 4536.
How attendance may be enforced to take testimony 5432.
How subpena issued for 5432.
Husband and wife, prosecution for crime committed by one against the other, either may testify 5424.
Husband and wife, when one cannot be against the other 5424.
If justice of the peace material, when defendant arrested in civil action to be taken before another justice 5746.
In case of death or certain absence of, deposition may be read 5456.
In civil action not required to attend unless fees paid, if demanded 2000.
Interrogatories, direct and cross, for taking deposition out of state 5460.
Judge or jury may be called 5429.
Liable in damages for failure to testify before officer taking acknowledgment of conveyance 1034.
Manner of taking deposition for perpetuation of testimony 5468.
May be compelled by attachment to attend in contest for county or township office 1809.
May be compelled to produce books, papers or documents 5416.
May be examined on hearing of objections to appointment of referee 5234.
May be punished for disobedience to subpena, refusal to be sworn or answer, or to subscribe affidavit or deposition 5438.
May be required to answer before officer taking acknowledgment or committed to jail 1034.
May be required to testify to execution of conveyance 1033, 1034.
May demand fees when served with subpena 5433.
May demand payment of fees 5431.
May take affirmation instead of oath, form 5448.

Witness—continued.
Mother may be in action to determine paternity of illegitimate child 765.
Must answer as to previous conviction of felony 5437.
Need not testify unless fees are paid if demanded 2012.
Not Christian, how sworn 5447.
Not excused from testifying or producing papers before public service commission on ground would criminate 4536.
Not required to give answer which would subject him to punishment for felony except as to conviction 5437.
Not subject to penalty or forfeiture for testifying before public service commission except for perjury 4536.
Not to testify in certain cases when opposite party is representative of deceased person 5419, 5423.
Not to testify when other party to transaction is dead 5419, 5423.
Out of state, when deposition of must be shown to be necessary to obtain postponement of trial, diligence 5462.
Penalty for disobedience, forfeiture and damages 5439.
Person present compelled to testify 5435.
Physician as 5427.
Refusing to be sworn or answer punishable for contempt in justice's court 5795.
Refusing to exhibit book or paper before public service commission, penalty 4536.
Refusal of party to testify or give deposition, pleadings may be stricken out or judgment taken, contempt 5421.
Refusal of to be sworn or answer is contempt 5394.
Religious belief or conviction of felony does not disqualify, but conviction may be shown to affect credibility 5420.
Shall not be rendered incompetent on account of religious belief (Nev. Const. art. i, sec. 4) 233.
Sworn, name of to be entered in justice's court docket 5800.
Testifying under act to regulate railroad and other rates not exempt from prosecution for perjury 4565.
Testimony of for perpetuation to be taken before judge 5467.
Testimony of may be taken and perpetuated 5464-5473.
Testimony of may be taken before justice of the peace for postponement of civil action 5759.
Testimony taken by deposition out of state may be read by either party 5463.
Testimony taken for perpetuation, when may be used on trial, certified copy, form of interrogatories 5470.
To conveyance, subpena for 1033, 1034.
To signature or subscription by mark and two required if for acknowledgment or sworn statement 5475.
To subscribe to deposition 5456.
Want of material ground for continuance in action for forcible entry or unlawful detainer 5597.
Warrant may issue to bring, when 5440.
Witness—continued.
Warrant of commitment must specify cause 5441.
Warrant to arrest for disobedience to be directed to and executed by sheriff 5441.
When arrest void in civil action and arresting officer liable 5446.
When attorney not to be in district court, rule xiii, p. 1428.
When concealed, how may be served with subpena 5434.
When exempt from arrest in civil action 5445.
When interpreter may be summoned and sworn, contempt 5430.
When may be required to attend and bring books, distance from place of trial, mileage 5431.
When not immune from testifying under act to regulate railroad and other rates 4565.
When prisoner, how brought, deposition of 5442, 5443, 5444.
When public officer not to be examined as 5428.
When testimony of officially reported may be used on subsequent trial 5472.
When testimony of may be taken by deposition out of state 5458.
Who may be, competency, facts which may be shown to affect credibility 5419.
Witnesses, children, when cannot be 5423.
Consent that testimony of be taken may be required on continuance 5203.
Depositions of, how taken on contest for members of the legislature 1818, 1819.
District court may compel attendance 4849.
Exclusion of during trial 5449.
Fees of in contested election for county or township office same as in district court 1811.
Fees of in proceeding relating to apprentices 494.
In civil actions, schedule of sections 5419.
In application for naturalization, to be examined in open court 2522.
Insane persons cannot be 5423.
May be compelled to appear and testify in action for damages under act relating to railroads 3581.
May be examined in contempt proceedings 5402.
May be required to appear before public service commission 4531, 4532.
May be subpenaed by arbitrators on voluntary submission of dispute between employer and employee 1932.
May be summoned to testify against garnishee 5177.
On trial of challenges to jurors 5207.
Party or assignor cannot testify if other party to transaction is dead 5419, 5423.
Persons excluded as 5423.
Required to appear and testify in proceedings supplementary to execution 5311.
Subscribing to will to be examined 5874.
Testimony and depositions of, in divorce proceedings same as in actions at law 5842.
To execution of conveyances 1027, 1028.
When oath to be administered to by arbitrators 5258.

Witness fees, attorney in case not entitled to 2038.
In civil action to be taxed as costs upon affidavit 2012.
In civil cases to be taxed as costs, affidavit 2000.
In counties polling over 450 votes 2012.
May be recovered as costs although not actually paid 5387.
Not to be allowed for more than two witnesses to same fact 2012.
When not over 450 votes in county 2000.
When paid garnishee 5189.
Woodchopper, to bring action on lien within 60 days after taking possession 2230.
Words and terms, defined 5475.
Workman, damages for death or injury may be recovered in action at law notwithstanding employer's liability act 1925.
Has right of action for damages if caused to change place of employment by misrepresentation 1938.
May recover compensation for injury under employer's liability act 1915, 1924.
Writ, disobedience to is contempt 5394.
How seal to be affixed 5481.
If application for made to one district judge not to be made to another unless upon written consent, rule xlii, p. 1431.
Of election, how issued (U. S. Const. 91) 2797, 2798.
When may be served by telegraph 5371.
When must be served upon party instead of attorney 5375.
When signifies order or precept in writing issued in name of state, court or judicial officer 5475.
When to have court seal affixed 4879.
Writ of assistance, may be ordered at chambers 4843.
Writ of attachment, how executed 5150, 5152.
In civil action in justice's court, substance of, several may be issued to different sheriffs 5751.
In justice's court, certain sections made applicable 5752.
In justice's court, for service in another county, to have certificate under seal of county clerk 5751.
Issuance of to be noted in justice's court docket 5800.
Liability of sheriff for failure to execute 1651.
May issue on nonjudicial day, what affidavit to state 4870.
Several may be issued to sheriffs of different counties 5150.
When to be returned 5168.
Writ of certiorari, amendment of return, hearing, judgment 5691.
Denominated writ of review 5683.
District court may try and determine at chambers 4843.
District court or judge may issue 4840.
Extent of review under 5690.
In issuing, words requiring stay may be omitted 5688.
Manner of service 5689.
Order to show cause why should not be granted 5685.
Return and hearing may be had at any time 5711.
Writ of certiorari—continued.
Return of 5684, 5686.
Supreme court and justice thereof may issue 4834.
Supreme court empowered to issue (Nev. Const. art. vi, sec. 4) 319.
To whom may be directed 5684, 5686.
Transmission of copy of judgment to inferior tribunal or officer 5692.
What to command 5687.
When may be granted and how returnable 5684.
When may be granted on affidavit 5685.
Writ of election, how issued (U. S. Const. 91) 2797, 2798.
Writ of error, not to issue after lapse of one year from date of judgment, order or decree sought to be reviewed, rule xxii, p. 1425.
Not to issue by supreme court except upon order after showing, rule xviii, p. 1424.
Operates as supersedeas, when, rule xix, p. 1424.
Rules and practice of supreme court regarding appeals apply, rule xxi, p. 1425.
When returnable before supreme court, rule xx, p. 1424.
Writ of execution, how executed 5289.
Issuance and what to state 5281.
Liability of sheriff for failure to execute 1651.
Writ of garnishment, form 5171.
How served and returned, alias writs 5172.
May issue after judgment 5190.
Writ of habeas corpus, district court or judge may issue 4840.
Justice of supreme court may issue to any part of the state, returnable before himself, the supreme court or district court or judge (Nev. Const. art. vi, sec. 4) 319.
Schedule of sections 6226. See Habeas Corpus and references thereto.
Shall not be suspended unless public safety require in case of rebellion or invasion (Nev. Const. art. i, sec. 5) 234.
Supreme court and justices thereof may issue 4834.
Supreme court empowered to issue (Nev. Const. art. vi, sec. 4) 319.
Writ of injunction, district court or judge may issue 4840.
Writ of mandamus, answer to may show cause, how made 5699.
Applicant may object to sufficiency of answer or introduce proof 5701.
Denominated writ of mandate 5694.
District court or judge may issue 4840.
District judge may try and determine at chambers 4843.
Fine imposed on officer for refusal to obey may be retained from salary 5707.
How served 5706.
In what cases and by what court or judge writ may issue, how returnable 5695.
May be issued by district court to compel registration of elector 1710, 1712.
Must be either alternative or peremptory, form 5697.
Officer guilty of misdemeanor in office for refusal to obey 5707.

Writ of mandamus—continued.
One new trial may be had, new jury to be summoned 5702.
Penalty for refusal to obey 5707.
Return and hearing may be had at any time 5711.
Service upon majority of board sufficient 5707.
Supreme court or justice thereof may issue 4834.
Supreme court empowered to issue (Nev. Const. art. vi, sec. 4) 319.
When alternative or peremptory writ will issue, default, hearing 5698.
When and how issued 5696.
When answer raises question of fact, jury trial may be ordered and damages assessed 5700.
Writ of prohibition, defined 5708.
May be alternative or peremptory, form of 5710.
Return and hearing may be had at any time 5711.
Supreme court or justice thereof may issue 4834.
Supreme court empowered to issue (Nev. Const. art. vi, sec. 4) 319.
When, where and how issued, by supreme court only 5709.
Writ of quo warranto, district judge may try and determine at chambers 4843.
District court or judge may issue 4840.
Supreme court and justice thereof may issue 4834.
Supreme court empowered to issue (Nev. Const. art. vi, sec. 4) 319.
Writ of restitution, form of in action for forcible entry or unlawful detainer 5605.
"Writ or summons," when "process" if issued in judicial proceedings 5475.
Writing, altered, who to explain 5418.
Contents of, how proved 5417.
Contract or liability founded upon, action may be commenced within six years 4967.
Includes printing and typewriting 5475.
Lost, contents of, how proved 5417.
Permission to take copy of 5416.
Writings, contents of numerous may be proved 5417.
Inspection or admission of 5416-5418.
Witness, may be compelled to produce 5416.
Writs, duty of sheriff to execute 1648, 1650.
Writs, of mandamus, injunction, quo warranto certiorari, habeas corpus, and other, district court or district judge may issue (Nev. Const. art. vi, sec. 6) 321.
Writs, proper to complete exercise of appellate jurisdiction, supreme court may issue (Nev. Const. art. vi, sec. 4) 319.
Written instrument, as affecting adverse possession 4956, 4958.
Copied in answer deemed genuine unless denied by affidavit 5063.
When deemed admitted 5062.
When admitted in justice's court unless denied by verified answer 5770.
When inspection may be ordered in justice's court 5769.
Wrongful act, action for damages to be brought by representative of deceased person 5648.
Wrongful act—continued.
Death by 5647.
Death by, judgment for damages not liable for debts, how distributed 5648.
Death or injury by, contract of insurance, indemnity or relief benefit will not bar recovery 5652.
Jury may give damages pecuniary and exemplary 5648.

Civil process. See Arrest in Civil Action under Civil Practice; Civil Arrest.
Elector not to be arrested under on election day 253.
Members of legislature exempt from arrest during legislative session and for fifteen days before 269.
Service on government land 1949, 1951.
Civil rights, and remedies 6297, 6302.
Consent of parent deprived of, not required on adoption of children 5828.
Convicts, certain, excluded from jury duty, when 285.
Restoration allows person convicted of crime to serve as juror (Nev. Const.) 285.
Claim, against county, action not to be brought unless demand first presented 1523.
Against county, action not to be brought until demand has been presented to commissioners and auditor, costs, when recoverable 1523.
Against county, district attorney not to advocate payment of 1520, 1605.
Against county, funds assigned to payment if not collected within two years payable on other claims, new demand and reallowance necessary, or claim barred 1536.
Against county, if taxpayer objects, commissioners to defer action at least ten days to allow institution of proceedings to determine validity 1521.
Against county, resident taxpayer may file objections against 1521.
Against estate of deceased person, action to be brought within thirty days after notice of rejection 5968.
Against estate of deceased person barred by statute of limitations at time of death 5968, 5969.
Claims, adverse, actions to determine 5479.
See Board of Examiners.
Against bank closed by bank examiner, actions, presentation and force of 671.
Against county, how presented and acted upon 1509-1512.
Against estates, district judge may approve in vacation 4850.
Against estates, how presented and acted upon 5964-5973.
Against state, board of examiners to pass on, except salaries or fixed compensation of officers 314.
For services or advances authorized by law, when action may be brought 5653.
How presented and acted upon 314, 4459-4465.
Incurred when state's liabilities exceed $300,000 void 350.

Claims against state—continued.
When not to be passed on by legislature without being acted upon by board of examiners 314.
Mining, location of 2378, 2422-2428, 2433-2443.
Presentation of on disincorporation of city 872, 873.
Under employers' liability act may be compromised 1928.
Unpatented mining, exempt from taxes 352, 3621.
Claimant, may be interpleaded in garnishment proceedings 5180.
Procedure to obtain title to lot in federal townsite 1983-1986.
Claim and delivery, district court 5124-5135, 5194; justice's court, 5753. See Civil Practice.
Clark County, creation, boundaries and seat 1456, 1457.
Classification of crimes 6266.
Clearing-house associations, how established 667. See Banks.
Clerk. See Civil Practice, County Clerk.
Clerk of assembly, election and duties 276, 415-419.
Clerk of court. See Civil Practice, County Clerk.
Clerk of elections. See Elections.
Clerk of supreme court, bond, amount, approval, filing 4895.
Contest for state office, to file complaint 1823.
Court fee to collect 331.
Court fees to pay state treasurer 2034.
Costs taxed by, indorsed on remittitur, S. C. rule vi, sec. 4, p. 1423.
Deputy, may appoint, salary of 4900.
Duty to give receipt for fees 2033.
Election, term 2765, 2773, 2776.
Eligibility 2766.
Fees of 2006, 2032.
Fees of paid to treasurer 2034.
Fees, when paid 4894.
Habeas corpus, writ to deliver, when 6231.
Judgment on appeal, to certify to clerk of lower court 5360.
Money to pay over 2034.
Office to be kept at seat of government 380.
Qualifications 2766.
Quo warranto, has same power to issue process as clerk of district court 5681.
Receipts for money, to give 2033.
Report to legislature 4896.
Reporter of decisions of supreme court, salary 2950.
Salary of 4391.
Statement settled on appeal in supreme court 5333.
Client, communication with not to be testified to by attorney, secretary, stenographer or clerk of attorney without consent 5425.
Closed bank. See Banks and Banking.
Closed season for fish and game 2056, 2059, 2085, 2100.
Cloud upon title, action to remove, how and by whom brought 5522.
Club, district court may make order for sale or mortgage of property of 1369.
Coal, how measured and weighed 4808. See Weights and Measures.
Coal lands, located, how 2408-2413. See Mines and Mining.
Cock fight, city may prevent 794(75).
Codefendants, cross complaint against and how served and answered 5052.
"Codicil," when included in word "will" 5475.
Coercion, when unlawful, penalty 6740.
Collars, sleeves and pulleys, failure to protect, penalty 6796, 6798.
Collateral attack. See Civil Practice.
Collection of taxes. See Revenue.
Collector of taxes, action for money paid under protest may be commenced against within one year 4967.
College of agriculture, mechanic arts and military tactics, supported by funds from congressional land grant 360.
Colonies, articles of confederation of 71-85.
Color, impediment to marriage 6514-6516.
Color, no discrimination as to in university 4647.
Color or previous condition of servitude not bar to suffrage or office 411.
Combination to resist process, penalty 6605.
Combustible materials, regulation of storage, penalties 1946-1948. See Explosives.
Commander-in-chief of military forces, governor to be 298.
Power of 4002.
When governor may continue, as in time of war out of state 311. See State Militia.
Commerce, power of Congress over, preferences forbidden 113, 134.
Commercial paper. See Negotiable Instruments 2548-2744.
Commissary-general, adjutant-general is ex officio 3993. See State Militia.
Commissary of state police, adjutant-general ex officio 4295.
Commissions on collections, retention not larceny 6652.
Commissioner, how subpena issued for the taking of testimony 5432.
Of internal improvements and chief engineer, surveyor-general ex officio 4351.
Commissioners, may hear testimony in proceedings in eminent domain 5616.
To be appointed by the court to determine value of right of way for railroad 3539.
Commissioners of deeds 1000-1004. See Acknowledgments, Conveyances.
Acts of, same force as notaries 1001.
Affidavits and depositions, may take 5451, 5459.
Appointment of 1000, 2765.
Commission of 1003.
Copy of act to accompany commission 1003.
Fee for commission 1004.
Foreign states and countries to have 1000.
Governor to appoint 1000.
Oath of office 1002.
Powers of 1000, 5451, 5459.
Term of office 1000.
Commissioners of horticulture 446-453. See Horticulture.
Commissions, to be signed by governor and secretary of state and under great seal 309.
Committing magistrate. See Criminal Practice.

Committing magistrate—continued.
Breach of peace before, security for peace 6873.
Defined 6928, 6929, 7461.
Other may act, when 6045, 6940, 6947.
Powers on arrest 6940, 6945.
Recorders as 4858.
Who are 6929.
Commitment 6975, 7226, 7343. See Criminal Practice.
And physician's certificate, copies of to be transmitted with insane person to asylum 2204.
Court may direct to make order effectual regarding children in action for divorce 5840.
Of insane person to be transmitted to asylum 2204.
Warrant of in contempt proceedings to specify act to be performed 5404.
Warrant of not to issue in contempt proceedings without previous attachment to answer or notice or order to show cause 5397.
Common carriers, bailments of 537-542. See Bailments, Railroads.
Freight unclaimed, sale of 537-542.
Liable for death or personal injury if caused by gross negligence notwithstanding slight negligence of employee 5651.
Common law, action, right of trial by jury in U. S. courts (U. S. Const.) 177.
Courts, federal, to what extent controls 177.
Crimes under, recognized 6300, 6827.
Facts which would exclude witnesses at may be shown to affect credibility 5419.
Rule of decision in civil actions adopted as 5474.
Supplements criminal law 6300, 6827.
Common school, district neglecting to maintain school or allowing sectarian instruction may be deprived of proportion of public school funds 354.
Legislature to provide for at least six months annually in each district and to pass laws requiring attendance 354.
Common schools and university, legislature to provide special tax for 358.
Common stock, convertible from bond issue 1138. See Corporations.
Communication with prisoner, penalty 6373.
Community property. See Husband and Wife.
Death of husband or wife, how disposed of 2164, 2165.
Defined 2156.
Divorce, how disposed of 2166.
Husband to control 2160.
Inventory of estate of deceased person to show 5944.
Not subject to administration if wife pays debts 2165.
"Company" included in word "person" 5475.
Company of militia 3999, 4000. See State Militia.
Compensation. See Civil Practice 5647-5652; Employer and Employee.
And fees of county and township officers, legislature may regulate (Nev. Const. art. iv, sec. 20) 278.
For injury or death of employee 1915.
Compensation—continued.
Of receiver of insolvent corporation 1199.
Of trustee of corporation dissolved in quo warranto 5671.
Compilation of laws, assistants, employment of 1011.
Compensation 1012.
Distribution 1015.
Justices of supreme court, commissioners for 1005.
Legal evidence 1016.
Presumption of correctness 5413.
State printer, duty to print 1014.
What to include 1006-1009.
Complaint (civil action). See Civil Practice.
District court 5039.
District court, tax suit 3661.
Justice court 5735, 5736. See Civil Practice.
Complaint (criminal) 6927-6931, 7471. See Criminal Practice.
Complaint of assessment, to be heard, when 3638.
Compounding offense, defined 6363.
Indictment for 7073.
Compromise, of claims under employers' liability act 1928.
Of misdemeanor 7411-7413. See Criminal Practice.
Offer of 5265, 5777. See Civil Practice.
With debtors of deceased persons 6028.
Compulsory education 3443-3451. See Public Schools.
Compulsory process, in action for divorce if necessary to disposition of property of children 5839.
Concealed weapons, carrying, penalty 6568.
Regulation of by city 794 (76).
Concealing birth, penalty 6450.
Concealing escaped prisoner, penalty 6343.
Concealing offense, indictment for 7073.
Conception, advertisements designed to prevent, penalty 6451-6455.
Condemnation, by cities for public purposes 794(85).
By foreign corporations 5629.
By towns for public purposes 877(5, 15).
Civil practice act, chapter concerning 5606-5629.
Conditions, precedent 5609. See Civil Practice.
For ditch or flume 4712, 4714.
For highway 3008, 3015.
For mining purposes 2456, 2459, 2462.
For railroad, telegraph or telephone lines 2138, 3535-3550.
For reclamation purposes 3104.
For toll road 3052.
Property not to be taken without payment made or secured (Nev. Const.) 237, 344.
Property subject to 5608.
Confederation, articles of 71-85.
Confession, extortion of 6807. See Civil Practice.
Judgment by, may be entered in district court 5249-5251; justice's court 5771.
Judgment may be entered upon in justice's court if amount does not exceed $300 exclusive of interest 5714.
Of judgment 5249-5251.
To clergyman, testimony regarding not to be given without consent 5426.

Congress. See Constitution of United States.
Has power to constitute tribunals inferior to supreme court (U. S. Const.) 119, 153.
Has power to make uniform laws relating to naturalization and bankruptcy (U. S. Const.) 114.
Territory of state may be enlarged by authorization of 368.
Congressmen. See Constitution of United States, and Member of Congress.
Cooperative associations, incorporation of 1249-1260.
Conscience, liberty of not to excuse acts of licentiousness 233.
Consanguinity, restrictions as to right of marriage 2339.
Degrees computed under rule of civil law in estate matters 6119.
Table of. See Appendix.
Consent. See Adoption of Children, Civil Practice.
Necessary to allow testimony of communication between attorney and client 5425.
Of patient necessary to enable physician to testify regarding communication 5427.
When marriage of person under age of, not to be annulled 2356.
Conservators of the peace, justices of the peace are 1689.
Consideration, conveyance shall not be adjudged fraudulent solely for want of valuable 1086.
Consolidation, of actions 5478.
Of irrigation districts 4786.
Constable. See Officers Generally.
Action against for official misconduct may be commenced within two years 4967.
Arrest, refusal to make or receive arrested person, penalty 2820.
Baggage, unclaimed, may sell, when 2153.
Bond, approval and filing 4927, 4928.
Buying or inducing action 2821, 6367.
Deed, may make for real estate sold by predecessor 1662, 1663.
Duel, failing to prevent, penalty 2823.
Duties imposed on sheriff extend to in action for claim and delivery in justice's court 5753.
Duties of generally 1692.
Duties of in new township 2785.
Duties of on receiving execution from justice's court 5786.
Duty to serve subpena requiring attendance before public service commission 4532.
Election of 2765, 2773, 2782.
Estray animals, to impound 2261, 2265.
Expense of transporting prisoners allowed 1544, 1545.
Fee book to keep 2020.
Fees, counties eight hundred or less 1999.
Counties over eight hundred 2011, 2019.
For selling animals on execution under judgment for charges 5499.
Hogs trespassing 2258.
In proceedings relating to apprentices 494.
Mileage 2037, 2040.
Monthly statement to make 2021.
On returns, none to charge 2041.
Payable in advance 2027.
Constable, fees—continued.
Quarterly statement of to commissioners 2021.
Table of to post 2025.
Violation of law governing, penalty 2023, 2024.
Hogs trespassing, may sell, when 2256-2260.
Judgment, unlawful to purchase 2821.
Justice of the peace may depute suitable person to act as 7524.
Local or special laws relating to jurisdiction and duties invalid (Nev. Const. art. iv, sec. 20) 278.
May serve summons in action in justice's court 5732.
Mileage 2037, 2040.
New township, duties in 2785.
Nuisances, to abate 920.
Oath of office 4928.
Prisoners, expense of transporting allowed 1544, 1545.
Purchasing judgment 2821.
Rewards, not eligible for, when 2905.
Riotous assemblage, duty concerning 2836-2838.
Sale, official, unlawful to be interested in 2821.
Stock, to impound, when 2262.
Stock, trespassing and unlawful, duties and responsibilities concerning 2251-2260.
Substitution for sheriff in supplementary proceedings 5787.
Successor may execute deed for tax or execution sale 1662, 1663.
To detain defendant arrested in civil action in justice's court until discharged by justice 5748.
To give notice and make return on arrest of defendant in civil action in justice's court 5747.
To pay moneys collected on execution of process to justice of the peace 5810.
To pay wages as preferred claim against attachment or execution 5494.
To summon jury to determine whether breach of contract of apprenticeship 491.
When liable for arresting in civil action witness subpenaed 5446.
When may arrest defendant in civil action in justice's court 5744.
When not to act as attorney in justice's court 5725.
When substituted for "sheriff" in section relating to attachment 5752.
When to relinquish property on stay of execution on appeal from justice's court 5793.
When to take plaintiff arrested in civil action in justice's court before another justice 5746.
Conspiracy, defined 6377, 6378.
Overt act not essential, evidence of 6378, 7173.
Constitutional amendments. See Elections.
How canvassed 363, 1796, 1842, 1863, 1881, 1884.
How submitted to people 1842, 1879.
Which have been proposed and to be either passed on by next legislature or at general election of 1912, 355, 371, 250, 237, 257, 370.
Which have been ratified to be certified to president of United States 419.

Constitutional convention, how called 384.
Constitutional debates, provision for publication of 410.
Constitutional oath, school teachers to take also 370, 357.
Constitutional powers of United States as defined by supreme court, paramount allegiance to 231.
Constitution of the United States, adoption of 231, 227.
Construction, reference in statutes to provisions of law revised and reenacted in civil practice act to be construed as applying to those provisions 5817.
When provisions of civil practice act to be construed as a continuation of existing statutes and not as new enactments 5817.
Consul of United States, may take affidavit in foreign country 5442.
To certify to judicial record of foreign country 5411.
Contagion, damages recoverable for when spread by diseased live stock 2268. See Live Stock.
Contempt, either house of legislature may punish or imprison 265.
Contracts, law impairing obligation of not to be passed 244.
Controller, state, duties, term, eligibility 312, 315.

CONSTITUTION, FEDERAL

Accusation, right to be informed of nature of 176.
Acts of Congress, supreme law of land 168.
Adoption of 227, 231.
Age of congressman 89.
Age of president 144.
Age of senators 95.
Amendments to constitution, how adopted, limitations on 166.
Appointment of officers, ambassadors, ministers and consuls 149.
Arrest, privilege of members of Congress from 106.
Armies, Congress to raise and support, appropriation for, limited 122, 124.
Arms, right of people to keep and bear 172.
Assemble, right of people to guaranteed 171.
Bail, excessive not to be required 178.
Bankruptcy, Congress to regulate 114.
Bill of attainder not to pass 131, 137.
Bills, of credit, state not to emit 137.
Origin, amendment, passage and approval 104, 108, 109.
Passage over veto 109.
When become law without signature of president 109.
Capitation tax, how paid 132.
Census to be taken 90.
Citizens, defined 185.
Citizens, rights and privileges of 160.
Citizens, rights of guaranteed 185.
Commander-in-chief 148.
Commerce, power of Congress over 113.
Commerce, preference forbidden 134.
Common law, how and where applied 177.
Confederation, debts of, valid 167.
Congress, adjournment, president may determine, when 151.
Adjournment, resolution for, president not to act on 110.
Congress—continued.
Amendments, how proposed and adopted, limitations on 166.
Annual meeting 101.
Appointive power may vest, where 149.
Armies to raise and support, appropriation for limited 122.
Army and navy, rules governing, to make 124.
Bankruptcy, uniform law on 114.
Bill of attainder, not to pass 131.
Bills, passage over president's veto 109.
Capitation tax, how laid 132.
Captures on land or water, rules to make 121.
Commerce, regulation of, not to grant preference 113, 134.
Consent, may grant to officer to accept title or gift from foreign power 136.
Consists of senate and house 87.
Copyrights, to provide for 118.
Counterfeiting, to provide punishment for 116.
Courts, may establish 119.
Crimes, trial for, place of, may determine 156.
Direct tax, how laid 132.
Disability for holding office, may remove, when 187.
District of Columbia, power over 127.
Duties, taxes, imposts and excises, to lay and collect, must be uniform 111.
Election of senators and representatives, may regulate 100.
Electors, time of choosing and day of, vote to determine 143.
Export tax or duty, not to lay 133.
Ex post facto law not to pass 131.
Freedom of speech and press not to be interfered with 171.
Full faith and credit clause, to prescribe enforcement 159.
General powers 128.
House of representatives, adjournment by less than quorum 102.
Adjournment limited without consent of senate 105.
Arrest, privilege of members from 106.
Attendance of members, may compel 102.
Apportionment of members 186.
Compensation of members 106.
Elections of members, time, place and manner, how regulated 100.
Election to fill vacancies 91.
Expulsion or punishment of members 103.
Governor to issue writ of election to fill vacancies 91.
Impeachment, sole power of 92.
Journal of proceedings, vote, when recorded 104.
Judge of elections, returns and qualifications of own members 102.
Members, how apportioned 90, 186.
Members, how and when chosen, qualifications 88, 89.
Members, not to be appointed to certain offices 107.
Oath of members 169.
President, when to elect 142.
Qualifications of members 88, 89, 107.
Quorum of 102.

Congress, house representatives—continued.
Revenue bills to originate in 108.
Rules of procedure, to determine 103.
Speaker and officers, to choose 92.
Speech or debate, members not to be questioned for 106.
Vacancies, how filled 91.
Immigration of certain persons 129.
Implied powers 128.
Lands, what may legislate concerning 127.
Laws of nations, Congress to provide punishment for violation of 120.
Letters of marque and reprisal, forbidden 121.
Members not to be questioned for speeches or debates in 106.
Message of president 151.
Militia, power over 125, 126.
Money, may borrow 112.
Money not to be drawn except on appropriation 135.
Money, to regulate 115.
Naturalization, to regulate 114.
Navy, to provide and maintain 123.
Orders and resolutions, take same course as bills 110.
Patent rights, to secure 118.
Piracies, and felonies on high seas, to provide punishment for 120.
Postoffices and roads, to provide 117.
Powers of 111-128.
Prescribe manner of proving acts, records and proceedings 159.
President may convene 151.
Press, freedom of, guaranteed 171.
Property of United States, to control 164.
Religion, laws affecting, prohibited 171.
Representation, when state's quota may be reduced 186.
Right of people to assemble and petition, not to be affected 171.
Senate, adjournment limited without consent of house 105.
Amendments to revenue bills 108.
Appointments by president, to ratify 149, 150.
Arrest, privilege of members from 106.
Attendance of members, may compel 102.
Bills for revenue and other legislation 108.
Classification of members 94.
Compensation of members 106.
Election of members, time, place and manner, how regulated 100.
Expulsion or punishment of members 103.
Impeachment, judgment in 99.
Impeachments, to try, vote necessary to convict 98.
Journal of proceeding, vote, when recorded 104.
Judge of election, returns and qualifications of own members 102.
Legislature to choose senators 93.
Members not to be appointed to certain offices 107.
Members of, number, how chosen 93.
Oath of members 169.
Officers of, how chosen 97.
President pro tem and officers, to choose 97.
Qualifications of members 95, 107.
Quorum of 102.
Congress, senate—continued.
Rules of procedure, to determine 103.
Speech or debate, members not to be questioned for 106.
Term of members 93.
Treaty power 149.
Two members for each state 93.
Vice-president, casting vote in case of tie 96.
Vacancies, governor to appoint temporarily 94.
Vice-president, president of 90.
Speech, freedom of, cannot abridge 171.
State cannot lay imposts or duties on imports or exports without consent of 138.
Tax, capitation or direct, how laid 132.
Taxes, duties, imposts and excises to lay and collect, must be uniform 111.
Territory, control over 164.
Treason, punishment for to declare, limitation 158.
War, may declare 121.
Weights and measures, to regulate 115.
Contracts, state cannot impair obligation of 137.
Copyrights, provision for 118.
Counsel, right to have in defense 176.
Counterfeiting to be punished 116.
Courts, common law, to what extent controls 177.
Courts, inferior, Congress may establish 119.
Crime, to be prosecuted by indictment 175.
Crimes, trial by jury 156.
Cruel and usual punishments, prohibited 178.
Debate, members of Congress not to be questioned for 106.
Debt of confederation valid 167.
Debt of state incurred in rebellion, void 188.
Debt of United States, defined, validity 188.
Direct taxes, how apportioned 90.
Direct tax, how laid 132.
District of Columbia, power of Congress over 127.
Disability for holding office 187.
Domestic violence, legislature or governor of state may apply for suppression 165.
Due process of law, guaranteed 175, 185.
Duties and taxes to be uniform 111.
Election of electors 141-143, 182.
Election of congressmen 91, 100.
Election of president and vice-president 141-143, 182.
Election of senators 100.
Elector, senator, representative or office holder not eligible for 141.
Electors for president and vice-president, eligibility, selection, meeting and vote 141, 142, 143, 182.
Eminent domain, compensation for property taken 175.
Excessive bail not to be required 178.
Excessive fines not to be imposed 178.
Executive power vested in a president 140.
Export tax or duty prohibited 133.
Ex post facto law not to be passed 131, 137.
Extradition 161.
Felonies on high seas, Congress to punish 120.
Fines, excessive not to be imposed 178.
Freedom of speech and press guaranteed 171.
Fugitive slaves (obsolete) 162.

Full faith and credit clause 159.
Guarantee of republican form of government 165.
House of representatives. See Congress, supra.
House of representatives with senate constitute Congress 87.
Impeachment, criminal prosecution not affected by 99.
House of representatives has sole power of 92.
Judgment in 99.
Of officers 152.
Senate to try, vote 98.
Indictment, crime to be prosecuted by 175.
Invasion of states, protection against 165.
Jeopardy, not to be put in twice 175.
Judicial department 153-158.
Judicial power, not extended to suits by individual against a state 181.
Judicial power, where vested 153.
Jurisdiction of government over land within states 128.
Jury in suits at common law 177.
Jury, right of trial by 176.
Jury, trial for crimes 156.
Law, due process of guaranteed 175.
Law, equal protection of guaranteed 185.
Laws of nations, punishments for violation of 120.
Legal tender 137.
Legislative powers vested in Congress 87.
Legislatures to ratify amendments 166.
Letters of marque and reprisal 121, 137.
Limitations on power of amendment 166.
Militia, necessary to a state 172.
Militia, power of Congress over 125, 126.
Money, Congress to regulate 115.
Money, state not to coin 137.
Naturalization, Congress to enact uniform law on 114.
Navy, provisions for 123, 124.
New states, admission of 163.
Oath of president 147.
Office, disability to hold, treason against government 187.
Officers, appointment of 149.
Officers, federal and state, oath or affirmation to support 169.
Officers, forbidden to accept presents, titles or emoluments from foreign power 136.
Pardons or reprieves, president may grant 148.
Patent rights, Congress to secure 118.
People, right of security against searches and seizures 174.
Right of to assemble and petition 171.
Right to keep and bear arms 172.
Rights retained by 179.
Petition, right of people to make, guaranteed 171.
Piracies, Congress to punish 120.
Powers of Congress 111-128.
Powers, reserved to states 180.
Postoffices and post roads, Congress to provide 117.
Preamble 86.
President, ambassadors, ministers and consuls, may appoint 149.
Ambassadors and ministers to receive 151.
Appointive power 149, 150.
Bills, approval or veto 109.
President—continued.
Commander-in-chief 148.
Commissions to officers 151.
Compensation 146.
Congress, may convene 151.
Congress, power to adjourn, when 151.
Duty to execute laws 151.
Elected, how 141, 142, 182.
Eligibility 144.
Executive power vested in 140.
Impeachment of 152.
Justices of supreme court to appoint 149.
Messages to Congress 151.
Oath of 147.
Opinions of heads of departments, may demand 148.
Orders and resolutions, approval or veto 110.
Pardons or reprieves, may grant 148.
Qualifications 144.
Successor 145.
Term of office 140.
Treaty power 149.
Vacancies, power to fill 150.
Vice-president to become, on failure to elect 182.
Vice-president to succeed 145.
President pro tem. of senate 97.
Private property for public use, compensation 175.
Press, freedom of, guaranteed 171.
Public money, statements of to be published 135.
Public use, private property taken for, compensation 175.
Punishments, cruel and unusual, prohibited 178.
Quartering of soldiers in private houses, forbidden 173.
Ratification of, number of states required 170.
Religious freedom guaranteed 171.
Religious test not to be required as qualification for office 169.
Representation, when may be reduced 186.
Representative in Congress, how chosen, qualifications 88, 89.
Representative, not eligible as elector 141.
Representatives, how apportioned 186.
Reprieves, president may grant 148.
Republican form of government guaranteed states 165.
Reservation of powers, by states 180.
Right of suffrage 190.
Right of trial by jury 176.
Rights retained by people 179.
Searches and seizures, unreasonable, guarantee against 174.
Search warrant, issued only on probable cause 174.
Security of person, house, papers and effects guaranteed 174.
Senate. See Congress, supra.
Senate and house constitute Congress 87.
Senator not eligible as elector 141.
Slavery prohibited 183.
Soldiers, not to be quartered on people 173.
Speech, freedom of, guaranteed 171.
States, cannot abridge privileges or immunities of citizens 185.
Cannot deny citizens due process or equal protection of law 185.

States—continued.
Compacts between 139.
Debt of, incurred in insurrection, void 188.
Boundaries not to be changed without consent 163.
Bound to respect constitution, acts of Congress and treaties as supreme law of land 168.
Domestic violence in, suppression of 165.
Guaranteed republican form of government 165.
New, admission of 163.
Not to be deprived of equal representation in senate without consent 166.
Not to lay duties or imposts on imports or exports without consent of Congress 138.
Not to pass law impairing obligation of contracts 137.
Powers reserved to 180.
Prohibited from doing certain acts or enacting certain legislation 137.
Protected from invasion 165.
Restrictions on, without consent of Congress 138, 139.
Suits by individuals against cognizable by state court 181.
Title of nobility, not to grant 137.
To give full faith and credit to acts of Congress and other states 159.
Treaty or alliance cannot make 137.
War, not to engage in, when 139.
Suffrage, not to be abridged for race, color or servitude 190.
Supreme court, jurisdiction, original and appellate 154, 155.
Judges of, term of office, compensation 153.
President to appoint justices of 149.
Supreme law of the land, defined 168.
Taxes and duties, to be uniform 111.
Tax, capitation or direct, how laid 132.
Taxes, direct, how apportioned 90.
Tender, in payment of debt 137.
Territory, Congress to control 164.
Titles of nobility, not to be granted 136, 137.
Treason, Congress to fix punishment 158.
Treason, disability to hold office 187.
Treason, of what consists, evidence requisite 157.
Treaties, how negotiated 149.
Treaty or alliance, state cannot make 137.
Treaty, supreme law of land 168.
Treasurer, to publish receipts and disbursements 135.
Treasury, money not to be drawn from except on appropriation 135.
Trial, right to speedy and public, by jury 176.
Twice in jeopardy, forbidden 175.
United States, powers not delegated to, reserved to states 180.
Vessels, freedom of 134.
Veto power of president 109, 110.
Vice-president elected, how 141, 142, 182.
Casting vote in case of tie in senate 96.
President of senate 96.
Succeed president, when 145.
Term of office 140.
To act as, on failure to choose president 182.
Vote, right of citizen to, not to be abridged 190.
War, civil rights may be suspended during 175.
War, Congress may declare 121.
War, state not to engage in, when 139.
Weights and measures, Congress to regulate 115.
Witness against self, person cannot be compelled to be 175.
Witnesses, right of, compulsory process for 176.
Witnesses, right to be confronted with 176.
Writ of habeas corpus, when may be suspended 130.

CONSTITUTION, STATE

Absence from state of judicial officer, penalty for (art. vi, sec. 17) 332.
Leave of, not to be granted by legislature to judicial officer (art. vi, sec. 17) 332.
Or inability of governor and lieutenant-governor, president pro tempore of senate to act (art. v, sec. 17) 310.
Absent members of legislature, attendance may be compelled (art. iv, sec. 13) 271.
Accused, not to be compelled to be a witness against himself (art. i, sec. 8) 237.
Right to appear and defend in person or by counsel (art. i, sec. 8) 237.
Act, special, municipal corporations may be formed under (art. viii, sec. 1) 338.
Action, civil: There shall be but one form and law and equity may be administered in same (art. vi, sec. 14) 329.
Trial by jury secured but may be waived (art. i, sec. 3) 232.
Action, criminal, for libel, truth may be given in evidence, when jury may acquit (art. i, sec. 9) 238.
If offense amounts to felony, supreme court has appellate jurisdiction on questions of law alone (art. vi, sec. 4) 319.
Legislature not to pass local or special law for change of venue (art. vi, sec. 20) 278.
No person to be twice put in jeopardy nor to be compelled to be witness against himself (art. i, sec. 8) 237.
Right of indictment or presentment, accused may appear with counsel (art. i, sec. 8) 237.
Action, for forcible entry and unlawful detainer, district court has jurisdiction (art. vi, sec. 6) 321.
For libel, truth may be given in evidence (art. i, sec. 9) 238.
In equity, supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
May be brought by or against corporation same as individual (art. viii, sec. 5) 342.
Provision may be made by general law for bringing against the state (art. iv, sec. 22) 280.
Actions, at law in which supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
At law, when district court has jurisdiction (art. vi, sec. 6) 321.
Civil, not included in general provisions of law and equity, supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
In equity, district court has jurisdiction (art. vi, sec. 6) 321.
Acts, of Territory of Nevada in force at time of admission of state to remain in force until repealed (art. xvii, sec. 2) 386.

Adjournment of legislature, by governor (art. v, sec. 11) 304.
From day to day (art. iv, sec. 13) 271.
Neither house to adjourn for more than three days or to other place without consent of other house (art. iv, sec. 15) 273.
Administrators, public, may be elected or abolished (art. iv, sec. 32) 290.
Adoption of constitution of United States by state (art. i, sec. 2) 227, 231.
Affirmation or official oath (art. xv, sec. 2) 370.
Agriculture, mechanic arts and military tactics, college for, investment of funds by regents of state university (art. xi, sec. 8) 360.
To be a department of the state university (art. xi, sec. 4) 356.
Agricultural improvement, to be encouraged by the legislature (art. xi, sec. 1) 353.
Aid of state to corporations prohibited (art. viii, sec. 9) 346.
Allegiance, paramount (art. i, sec. 2) 231.
Amendment, of statute not to be made by reference to title only, reenactment at length (art. iv, sec. 17) 275.
Proposed to art. xv, sec. 3, passed at legislative sessions 1909, 1911, subject to ratification by people at general election 1912, provides that certain females may be eligible for deputy superintendent of public instruction or notary public 371.
Proposed to constitution by adding to art. xix, sec. 3, passed at legislative sessions 1909, 1911, subject to ratification by people at general election 1912, provides for initiative and further in regard to referendum 413.
Proposed to constitution, art. xi, sec. 3, passed at legislative sessions 1909, 1911, subject to ratification by people at general election 1912, provides for the investment of school moneys in bonds of any county in the state 355.
Proposed to sec. 1, art. ii, of the constitution, passed at legislative session 1911, subject to approval by the legislature of 1913 and ratification later by the people, provides that there shall be no denial of elective franchise on account of sex 250.
Proposed to sec. 8, art. i, of the constitution, passed at legislative sessions 1909, 1911, subject to ratification by the people at general election 1912, provides that persons accused of crime may be prosecuted by information as well as by indictment 237.
Proposed to sec. 8, art. ii, of the constitution, passed at legislative sessions 1909, 1911, subject to ratification by the people at general election 1912, provides that any public officer in the state may be recalled 257.
To art. xv, sec. 2, of the constitution, prescribing official oath, proposed and passed at legislature 1911, subject to approval and ratification by the people at the succeeding election 370.
Amendments to constitution, how may be proposed, passed, published and ratified (art. xvi, sec. 1) 383. See also 1842, 1879.
Annual tax, legislature shall provide for to meet expenses of state for fiscal year, or ensuing two years, and deficiencies (art. ix, sec. 2) 349.
Appeal, from justice's courts, legislature may prescribe regarding (art. vi, sec. 8) 323.
In civil actions special court fee to be advanced to clerk by party taking and applied to judge's compensation (art. vi, sec. 16) 331.
Appellate jurisdiction, district court has final, in cases appealed from justice's court (art. vi, sec. 6) 321.
Of supreme court (art. vi, sec. 4) 319.
Appointment, or choosing of officers whose election or appointment is not otherwise provided for may be made as prescribed by law (art. xv, sec. 10) 378.
When not to be made of assemblyman or senator to office created during his term (art. iv, sec. 8) 266.
Apportionment, of senators and assemblymen (art. xvii, secs. 6, 9, 10) 390, 393, 394.
Of senators and assemblymen to be based on population (art. xvi, sec. 13) 381.
To the several counties of moneys pledged for school purposes to be made by law (art. xi, sec. 3) 355.
Appropriation, for standing army not to be for longer than two years (art i, sec. 11) 240.
Appropriations, no money to be drawn from state treasury except under (art. iv, sec. 19) 277.
To be made for payment of state indebtedness (art. ix, sec. 3) 350.
Archives and records of Territory of Nevada vested in state (art. xvii, sec. 4) 388.
Arms, public, safe keeping of (art. xii, sec. 1) 363.
Army, appropriation for in time of war limited to two years (art. i, sec. 11) 240.
Standing, not to be maintained in time of peace (art. i, sec. 11) 240.
Arrest, of elector on civil process not to be made on election day (art. ii, sec. 4) 253.
On civil process, members of legislature exempt from during session and for 15 days before (art. iv, sec. 11) 269.
Assemblage, right of assured (art. i, sec. 10) 239.
Assembly, bill may originate or be amended in (art. iv, sec. 16) 274.
Has sole power of impeachment, majority of all members necessary (art. vii, sec. 1) 334.
Judge of qualifications of its members, may choose officers and punish or expel members (art. iv, sec. 6) 264.
May punish or imprison person not member (art. iv, sec. 7) 265.
Speaker of to receive $2 per day additional (art. iv, sec. 33) 291.
Assembly and senate, legislative authority vested in (art. iv, sec. 2) 259.
Assemblymen, compensation of (art. xvii, sec. 5) 389.

Assemblymen—continued.
Compensation not to be increased or diminished during session (art. iv, sec. 28) 286.
Compensation to be fixed by law, not to be increased during session (art. iv, sec. 22) 291.
Payment of expense of for postage, express charges, newspapers and stationery (art. iv, sec. 33) 291.
People have right to instruct (art. i, sec. 10) 239.
Prohibited from receiving fees or perquisites (art. xvii, sec. 5) 389.
Qualifications (art. iv, sec. 5) 263.
Term of office to be two years (art. iv, sec. 3; art. xvii, sec. 10) 261, 394.
To be apportioned according to population (art. i, sec. 13) 242.
Vacancy in office, governor to issue writ to fill (art. iv, sec. 12) 270.
When to be elected (art. iv, sec. 3) 261.
When not to be appointed to office created during term (art. iv, sec. 8) 266.
Assessment, and collection of state, county and township taxes, local or special law invalid (art. iv, sec. 20) 278.
By cities or towns, legislature to restrict (art. viii, sec. 8) 345.
District court has jurisdiction of cases involving legality of (art. vi, sec. 6)321.
In action involving legality supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
Assessment and taxation, how to be made upon all property, including mines, exemptions (art x, sec. 1) 352. See Revenue.
Associations, when state shall not donate or loan money or subscribe to (art. viii, sec. 9) 346.
Assumption, by state of debt of territory (art. xvii, sec. 7) 391.
Of debt of counties, towns or cities by state prohibited (art. ix, sec. 4) 351.
Attainder, bill of not to be passed (art. i, sec. 15) 244.
Attendance, of absent members of the legislature may be compelled (art. iv, sec. 13) 271.
On public schools to be secured by legislature (art. xi, sec. 2) 354.
Attorney-general, election, term, eligibility (art. v, sec. 19) 312.
Member of board of pardons, and to perform other duties (art. v, secs. 14, 22) 307, 315.
Member of board of state prison commissioners and board of examiners (art. v, sec. 21) 314.
Prohibited from receiving fees or perquisites (art. xvii, sec. 5) 389.
To perform duties prescribed by law (art. v, sec. 22) 315.
Bail, excessive not to be required (art. i, sec. 6) 235.
To be allowed in all cases unless for capital offense when proof is evident or presumption great (art. i, sec. 7) 236.
Ballot, election by people to be by (art. ii, sec. 5) 254.
Bequeathed property, to the state, pledged to educational purposes (art. xi, sec. 3) 355.
Bill, enacting clause of (art. iv, sec. 23) 281.
How may be passed over governor's veto (art. iv, sec. 35) 293.
Legislative, method of reading, passage and signing (art. iv, sec. 18) 276.
Legislative, to embrace but one subject (art. iv, sec. 17) 275.
May originate or be amended in either house of the legislature (art. iv, sec. 16) 274.
No law to be enacted except by (art. iv, sec. 23) 281.
When becomes law without governor's approval (art. iv, sec. 35) 293.
Blind, deaf and dumb, institution for to be supported by state (art. xiii, sec. 1) 365.
Board of county commissioners, legislature to provide for in each county and duties (art. iv, sec. 26) 284.
Board of examiners, how constituted and powers (art. v, sec. 21) 314.
Board of pardons, personel and powers (art. v, sec. 14) 307.
Board of regents of university, from accruing interest to maintain mining department (art. xi, sec. 8) 360.
Legislature to provide for and define their duties (art. xi, sec. 7) 359.
To control state university, duties to be prescribed by law (art. xi, sec. 4) 356.
To invest in separate fund, to be irreducible, proceeds from land granted by act of Congress of July 2, 1862, for college for benefit of agriculture, mechanic arts and military tactics (art. xi, sec. 8)360.
Board of state prison commissioners, how constituted (art. v, sec. 21) 314.
Bonds, amendment proposed to art. xi, sec. 3, of the constitution, passed at the legislative sessions 1909, 1911, subject to ratification by the people at the general election 1912, provides for the investment of school moneys in bonds of any county in the state 355.
Of the United States or any state, legislature may invest school moneys in (art. xi, sec. 3) 355.
State may not incur debt exceeding $300,000 (art. ix, sec. 3) 350.
Boundary of state defined, may include additional territory if authorized by Congress and State of California (art xiv, sec. 1) 368.
Bribery, conviction excludes from jury unless restored to civil rights (art. iv, sec. 27) 285.
In relation to election or procurement of office disqualifies from holding office (art. iv, sec. 10) 268.
Laws to be passed preventing at elections (art. iv, sec. 27) 285.
California, State of Nevada may be enlarged by relinquishment of territory by (art. xiv, sec. 1) 368.
Canvass of returns, of election for ratification of constitution 419.
Of election for state officers by chief justice and associate justices (art. v, sec. 4) 297.
Capital offenses, bail not to be allowed if proof evident or presumption great (art. i, sec. 7) 236.

Capital, terms of supreme court to be held at (art. vi, sec. 7) 322.
To be at Carson City (art. xv, sec. 1) 369.
Carson City, to be seat of government (art. xv, sec. 1) 369.
Census, to be taken under direction of legislature if deemed necessary, and with that taken under direction of Congress to serve as basis of representation in legislature (art. xv, sec. 13) 381.
Certiorari, supreme court empowered to issue writ of (art. vi, sec. 4) 319.
Writ of, district court or judge may issue (art vi, sec. 6) 321.
Changing names of persons, local or special laws for, invalid (art. iv, sec. 20) 278.
Charitable association or company, state may loan, donate or subscribe to (art. viii, sec. 9) 346.
Charitable corporation, may be exempted from taxation (art. viii, sec. 3) 339.
Chief justice, and associate justices to canvass returns for state officers (art. v, sec. 4) 297.
For reasonable cause may be removed on two-thirds vote of members elected to each branch of the legislature (art. vii, sec. 3) 336.
Of supreme court is justice with shortest term, but if commissions of two bear same date, chief justice shall be determined by lot (art. vi, sec. 3) 318.
To preside over senate on trial of impeachment of governor or lieutenant-governor (art. vii, sec. 1) 334.
Cities, legislature shall provide for organization of by general laws and restrict their powers except for procuring water (art. viii, sec. 8) 345.
Cities and towns, legislature to restrict powers of taxation, assessment, borrowing money, contracting debts and loaning credit except for procuring water (art. viii, sec. 8) 345.
City, indebtedness or liability to, local or special law releasing, invalid (art. iv, sec. 20) 278.
Shall not become stockholder in or loan to any company, corporation or association except railroad company (art. viii, sec. 10) 347.
State not to assume debt of unless created for public defense (art. ix, sec. 4) 351.
To make provision for support of its own officers subject to regulations prescribed by law (art. xvii, sec. 21) 405.
Citizen of United States, lands of in this state not to be taxed higher than lands of resident 228.
Male, right of suffrage or office-holding not to be withheld from by reason of color or previous condition of servitude (art. xviii, sec. 1) 411.
Civil action, special court fee to be advanced to clerk by party bringing or taking appeal and applied to judge's compensation (art. vi, sec. 16) 331.
There shall be but one form and law and equity may be administered in same (art. vi, sec. 14) 329.
Trial by jury secured but may be waived (art. i, sec. 3) 232.
Civil actions, not included in general provisions of law and equity, supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
Civil cases, legislature by two-thirds vote may require unanimous verdict (art. i, sec. 3) 232.
Civil officer, governor to transact executive business with and may require information (art. v, sec. 6) 299.
Civil practice, local or special laws relating to are invalid (art. iv, sec. 20) 278.
Civil power, military subordinate to (art. i, sec. 11) 240.
Civil process, elector not to be arrested under on election day (art. ii, sec. 4) 253.
Members of legislature exempt from arrest under during session and for 15 days before (art. iv, sec. 11) 269.
Civil rights, certain convicts excluded from juries unless restored to (art. iv, sec. 27) 285.
Restoration allows person convicted of crime to serve as juror (art. iv, sec. 27) 285.
Claim against state, incurred when its liabilities exceed $300,000 shall be void (art. ix, sec. 3) 350.
When not to be passed upon by legislature without being acted upon by board of examiners (art. v, sec. 21) 314.
Claims, all against the state to be examined by board of examiners, except salaries or fixed compensation of officers (art. v, sec. 21) 314.
Clerk of supreme court, to keep office at seat of government (art. xv, sec. 12) 380.
College of agriculture, mechanic arts and military tactics, investment by board of regents of state university of funds from land grants by Congress (art. xi, sec. 8) 360.
Commander-in-chief, of military forces of state, governor to be (art. v, sec. 5) 298.
When governor may continue as in time of war out of state (art. v, sec. 18) 311.
Commissions, to be signed by governor and secretary of state and under great seal (art. v, sec. 16) 309.
Common school, district neglecting to maintain school or allowing sectarian instruction may be deprived of proportion of public school funds (art. xi, sec. 2) 354.
Legislature to provide for at least six months annually in each district and to pass laws requiring attendance (art. xi, sec. 2) 354.
Common schools and university, legislature to provide special tax for (art. xi, sec. 6) 358.
Compensation and fees of county and township officers, legislature may regulate (art. iv, sec. 20) 278.
Condemnation, property shall not be taken for public use without just compensation having been first made or secured, exception (art. i, sec. 8) 237.
Right of way not to be appropriated to use of corporation until compensation is made or secured (art. viii, sec. 7) 344.

Congress, territory of state may be enlarged by authorization of (art. xiv, sec. 1) 368.
Conscience, liberty of not to excuse acts of licentiousness (art. i, sec. 4) 233.
Constable, local or special laws relating to jurisdiction and duties of, invalid (art. iv, sec. 20) 278.
Constitution, amendment proposed to art. xi, sec. 3, passed at legislative sessions of 1909, 1911, subject to ratification by the people at general election 1912, provides for the investment of school moneys in bonds of any county in the state 355.
Amendment proposed to art xv, sec. 3, passed at the legislative sessions 1909, 1911, subject to ratification by the people at general election 1912, provides that certain females may be eligible for deputy superintendent of public instruction or notary public 371.
Amendment proposed to sec. 1, art. ii, passed at legislative session 1911, subject to approval by the legislature of 1913 and to ratification later by the people, provides that there shall be no denial of elective franchise on account of sex 250.
Amendment proposed to sec. 8, art i, passed at the legislative sessions 1909, 1911, subject to ratification by the people at general election 1912, provides that persons accused of crime may be prosecuted by information as well as by indictment 237.
Amendment proposed to sec. 8, art. ii, passed at the legislative sessions 1909, 1911, subject to ratification by the people at the general election 1912, provides that any public officer in the state may be recalled 257.
Amendment to art. xv, sec. 2, prescribing official oath, proposed and passed at legislative session 1911, subject to approval and ratification by the people at the succeeding general election 370.
Amendment proposed by addition of sec. 3 to art xix, passed at the legislative sessions 1909, 1911, subject to ratification by the people at the general election 1912, provides for initiative and further in regard to referendum 413.
Certification and ratification of to president of United States 419.
Election for ratification of, ordinance, provisions 414-427.
How amendments to may be proposed, passed, published and ratified (art. xvi, sec. 1) 383.
Constitutional convention, how called (art. xvi, sec. 2) 384.
Constitutional debates, provision for publication of (art. xvii, sec. 26) 410.
Constitutional oath (art. xv, sec. 2) 370.
School teachers required to take (art. xi, sec. 5) 357.
Constitutional powers of the United States as defined by supreme court, paramount allegiance to (art. i, sec. 2) 231.
Constitution of the United States, adoption of (art. i, sec. 2) 231, 227.
Contempt, either house of legislature may punish or imprison for (art. iv, sec. 7) 265.
Contracts, law impairing obligation of not to be passed (art. i, sec. 15) 244.
Controller, election, term, eligibility (art. v, sec. 19) 312.
To perform duties prescribed by law (art. v, sec. 22) 315.
Conviction, of bribery or embezzlement of public funds disqualifies from holding office (art. iv, sec. 10) 268.
Of certain crimes excludes elector from jury unless restored to civil rights (art. iv, sec. 27) 285.
See Criminal Practice.
Corporations, dues may be secured as prescribed by law, but corporators not individually liable for debts (art. viii, sec. 3) 340.
Formed under laws of Territory of Nevada subject to those laws and state laws (art. viii, sec. 4) 341.
May be formed only under general laws, which may be altered or repealed, municipal corporations excepted (art. viii, sec. 1) 338.
May sue and be sued same as individuals (art. viii, sec. 5) 342.
Municipal may be formed under special act (art. viii, sec. 1) 338.
Property of subject to taxation same as individuals; corporations formed for municipal, charitable, religious or educational purposes may be exempted by law (art. viii, sec. 2) 339.
Rates of certain may be regulated by the legislature (art. iv, sec. 20) 278.
Rights of way not to be appropriated to use of until compensation is made or secured (art. viii, sec. 7) 344.
State not to assume debt of unless created for public defense (art. ix, sec. 4) 351.
Counsel, right of accused to have (art. i, sec. 8) 237.
Counties, apportionment to of moneys pledged to school purposes to be made by law (art. xi, sec. 3) 355.
To provide for indigents as may be prescribed by law (art. xiii, sec. 2) 366.
County, indebtedness or liability to, local or special law releasing, invalid (art. iv, sec. 20) 278.
Shall not become stockholder in or loan to any company, corporation or association except railroad company (art. viii, sec. 10) 347.
State not to assume debt of unless created for public defense (art. ix, sec. 4) 351.
To make provisions for support of its own officers subject to regulations prescribed by law (art. xvii, sec. 21) 405.
County business, local or special law regulating, invalid (art. iv. sec. 20) 278.
County commissioners, board of, legislature to provide for in each county (art. iv, sec. 26) 284.
County funds, not to be used for sectarian purposes (art. xi, sec. 10) 362.
County government, legislature to establish uniform (art. iv, sec. 25) 283.
County officers, fees of may be regulated by legislature (art. iv, sec. 20) 278.

County officers—continued.
Legislature may regulate fees and compensation (art. iv, sec. 20) 278.
Local or special law for regulating election, invalid (art. iv, sec. 20) 278.
To hold their offices at county-seat (art. xv, sec. 7) 375.
County-seat, district court to be held at (art. vi, sec. 7) 322.
Officers to hold their offices at (art. xv, sec. 7) 375.
County treasury, local or special law refunding money paid into, invalid (art. iv, sec. 20) 278.
Court, district, jurisdiction of (art. vi, sec. 6) 321.
District, may issue writs of mandamus, injunction, quo warranto, certiorari, habeas corpus and other writs (art. vi, sec. 6) 321.
District, times of holding to be as fixed by law and to be at county-seat, but legislature may divide county into two or more districts and designate place of holding court (art. vi, sec. 7) 322.
Justice's, has such criminal jurisdiction as may be prescribed by law (art. vi, sec. 8) 323.
Justice's, jurisdiction of (art. vi, sec. 8) 323.
Of record, justices of the peace not to try cases in conflict with (art. vi, sec. 8) 323.
Supreme, times of holding to be as fixed by law and to be at seat of government (art. vi, sec. 7) 322.
Court fee, to be advanced to clerk by party bringing action or taking appeal and applied to compensation of judge (art. vi, sec. 16) 331.
Courts, inferior, in cases appealed from district court has final appellate jurisdiction (art. vi, sec. 6) 321.
Judicial power of state vested in supreme court, district courts, justices of the peace and municipal courts (art. vi, sec. 1) 316.
Justice's, legislature may prescribe regarding appeals from (art. vi, sec. 8) 323.
Legislature may establish for municipal purposes (art. v, sec. 21) 316.
Persons having judicial powers not to exercise functions pertaining to legislative or executive departments (art. iii, sec. 1) 258.
Supreme and district and such other as the legislature may designate are courts of record (art. vi, sec. 8) 323.
Courts of justice, local or special laws relating to practice, invalid (art. iv, sec. 20) 278.
Criminal cases, amounting to felony supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
District court has jurisdiction when not otherwise provided (art. vi, sec. 6) 321.
Criminal practice, witnesses not to be unreasonably detained (art. i, sec. 6) 235.
Crime, bail to be allowed in all cases unless for capital offense when proof evident or presumption great (art. i, sec. 7) 236.
Crime—continued.
No person to be tried for capital, infamous, except on presentment or indictment, exception (art. i, sec. 8) 237.
Slavery or involuntary servitude not to be tolerated except as punishment for (art. i, sec. 17) 246.
Crimes, accused not to be compelled to be witness against himself (art. i, sec. 8) 237.
Action for libel, truth may be given in evidence, when jury may acquit (art. i, sec. 9) 238.
District court has jurisdiction when not otherwise provided (art. vi, sec. 6) 321.
Governor may suspend collection of fines and forfeitures and grant reprieve not exceeding 60 days, except in cases of impeachment (art. v, sec. 13) 306.
Legislature not to pass local or special laws relating to (art. iv, sec. 20) 278.
No person to be twice put in jeopardy for same offense (art. i, sec. 8) 237.
Persons convicted of certain, to be excluded from juries unless restored to civil rights (art. iv, sec. 27) 285.
Treason defined (art. i, sec. 19) 248.
Cruel punishment not to be inflicted (art. i, sec. 6) 235.
Currency, only federal to circulate as money (art. viii, sec. 6) 343.
Deaf and dumb, institution for to be supported by the state (art. xiii, sec. 1) 365.
Debt, of county, town, city or corporation, state not to assume unless created to repel invasion, suppress insurrection, or for public defense (art. ix, sec. 4) 351.
No imprisonment for except in case of fraud, libel or slander (art. i, sec. 14) 243.
Debtors, reasonable amount of property may be exempted from execution (art. i, sec. 14) 243.
Deceased persons, estates of, district court has jurisdiction (art. vi, sec. 6) 321.
Decisions, of supreme court, concurrence of majority of justices necessary (art. vi, sec. 2) 317.
Of supreme court, not effective until opinions filed with clerk (art. xv, sec. 8) 376.
Of supreme court, judicial and laws to be free for publication (art. xv, sec. 8) 376.
Of supreme court, and statutes, legislature to provide for publication (art. xv, sec. 8) 376.
Declaration of rights (art. i, sec. 1) 230.
Deed, invalid, local or special law giving effect to, invalid (art. iv, sec. 20) 278.
Demand, against the state incurred when its liabilities exceed $300,000 shall be void (art. ix, sec. 3) 350.
Exceeding $300 exclusive of interest, district court has jurisdiction (art. vi, sec. 6) 321.
Exceeding $300 exclusive of interest, not to be tried in justice's court (art. vi, sec. 8) 323.
Exceeding $300 exclusive of interest, supreme court has appellate jurisdiction (art. vi, sec. 4) 319.

Departments of government, legislative, executive, judicial (art. iii, sec. 1) 258.
Detainer, unlawful, district court has jurisdiction (art. vi, sec. 6) 321.
District court, is court of record (art. vi, sec. 8) 323.
Jurisdiction of (art. vi, sec. 6) 321.
May issue writs of mandamus, injunction, quo warranto, certiorari, habeas corpus and other writs (art. vi, sec. 6) 321.
Or judge, supreme court may make writ of habeas corpus returnable before (art. vi, sec. 4) 319.
Times of holding to be as fixed by law and to be at county-seat, but legislature may divide county into two or more districts and designate place of holding court (art. vi, sec. 7) 322.
District courts, cases in territorial probate courts transferred to (art. xvii, sec. 23) 407.
Terms and salaries of judges first term under constitution (art. xvii, secs. 15, 16) 399, 400.
District judge, compensation to be fixed by law, when and how payable, not to be increased or diminished during term (art. vi, sec. 15) 330.
For reasonable cause may be removed by two-thirds vote of members elected to each branch of the legislature (art. vii, sec. 3) 336.
Governor to fill vacancy in office of (art. xvii, sec. 22) 406.
Ineligible to any office except judicial during term for which elected (art. vi, sec. 11) 326.
May issue writs of mandamus, injunction, quo warranto, certiorari, habeas corpus and other writs (art. vi, sec. 6) 321.
Salary of may be changed subject to constitutional provisions (art. xvii, sec. 17) 401.
Vacancy in office, how filled (art. xvii, sec. 22) 406.
District judges, how elected, terms of office (art. vi, sec. 5) 320.
Legislature may increase or diminish number, change not to take effect except in case of vacancy or expiration of term (art. vi, sec. 5) 320.
Districts, judicial, legislature may provide for and number of judges, change not to take effect except in case of vacancy or expiration of term (art. vi, sec. 5) 320.
Ditch companies, rates may be regulated by the legislature (art. iv, sec. 20) 278.
Divorce, local or special laws for granting are invalid (art. iv, sec. 20) 278.
Duel, person who has fought or sent challenge since adoption of constitution not eligible to office (art. xv, sec. 3) 371.
Due process of law, person shall not be deprived of life, liberty or property without (art. i, sec. 8) 237.
Dues from corporations may be secured, but corporators not individually liable for debts (art. viii, sec. 3) 340.
Education, amendment proposed to constitution, art. xi, sec. 3, passed at legislative sessions 1909, 1911, subject to ratification by the people at general election 1912, provides for the investment of school moneys in bonds of any county in the state 355.
Certain females eligible as superintendent and trustee of schools (art. xv, sec. 3) 371.
Estates that escheat to the state, fines collected under penal laws and property bequeathed to state pledged to educational purposes and interest thereon to be proportioned among counties as legislature may provide; as amended 1889 (art. xi, sec. 3) 355.
Lands granted by United States to state and proceeds dedicated to educational purposes (art. xi, sec. 3) 355.
Proceeds from land granted state by act of Congress of July 2, 1862, for college for benefit of agriculture, mechanic arts and military tactics to be invested by board of regents of university in separate fund to be irreducible (art. xi, sec. 8) 360.
Sectarian instruction not to be imparted in any school or university under the constitution (art. xi, sec. 9) 361.
Special tax to be provided by legislature; as amended 1889 (art. xi, sec. 6) 358.
Educational association or company, state may loan, donate or subscribe to (art. viii, sec. 9) 346.
Educational corporation, may be exempted from taxation (art. viii, sec. 2) 339.
Election, and terms of office of district judges (art. vi, sec. 5) 320.
For ratification of state constitution, canvass of returns 419.
For ratification of state constitution, ordinance, provisions 414-427.
For ratification of state constitution, qualification of electors 415, 416.
For state officers, if tie legislature by joint vote to elect (art. v, sec. 4) 297.
General, to be held on Tuesday next after first Monday in November (art. xv, sec. 5) 373.
Of assemblymen, when to be held (art. iv, sec. 3) 261.
Of county and township officers, local or special law regulating, invalid (art. iv, sec. 20) 278.
Of governor (art. v, sec. 2) 295.
Of senators, when to be had (art. iv, sec. 4) 262.
Of superintendent of public instruction, legislature to make provision for (art. xi, sec. 1) 353.
Of United States senator, when and how to be had, when governor may convene legislature in joint session for (art. iv, sec. 34) 292.
Plurality of votes to constitute choice where not otherwise provided by constitution (art. xv, sec. 14) 382.

Election—continued.
Soldiers and sailors not to pay poll tax (art. ii, sec. 3) 252.
Votes of soldiers and sailors to apply to county and township of residence (art. ii, sec. 3) 252.
Elections, by people to be by ballot and by legislature viva voce (art. ii, sec. 5) 254.
For state officers, time, terms, eligibility (art. v, sec. 19) 312.
Laws may be passed regulating and prohibiting undue influence and bribery (art. iv, sec. 27) 285.
Local or special law regulating election of county or township officers prohibited (art. iv, sec. 20) 278.
Provision to be made by law for manner of holding for soldiers and sailors and making returns (art. ii, sec. 3) 252.
Provision to be made by law regarding registration, right of suffrage, purity and manner of holding and prescribing rules or oath (art. ii, sec. 6) 255.
Returns for state officers, how canvassed by justices of supreme court (art. v. sec. 4) 297.
Right of suffrage to be enjoyed by persons in military or naval service (art. ii, sec. 3) 252.
Election day, elector not to be arrested on, under civil process (art. ii, sec. 4) 253.
Elector, amendment proposed to sec. 1, art. ii, of the constitution, passed at the legislative session 1911, subject to approval by the legislature of 1913 and to ratification later by the people, provides that there shall be no denial of elective franchise on account of sex 250.
Convicted of certain crimes to be excluded from jury unless restored to civil rights (art. iv, sec. 27) 285.
Not to be arrested under civil process on election day (art. ii, sec. 4) 253.
Only, eligible to office, except certain females eligible for superintendent of public school and school trustee (art xv, sec. 3) 371.
Person not, excluded from jury (art. iv, sec. 27) 285.
Person who has fought duel or sent challenge since adoption of constitution not qualified (art. xv, sec. 3) 371.
Qualifications of, legislature may prescribe further rules or oaths (art. ii, sec. 6) 255.
Qualifications of prescribed; as amended 1880 (art. ii, sec. 1) 250.
Residence required to constitute (art. ii, secs. 1, 2) 250, 251.
Electors, majority of highest number voting will carry call for constitutional convention (art. xvi, sec. 2) 384.
Majority of qualified voting thereon may ratify amendment to constitution (art. xvi, sec. 1) 383.
Qualifications of for election for ratification of state constitution 415, 416.
Referendum, if majority signify approval of law it shall not be annulled except by direct vote of the people, or if they disapprove it shall be void (art. xix, sec. 2) 413.
Electors—continued.
Ten per cent of may have law passed by legislature submitted for approval or disapproval at next ensuing election (art. xix, sec. 1) 412.
Eleemosynary purposes, perpetuities allowed for only (art. xv, sec. 4) 372.
Eligibility to office (art. xv. sec. 3) 371.
Justice of supreme court and district judge ineligible to any office other than to judicial during term for which elected (art. vi, sec. 11) 326.
No person holding lucrative office under government of the United States eligible to civil office of profit except certain postmasters and commissioners of deeds (art. iv, sec. 9) 267.
Embezzlement of public funds, conviction of disqualifies from holding public office (art. iv, sec. 10) 268.
Eminent domain, property shall not be taken for public use without just compensation having been first made or secured, exception (art. i, sec. 8) 237.
Right of way not to be appropriated to corporation until compensation is made or secured (art. viii, sec. 5) 344.
Employee of legislature, compensation not to be increased or decreased during session (art. iv, sec. 28) 286.
Enacting clause of statutes (art. iv, sec. 23) 281.
Entry, forcible, district court has jurisdiction (art. vi, sec. 6) 321.
Enumeration of inhabitants of state, under direction of legislature, with census taken under direction of Congress as basis of representation in legislature (art. xv, sec. 13) 381.
Enumeration of rights, not to impair others retained by the people (art. i, sec. 20) 249.
Equity, district court has jurisdiction (art. vi, sec. 6) 321.
Equity action, supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
Equity and law, may be administered in same action (art. vi, sec. 14) 329.
Escheat, estates that escheat to the state pledged to educational purposes (art. xi, sec. 3) 355.
Estates, of deceased persons, cases in territorial probate court transferred to state district courts (art. xvii, sec. 23) 407.
Of deceased persons, district court has jurisdiction (art vi, sec. 6) 321.
Of insane persons, district court has jurisdiction (art. vi, sec. 6) 321.
Of minors, district court has jurisdiction (art. vi, sec. 6) 321.
That escheat to state pledged to educational purposes (art. xi, sec. 3) 355.
Evidence, accused not to be required to be witness against himself (art. i, sec. 8) 237.
In action for libel truth may be given (art. i, sec. 9) 238.
Two witnesses or confession required for conviction of treason (art. i, sec. 19) 248.
Witness shall not be rendered incompetent on account of religious belief (art. i, sec. 4) 233.

Evidence—continued.
Witnesses not to be unreasonably detained (art. i, sec. 6) 235.
Examiners, board of, how constituted and powers (art. v, sec. 21) 314.
Excessive bail, not to be required (art. i, sec. 6) 235.
Excessive fines, not to be imposed (art. i, sec. 6) 235.
Execution, reasonable amount of debtor's property to be exempt (art. i, sec. 14) 243.
Executive business, governor to transact with civil and military forces and may require information (art. v, sec. 6) 299.
Executive department, person in not to exercise legislative or judicial functions (art. iii, sec. 1) 258.
Secretary of state to keep record of official acts (art. v, sec. 20) 313.
Executive power of state, supreme vested in governor (art. v, sec. 1) 294.
Exemption from execution, reasonable amount of property of debtor to be (art. i, sec. 14) 243.
Exemption of homestead from forced sale (art. iv, sec. 30) 288.
Ex post facto law, or law impairing obligation of contracts, not to be passed (art. i, sec. 15) 244.
Expulsion of member of legislature by two-thirds vote (art. iv, sec. 6) 264.
Federal currency only to circulate as money (art. viii, sec. 6) 343.
Fees, and compensation of county and township officers, legislature may regulate (art. iv, sec. 20) 278.
Not to be received to own use by judicial officer except justice of the peace or city recorder (art. vi, sec. 10) 325.
Of officers may be regulated by legislature (art. iv, sec. 20) 278.
Fees and perquisites, certain state officers and members of legislature prohibited from receiving (art. xvii, sec. 5) 389.
Felony, person convicted of, not to be an elector unless restored to civil rights (art. ii, sec. 1) 250.
Felony cases, supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
Females, certain eligible to office of superintendent of public schools and school trustee (art. xv, sec. 3) 371.
Fine, collection of may be suspended by governor not exceeding 60 days except in cases of impeachment (art. v, sec. 13) 306.
May be remitted by board of pardons, of which the governor shall be one (art. v, sec. 14) 307.
Militia, no person to be imprisoned for in time of peace (art. i, sec. 14) 243.
Municipal, district court has jurisdiction of cases involving legality (art. vi, sec. 6) 321.
Municipal, in action involving legality supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
Fines, collected under penal laws pledged to educational purposes (art. xi, sec. 3) 355.
Excessive, not to be imposed (art. i, sec. 6) 235.
Fire, in case of, property may be taken for public use, compensation to be made afterward (art. i, sec. 8) 237.
Fiscal year, to commence on first day of January (art. ix, sec. 1) 348.
Flume companies, rates of may be regulated by the legislature (art. iv, sec. 20) 278.
Forcible entry, action for, district court has jurisdiction (art. vi, sec. 6) 321.
Foreigners, who are bona fide residents have same property rights as native-born citizens (art. 1, sec. 16) 245.
Forfeitures, may be remitted by board of pardons, of which the governor shall be one (art. v, sec. 14) 307.
Forgery, conviction of excludes from jury unless restored to civil rights (art. iv, sec. 27) 285.
Franchise, qualifications for exercise of; as amended 1880 (art. ii, sec. 1) 250.
Fraud, for debt contracted by and in case of libel and slander there may be imprisonment (art. i, sec. 14) 243.
Freight rates, may be regulated by the legislature (art. iv, sec. 20) 278.
General election, to be held on Tuesday next after first Monday in November (art. xv, sec. 5) 373.
Government, county and township, legislature to establish uniform (art. iv, sec. 25) 283.
Governor, failure to act upon bill, when becomes law (art. iv, sec. 35) 293.
Has power to call out militia to execute laws, suppress insurrection or repel invasion (art. xii, sec. 2) 364.
How elected, term of office (art. v, sec. 2) 295.
In case of removal or inability lieutenant-governor to act (art. v, sec. 18) 311.
In case of vacancy in offices of governor and lieutenant-governor president pro tempore of senate to act (art. v, sec. 17) 310.
In time of war with consent of legislature may continue commander-in-chief out of state (art. v, sec. 18) 311.
Liable to impeachment for misdemeanor or malfeasance (art. vii, sec. 2) 335.
May adjourn legislature in case of disagreement of both houses (art. v, sec. 11) 304.
May call extraordinary session of the legislature and specify business to be transacted (art. v, sec. 9) 302.
May convoke legislature in joint session for election of United States senator (art. iv, sec. 34) 292.
May convoke legislature in special session (art. iv, sec. 4) 260.
May suspend collection of fines and forfeitures and grant reprieves not exceeding 60 days except in cases of impeachment (art. v, sec. 13) 306.
May suspend execution on conviction for treason until next legislature, which may pardon, reprieve or direct execution of sentence (art. v, sec. 13) 306.
Member of board of pardons and necessary for remission of fines or forfeitures, commutation of punishments and granting of pardons (art. v, sec. 14) 307.

Governor—continued.
Member of board of state prison commissioners and board of examiners (art. v, sec. 21) 314.
Message and recommendations to the legislature (art. v, sec. 10) 303.
Not to hold office under United States government (art. v, sec. 12) 305.
Of territory authorized to issue proclamation for election for ratification of the constitution 414.
Qualifications of (art. v, sec. 3) 296.
Supreme power of state vested in as chief magistrate (art. v, sec. 1) 294.
To be commander-in-chief of military forces of state (art. v, sec. 5) 298.
To communicate to legislature every case of fine and forfeiture remitted, reprieve, pardon or commutation granted (art. v, sec. 13) 306.
To issue writ to fill vacancy in legislature (art. iv, sec. 12) 270.
To keep and use official great seal of the state (art. v, sec. 15) 308.
To keep office at seat of government (art. xv, sec. 12) 380.
To make appointment to fill vacancy of state officer or district judge (art. xvii, sec. 22) 406.
To see that laws are faithfully executed (art. v, sec. 7) 300.
To sign grants and commissions (art. v, sec. 16) 309.
To transact executive business with civil and military forces and may require information (art. v, sec. 6) 299.
Trial of impeachment, chief justice to preside over senate (art. vii, sec. 1) 334.
When may direct execution of sentence for treason (art. v, sec. 13) 306.
When powers and duties of devolve upon lieutenant-governor (art. v, sec. 18)311.
When to fill vacancy in office (art. v, sec. 8) 301; (art. xvii, sec. 12) 406.
Veto power of (art. iv, sec. 35) 293.
Grand jury, local or special law for summoning of impaneling or for compensation, invalid (art. iv, sec. 20) 278.
Presentment or indictment of, in prosecutions for capital or infamous crimes (art. i, sec. 8) 237.
Grants of land, to be signed by governor and secretary of state and under great seal (art. v, sec. 16) 309.
Great seal of state, to be attached to grants and commissions (art. v, sec. 16) 309.
Habeas corpus, supreme court empowered to issue writ (art. vi, sec. 4) 319.
Writ of, district court or judge may issue (art. vi, sec. 6) 321.
Writ of, justice of supreme court may issue to any part of the state returnable before himself, the supreme court or district court or judge (art. vi, sec. 4) 319.
Writ of shall not be suspended unless public safety require in case of rebellion or invasion (art. i, sec. 5) 234.
Happiness, right of pursuing and obtaining (art. i, sec. 1) 230.
High crime, conviction excludes from jury unless restored to civil rights (art. iv, sec. 27) 285.
Highways, local or special laws for vacating, invalid (art. iv, sec. 20) 278.
Homestead, not to be alienated without joint consent of husband and wife and to be exempt from forced sale, when (art. iv, sec. 30) 288.
Liable for purchase money, taxes, improvements or lien given by consent of husband and wife (art. iv, sec. 30) 288.
House of refuge, for juvenile offenders to be maintained by the state (art. xiii, sec. 2) 366.
Husband and wife, homestead not to be alienated without joint consent (art. iv, sec. 30) 288.
Idiots, not entitled to privileges of elector (art. ii, sec. 1) 250.
Impeachment, assembly shall have sole power of, concurrence of majority of all members necessary (art. vii, sec. 1) 334.
Governor, state and judicial officers, except justice of peace liable to for misdemeanor or malfeasance (art. vii, sec. 2) 335.
Judgment not to extend further than removal from office and disqualification to hold office (art. vii, sec. 2) 335.
Of governor or lieutenant-governor, trial, chief justice to preside over senate (art. vii, sec. 1) 334.
Party whether convicted or acquitted liable to indictment and punishment (art. vii, sec. 2) 335.
Persons convicted under not to be pardoned (art. v, sec. 14) 307.
Trial by senate, oath of senators, concurrence of two-thirds elected necessary (art. vii, sec. 1) 334.
Trial without presentment or indictment (art. i, sec. 8) 237.
Impost, district court has jurisdiction of cases involving legality (art. vi, sec. 6) 321.
Imprisonment, for debt prohibited except in cases of fraud, libel or slander (art. i, sec. 14) 243.
Not to be imposed for militia fine in time of peace (art. i, sec. 14) 243.
When person may be imprisoned by either house of legislature (art. iv, sec. 7) 265.
Indebtedness, of territory, state became liable for (art. xvii, sec. 7) 391.
Or liability of corporation or person to state, county or municipality, local or special law for release of, invalid (art. iv, sec. 20) 278.
Indictment, may be presented against officer impeached (art. vii, sec. 2) 335.
Or presentment required in prosecutions for capital or infamous crime (art. i, sec. 8) 237.
Indigents, counties to provide for as may be prescribed by law (art. xiii, sec. 3) 367.
Information, amendment proposed to art. i, sec. 8, of the constitution, passed at legislative sessions 1909, 1911, subject to ratification by the people at general election 1912, provides that persons accused of crime may be prosecuted by information as well as by indictment 237.

Initiative and referendum, proposed amendment to constitution by addition to sec. 3, art. xix, passed at legislative sessions 1909, 1911, subject to ratification by the people at general election of 1912 413.
Injunction, writ of, district court or judge may issue (art. vi, sec. 6) 321.
Insane persons, estates of, district court has jurisdiction (art. vi, sec. 6) 321.
Institution for to be maintained by the state (art. xiii, sec. 1) 365.
Not entitled to privilege of elector (art. ii, sec. 1) 250.
Institutions, state, for insane, deaf, dumb and blind to be fostered and supported by the state (art. xiii, sec. 1) 365.
Instruction, sectarian, not to be imparted at any school or university established under the constitution (art. xi, sec. 9) 361.
Instructions, judge shall not charge jury in respect to matters of fact, but may state testimony and declare the law (art. vi, sec. 12) 327.
Instrument, invalid, local or special law giving effect to, invalid (art. iv, sec. 20) 278.
Insurrection, governor has power to call out militia to suppress (art. xii, sec. 2) 364.
No limit to debt which state may incur to suppress (art. ix, sec. 3) 350.
Intellectual improvement, to be encouraged by legislature (art. xi, sec. 1) 353.
Invalid deed, local or special law giving effect to, invalid (art. iv, sec. 20) 278.
Invalid instrument, local or special law giving effect to, invalid (art. iv, sec. 20) 278.
Invalid will, local or special law giving effect to, invalid; as amended 1889 (art. iv, sec. 20) 278.
Invasion, governor may call out militia to repel (art. xii, sec. 2) 364.
In case of writ of habeas corpus may be suspended if public safety requires (art. i, sec. 5) 234.
No limit to debt which state may incur to repel (art. ix, sec. 3) 350.
Involuntary servitude, not to be tolerated except as punishment for crime (art. i, sec. 17) 246.
Prohibited except for crime 228.
Jeopardy, no person to be twice put in for same offense (art. i, sec. 8) 237.
Judge, before removal from office by legislature shall have opportunity to be heard in person or by counsel (art. vii, sec. 3) 336.
Except justice of the peace or city recorder, not to receive fees to his own use (art. vi, sec. 10) 325.
For reasonable cause may be removed on two-thirds vote of members elected to each branch of the legislature (art. vii, sec. 3) 336.
Legislature shall not grant leave of absence to, absence from state for 90 days vacates office (art. vi, sec. 17) 332.
Liable to impeachment for misdemeanor or malfeasance (art. vii, sec. 2) 335.
Not to charge jury in respect to matters of fact, but may state testimony and declare the law (art. vi, sec. 12) 327.
To be served with complaint on proceedings before legislature for removal from office (art. vii, sec. 3) 336.
Judge's compensation, court fee to be advanced to clerk and applied on (art. vi, sec. 16) 331.
Judgment, of supreme court not effective until opinion filed with clerk (art. xv, sec. 8) 376.
On impeachment not to extend further than removal from office and disqualification to hold office (art. vii, sec. 2) 335.
Judicial department, person in not to exercise legislative or executive functions (art. iii, sec. 1) 258.
Judicial districts, legislature may provide for and number of judges, change not to take effect except in case of vacancy or expiration of term (art. vi, sec. 5) 320.
Judicial officer, except justice of the peace and city recorder not to receive fees to own use (art. vi, sec. 10) 325.
For reasonable cause may be removed on two-thirds vote of members elected to each branch of the legislature (art. vii, sec. 3) 336.
If removed by legislature member not eligible to position (art. vii, sec. 3) 336.
Legislature shall not grant leave of absence to, absence from state for 90 days vacates office (art. vii, sec. 17) 332.
Liable for impeachment for misdemeanor or malfeasance (art. vii, sec. 2) 335.
Not superseded until election of successor (art. vi, sec. 18) 333.
Judicial power, of state vested in supreme court, district courts, justices of the peace and municipal courts (art vi, sec. 1) 316.
Juries, local or special laws for summoning or impaneling not to be passed (art. iv, sec. 20) 278.
Persons convicted of certain crimes to be excluded from unless restored to civil rights (art. iv, sec. 27) 285.
Jurisdiction, district court has final appellate in action appealed from justice's court (art. vi, sec. 6) 321.
Duties of justice of the peace and constable, local or special laws, invalid (art. iv, sec. 20) 278.
In municipal court to be fixed by law so as not to conflict with courts of record (art. vi, sec. 9) 324.
Of district court (art. vi, sec. 6) 321.
Of justices of the peace (art. vi, sec. 8) 323.
Of supreme court defined (art. vi, sec. 4) 319.
Jury, local or special law for summoning or impaneling or for compensation, invalid (art. iv, sec. 20) 278.
May exonerate libel if true and published with good motives (art. i, sec. 9) 238.
Persons not electors or convicted of certain crimes to be excluded from unless restored to civil rights (art. iv, sec. 27) 285.
Three-fourths in civil cases may render verdict, but legislature by two-thirds vote may require unanimous (art. i, sec. 3) 232.
Trial by, secured, but may be waived in civil cases (art. i, sec. 3) 232.
When may acquit in action for libel (art. i, sec. 9) 238.

Justice of supreme court, vacancy in office of, how filled (art. xvii, sec. 22) 406.
Compensation to be fixed by law, when and how payable, not to be increased or diminished during term (art. vi, sec. 15) 330.
For reasonable cause may be removed by two-thirds vote of members elected to each branch of the legislature (art. vii, sec. 3) 336.
Governor to fill vacancy in office of (art. xvii, sec. 22) 406.
How elected, to hold for six years (art. vi, sec. 3) 318.
Ineligible to any office except judicial during term for which elected (art. vi, sec. 11) 326.
Legislature shall not grant leave of absence to, absence from state for 90 days vacates office (art. vi, sec. 17) 332.
May issue writ of habeas corpus to any part of the state returnable before himself, supreme court or district court or judge (art. vi, sec. 4) 319.
With shortest term is chief justice (art. vi, sec. 3) 318.
Justices of supreme court, legislature may provide for two additional (art. vi, sec. 2) 317.
To canvass returns for state officers (art. v, sec. 4) 297.
Justice of the peace, legislature to prescribe method of appeal from justice's court (art. vi, sec. 8) 323.
Local or special laws relating to jurisdiction and duties, invalid (art. iv, sec. 20) 278.
Without jurisdiction if demand exceeds $300 exclusive of interest (art. vi, sec. 8) 323.
Without jurisdiction if title to real estate, mining claim or boundaries to land involved, or if case conflicts with jurisdiction of court of record (art. vi, sec. 8) 323.
Justices of the peace, legislature to determine number and powers of, limitation of jurisdiction (art. vi, sec. 8) 323.
Justice's court, has such criminal jurisdiction as may be prescribed by law (art. vi, sec. 8) 323.
In cases appealed from, district court has final appellate jurisdiction (art. vi, sec. 6) 321.
Jurisdiction of (art. vi, sec. 8) 323.
Legislature may prescribe method of appeal from (art. vi, sec. 8) 323.
Juvenile offenders, house of refuge for to be maintained by state (art. xiii, sec. 2) 366.
Landlord and tenant, where relation of exists legislature may confer power on justice's courts in actions for possession or where possession has been unlawfully obtained or withheld (art. vi, sec. 8) 323.
Lands, granted by United States to state and proceeds dedicated to educational purposes (art. xi, sec. 3) 355.
Grants of to be signed by governor and secretary of state and under great seal (art. v, sec. 16) 309.
Lands—continued.
Of nonresident citizen of United States not to be taxed higher than land of resident 228.
Lands and tenements, legislature may confer power on justice's court in action for possession of where relation of landlord and tenant exists or where possession has been unlawfully obtained or withheld (art. vi, sec. 8) 323.
Larceny, conviction of excludes from jury unless restored to civil rights (art. iv, sec. 27) 285.
Law, due process of, person shall not be deprived of life, liberty or property without (art. i, sec. 8) 237.
Enacted by legislature to embrace but one subject, to be expressed in title (art. iv, sec. 17) 275.
Impairing obligation of contracts or ex post facto not to be passed (art. 1, sec. 15) 244.
Judge may declare to jury (art. vi, sec. 12) 327.
Legislature to enact regarding registration, purity and conduct of elections (art. ii, sec. 6) 255.
Not to be amended by reference to title only, but section amended to be reenacted at length (art. iv, sec. 17) 275.
Not to be enacted except by bill (art. iv, sec. 23) 281.
To be enacted regulating manner of holding elections for soldiers and sailors and making returns (art. ii, sec. 3) 252.
When bill becomes without action of governor (art. iv, sec. 35) 293.
Laws, and judicial decisions to be free for publication (art. xv, sec. 8) 376.
Governor to have faithfully executed (art. v, sec. 7) 300.
Local or special in certain enumerated cases are invalid (art. iv, sec. 20) 278.
Of Territory of Nevada remain in force in state (art. xvii, sec. 2) 386.
To exclude from jury persons not qualified electors or who have been convicted of certain crimes unless restored to civil rights (art. iv, sec. 27) 285.
When to be general and of uniform operation throughout the state (art. iv, sec. 21) 279.
Law and equity, may be administered in same action (art. vi, sec. 14) 329.
Leave of absence, not to be granted by legislature to judicial officer (art. vi, sec. 17) 332.
Legislative authority of state, how vested, definition of legislature (art. iv, sec. 1) 259.
Legislative bill, when becomes law without governor's approval (art. iv, sec. 35) 293.
Legislative department, person in, not to exercise executive or judicial functions (art. iii, sec. 1) 258.
Secretary of state to keep record of official acts of (art. v, sec. 30) 313.
Legislative sessions, to be held at seat of government (art. iv, sec. 1) 259.
Legislature, act of to embrace but one subject, expressed in title (art. iv, sec. 17) 275.

Legislature—continued.
Aggregate number of members of both branches not to exceed seventy-five (art. xv, sec. 6) 374.
Bill may originate or be amended in either house (art. iv, sec. 16) 274.
Bill to embrace but one subject, expressed in title (art. iv, sec. 17) 275.
Board of examiners must first act upon certain claims against state (art. v, sec. 21) 314.
By joint vote to elect state officer if tie at general election (art. v, sec. 4) 297.
By two-thirds vote may require unanimous verdict in civil cases (art. i, sec. 3) 232.
By two-thirds vote of both houses may recommend electors to vote for constitutional convention (art. xvi. sec. 2)384.
Compensation of members to be fixed by law, not to be increased during term (art. iv, sec. 33) 291.
Doors of each house to be kept open, except senate in executive session (art. iv, sec. 15) 273.
Each house judge of qualifications of its members, may choose officers and punish or expel members (art. iv, sec. 6) 264.
Each house to keep journal of proceedings, yeas and nays to be entered at desire of three members (art. iv, sec. 14) 272.
Either house may punish or imprison person not member (art. iv, sec. 7) 265.
Elections by to be viva voce (art. ii, sec. 5) 254.
Every bill to be read on three several days, exception, reading by sections on final passage not to be dispensed with, vote by yeas and nays to be entered (art. iv, sec. 18) 276.
Governor may adjourn in case of disagreement of two houses (art. v, sec. 11) 304.
Governor may call special session and specify business to be transacted (art. v, sec. 9) 302.
Governor may convoke in special session (art. iv, sec. 2) 260.
Governor to communicate to, every case of fine and forfeiture remitted, or reprieve, pardon or commutation granted (art. v, sec. 13) 306.
Has power to establish normal and different grades of schools from primary to university (art. xi, sec. 5) 357.
How may pass bill over veto of governor (art. iv, sec. 35) 293.
Majority of members elected to each house necessary to passage of bill, how signed (art. iv, sec. 18) 276.
May agree to proposed amendments to the constitution and submit same to the people (art. xvi, sec. 1) 383.
May confer on justice's court jurisdiction concurrent with district court in certain cases relating to mechanics' liens, and for possession of lands and tenements where relation of landlord and tenant exists or possession unlawfully obtained or withheld (art. vi, sec. 8) 323.
Legislature—continued.
May consent in time of war that governor out of state continue as commander-in-chief (art. v, sec. 18) 311.
May contract debts, purposes to be specified, not to exceed $300,000, exceptions, provision for payment required (art. ix, sec. 3) 350.
May establish municipal courts (art. vi, sec. 1) 316.
May increase or diminish number of judicial districts and judges, change not to take effect except in case of vacancy or expiration of term (art. vi, sec. 5) 320.
May increase or diminish salaries of officers fixed by constitution, but change not to take effect during term (art. xv, sec. 9) 377.
May prescribe regarding appeals from justice's courts (art. vi, sec. 8) 323.
May provide for two additional justices of supreme court (art. vi, sec. 2) 317.
May regulate fees of county or township officers (art. iv, sec. 20) 278.
May regulate rates of railroads, toll roads, ditch, flume and tunnel companies (art. iv, sec. 20) 278.
Members of exempt from arrest under civil process during session and for 15 days before (art. iv, sec. 11) 269.
Members of to be apportioned according to population (art. i, sec. 13) 242.
Message and recommendations of governor to (art. v, sec. 10) 303.
Neither house without consent of other to adjourn for more than three days, nor to any other place (art. iv, sec. 15) 273.
No officer or employee to receive compensation except as fixed prior to election or appointment (art. iv, sec. 28) 286.
Not to amend law by reference to title only, but section amended to be reenacted at length (art. iv, sec. 17) 275.
Not to create tenure of office for more than four years unless provided by constitution (art. xv, sec. 11) 379.
Not to grant leave of absence to judicial officer (art. vi, sec. 17) 332.
Not to pass local or special laws for assessment or collection of taxes (art. iv, sec. 20) 278.
Not to pass local or special laws in certain enumerated cases (art. iv, sec. 20) 278.
Not to pass local or special laws refunding money paid into state or county treasury (art. iv, sec. 20) 278.
Not to pass local or special laws regulating county or township business (art. iv, sec. 20) 278.
Not to pass local or special laws regulating election of county or township officers (art. iv, sec. 20) 278.
Not to pass local or special laws relating to crimes and punishments (art. iv, sec. 20) 278.
Not to pass local or special laws relating to summoning of grand or petit juries (art. iv, sec. 20) 278.
Not to pass upon claim against state unless first acted upon by board of examiners, except for salary or fixed compensation of officer (art. v, sec. 21) 314.

Legislature—continued.
Payment of expenses of members for postage, express charges, newspapers and stationery (art. iv, sec. 33) 291.
People have right to instruct members of (art. i, sec. 10) 239.
Regular session not to exceed 60 days, special session 20 days (art. iv, sec. 29) 287.
Removing judicial officer, member of not eligible to position (art. vii, sec. 3) 336.
Salary of officer or employee not to be increased or diminished during session (art. iv, sec. 28) 286.
Secretary of state to lay record of official acts before (art. v, sec. 20) 313.
Shall promote intellectual, literary, scientific, mining, mechanical, agricultural and moral improvement (art. xi, sec. 1) 353.
Sessions to be biennial, commencing third Monday in January; as amended 1889 (art. iv, sec. 2) 260; (art. xvii, sec. 12) 396.
Terms of senators to be four years and assemblymen two years (art. xvii, sec. 10) 394.
To determine number and powers of justices of the peace (art. vi, sec. 8) 323.
To enact law regarding elections, registration, right of suffrage, purity and manner of holding elections and prescribing rules or oath (art. ii, sec. 6) 255.
To establish uniform system of county and township government (art. iv, sec. 25) 283.
To pass no special act relating to corporate powers except for municipal purposes, may alter or repeal general laws relating to corporations (art. viii, sec. 1) 338.
To prescribe powers and duties of municipal court so as not to conflict with courts of record (art. vi, sec. 9) 324.
To provide a state university which shall embrace departments of agriculture, mechanic arts and mining (art. xi, sec. 4) 356.
To provide equal assessment and taxation except mines, the proceeds of which shall be assessed and taxed, and when mines patented shall be assessed at not less than $500, unless $100 annual labor performed, exemption for municipal, educational, literary, scientific or charitable purposes; as amended 1906 (art. x, sec. 1) 352.
To provide for annual tax to defray expenses of state for fiscal year, or ensuing two years, and deficiencies (art. ix, sec. 2) 349.
To provide for apportionment among the several counties of money pledged to school purposes (art. xi, sec. 3) 355.
To provide for board of regents of the university and define their duties (art. xi, sec. 7) 359.
To provide for common schools at least six months annually in each district and pass laws requiring attendance (art. xi, sec. 2) 354.
Legislature—continued.
To provide for election of board of county commissioners in each county and duties (art. iv, sec. 26) 284.
To provide for election of superintendent of public instruction (art. xi, sec. 1) 353.
To provide for investment of moneys pledged to educational purposes in United States bonds or bonds of this or other states; as amended 1889 (art. xi, sec. 3) 355.
To provide for organizing state militia, encouragement of volunteer corps and keeping of public arms (art. xii, sec. 1) 363.
To provide for organization of cities and towns by general laws and restrict their powers except for procuring water (art. viii, sec. 8) 345.
To provide for poll tax to be expended on public roads; as amended 1910 (art. ii, sec. 7) 256.
To provide for publication of statutes and decisions of supreme court (art. xv, sec. 8) 376.
To provide special tax for maintenance of university and schools (art. xi, sec. 6) 358.
To provide that State of Nevada shall maintain fund derived from proceeds of land granted by Congress under act of July 2, 1862, for college for benefit of agriculture, mechanic arts and military tactics (art. xi, sec. 8) 360.
To regulate by law manner of holding elections for soldiers and sailors and making returns (art. ii, sec. 3) 252.
Vacancy in, governor to issue writ of election to fill (art. iv, sec. 12) 270.
What census to serve as basis of representation (art. xv, sec. 13) 381.
When and how to elect United States senator (art. iv, sec. 34) 292.
When may be convoked by governor in joint session for election of United States senator (art. iv, sec. 34) 292.
When may pardon, reprieve, or direct execution of sentence for treason (art. v, sec. 13) 306.
Liability, or indebtedness of corporation or person to state, county or municipality, local or special law for release of, invalid (art. iv, sec. 20) 278.
Libel, if true and made with good motives jury may exonerate (art. i, sec. 9) 238.
Liberty, of speech and press, law not to be passed to abridge (art. i, sec. 9) 238.
Right of enjoying and defending (art. i, sec. 1) 230.
Licentiousness, acts of not to be excused by religious profession or worship (art. i, sec. 4) 233.
Lien, homestead may be liable for improvements or when lien given by consent of husband and wife (art. iv, sec. 30) 288.
Mechanic's, legislature may confer power on justice's court to enforce in certain cases (art. vi, sec. 8) 323.
Lieutenant-governor, as president of senate to receive $2 per diem additional (art. iv, sec. 33) 291.

Lieutenant-governor—continued.
Eligibility, election, term, duties (art. v, sec. 17) 310.
To be president of senate, has casting vote (art. v, sec. 17) 310.
To act in case of inability or removal of governor (art. v, sec. 18) 311.
Trial of impeachment, chief justice to preside over senate (art. vii, sec. 1)334.
When powers and duties of governor devolve upon (art. v, sec. 18) 311.
Life, right of enjoying and defending (art. i, sec. 1) 230.
Literary improvement, to be encouraged by legislature (art. xi, sec. 1) 353.
Local or special laws, in certain enumerated cases are invalid (art. iv, sec. 20) 278.
Lottery, and sale of lottery tickets prohibited (art. iv, sec. 24) 282.
Malfeasance in office, governor, state or judicial officer liable for (art. vii, sec. 2)335.
Mandamus, supreme court empowered to issue writ (art. vi, sec. 4) 319.
Writ of, district court or judge may issue (art. vi, sec. 6) 321.
Marriage, separate property of wife defined (art. iv, sec. 31) 289.
Mechanic arts, to be a department of the state university (art. xi, sec. 4) 356.
Mechanical improvement, to be encouraged by the legislature (art. xi, sec. 1) 353.
Mechanic's lien, legislature may confer power on justice's court to enforce in certain cases (art. vi, sec. 8) 323.
Members of legislature, compensation to be fixed by law, not to be increased during term (art. iv, sec. 33) 291.
May be punished or expelled (art. iv, sec. 6) 264.
Payment of expenses for postage, express charges, newspapers and stationery (art. iv, sec. 33) 291.
Message, of governor to legislature (art v, sec. 10) 303.
Military, subordinate to civil power (art. i, sec. 11) 240.
Military fine, no person to be imprisoned in time of peace (art. i, sec. 14) 243.
Military forces of state, governor may continue as commander-in-chief out of state in time of war (art. v, sec. 18)311.
Governor to be commander-in-chief (art. v, sec. 5) 298.
Military officers, governor to transact executive business with and may require information (art. v, sec. 6) 299.
Military service, persons in to enjoy right of suffrage (art ii, sec. 3) 252.
Militia, legislature to provide for organizing (art. xii, sec. 1) 363.
Trial without presentment or indictment (art. i, sec. 8) 237.
Mines, district court has jurisdiction in cases involving title or possession (art. vi, sec. 6) 321.
In actions involving title or possession, supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
Patented and unpatented, how to be assessed (art. x, sec. 1) 352.
Mining, to be a department of the state university (art. xi, sec. 4) 356.
Mining claims, district court has jurisdiction in cases involving title or possession (art. vi, sec. 6) 321.
Trial of title to not within jurisdiction of justice's court (art. vi, sec. 8) 323.
Mining improvement, to be encouraged by the legislature (art. xi, sec. 1) 353.
Minors, estates of, district court has jurisdiction (art. vi, sec. 6) 321.
Local or special law for sale of real estate belonging to, invalid (art. iv, sec. 20) 278.
Money, banknotes not to circulate as, except federal currency (art. viii, sec. 6) 343.
Not to be drawn from state treasury except under appropriation (art. iv, sec. 19) 277.
Public, accurate statement of receipts and expenditures to be published (art. iv, sec. 19) 277.
Moral improvement, to be encouraged by the legislature (art. xi, sec. 1) 353.
Mortgage lien on homestead may be given by joint consent of husband and wife (art. iv, sec. 30) 288.
Municipal corporation, shall not become stockholder in or loan to any company, corporation or association, except railroad company (art. viii, sec. 10) 347.
May be formed under special act (art. viii, sec. 1) 338.
Municipal courts, legislature may establish (art. v, sec. 21) 316.
Powers and duties of to be fixed by law so as not to conflict with courts of record (art. vi, sec. 9) 324.
Municipal fine, district court has jurisdiction of cases involving legality (art. vi, sec. 6) 321.
Municipal funds, not to be used for sectarian purposes (art. xi, sec. 10) 362.
Municipality to make provisions for support of its own officers subject to regulations prescribed by law (art. xvii, sec. 21) 405.
Names of persons, special or local law for changing, invalid (art. iv, sec. 20) 278.
Naval service, persons in, to enjoy right of suffrage (art. ii, sec. 3) 252.
Normal schools, may be established by the legislature (art. xi, sec. 5) 357.
Notary public, amendment proposed to art. xv, sec. 3, of the constitution, passed at legislative sessions 1909, 1911, provides that certain females shall be eligible as 371.
Oath, constitutional, teachers in public schools required to take (art. xi, sec. 5) 357.
Legislature may prescribe further as test of electoral qualification (art. ii, sec. 6) 255.
Official (art. xv, sec. 2) 370.
Offenses, bail to be allowed except for capital and when proof evident or presumption great (art. i, sec. 7) 236.
Office, appointee to vacancy to hold until next election (art. v, sec. 8) 301.
Certain persons holding lucrative, under government of the United States not eligible to office of profit in this state (art. iv, sec. 9) 267.

Office—continued.
Eligibility for governor (art. v, sec. 3) 296.
If vacancy in, of governor and lieutenant-governor, president pro tempore of senate to act (art. v, sec. 17) 310.
Legislature not to create tenure for more than four years unless provided by constitution (art. xv, sec. 11) 379.
Not to be held by persons convicted of bribery and certain other crimes (art. iv, sec. 10) 268.
Of governor, secretary of state, state treasurer, state controller and clerk of supreme court to be kept at seat of government (art. xv, sec. 12) 380.
Person who has fought duel or sent challenge since adoption of constitution not eligible (art. xv, sec. 3) 371.
Tenure of not provided by constitution may be declared by law, otherwise held at pleasure of authority making appointment (art. xv, sec. 11) 379.
Term of certain state officers begins Tuesday after first Monday in January (art. xvii, sec. 8) 392.
Terms of senators and assemblymen (art. iv, sec. 3) 261; (art. xvii, sec. 10) 394.
Under United States not to be held by governor, exception (art. v, sec. 12) 305.
Vacancy in, when to be filled by governor (art. v, sec. 8) 301; (art. xvii, sec. 22) 406.
Who eligible (art. xv, sec. 3) 371.
Officer, impeached, whether convicted or acquitted liable to indictment and punishment (art. vii, sec. 2) 335.
Justice of supreme court and district judge ineligible to any office except judicial during term for which elected (art. vi, sec. 11) 326.
Of county, town, city or municipality, how to be supported (art. xvii, sec. 21) 405.
Of legislature, salary not to be increased or diminished during session (art. iv, sec. 28) 286.
State, governor to fill vacancy (art. xvii, sec. 22) 406.
State or judicial, liable to impeachment for misdemeanor or malfeasance (art. vii, sec. 2) 335.
Officers, certain prohibited from receiving fees or perquisites (art. xvii, sec. 5) 389.
Civil and military, governor to transact executive business with and may require information (art. v, sec. 6) 299.
County, to hold their offices at county-seat (art. xv, sec. 7) 375.
County and township of territory continued in office under state government (art. xvii, sec. 13) 397.
County or township, local or special law regulating election prohibited (art. iv, sec. 20) 278.
Each house of legislature may choose its own, excepting president of senate (art. iv, sec. 6) 264.
Fees of may be regulated by legislature (art. iv, sec. 20) 278.
In legislative or judicial department of government not to exercise powers in other department, exception (art. iii, sec. 1) 258.
Officers—continued.
Provision to be made for removal of certain, for malfeasance or nonfeasance (art. vii, sec. 4) 337.
Salaries fixed by constitution may be increased or diminished by legislature, but change not to take effect during term (art. xv, sec. 9) 377.
State, election, time, terms, eligibility (art. v, sec. 19) 312.
State, first, how commissioned (art. xvii, sec. 20) 404.
State, to perform duties prescribed by law (art. v, sec. 22) 315.
Territorial, continued in office until qualification of state officers (art. xvii, sec. 14) 398.
Whose election or appointment is not otherwise provided for may be chosen or appointed as may be prescribed by law (art. xv, sec. 10) 378.
Office-holding and suffrage, right of not to be withheld from any male citizen by reason of color or previous condition of servitude (art. xviii, sec. 1) 411.
Official oath (art. xv, sec. 2) 370.
Official oath, amendment proposed to constitution at legislative session 1911, subject to approval of next legislature and ratification by the people at succeeding general election 370.
Opinion of supreme court, decision not effective until opinion filed with clerk (art. xv, sec. 8) 376.
Ordinance, irrevocable without consent of United States and people of Nevada 228.
Paramount allegiance (art. i, sec. 2) 231.
Pardons, may be granted after conviction by board of pardons, of which governor shall be one, except in cases of treason or impeachment (art. v, sec. 14) 307.
Personnel and powers of board of (art. v, sec. 14) 307.
Passenger rates, may be regulated by the legislature (art. iv, sec. 20) 278.
Patent for state land to be signed by governor and secretary of state (art. v, sec. 16) 309.
Patented mines, how to be assessed (art. x, sec. 1) 352.
People, election by, to be by ballot (art. ii, sec. 5) 254.
Enumeration of rights not to impair others retained by (art. i, sec. 20) 249.
Government instituted for protection, security and benefit of (art. i, sec. 2) 231.
Have right to assemble to instruct representatives and petition legislature (art. i, sec. 10) 239.
Political power inherent in (art. i, sec. 2) 231.
Perjury, conviction of excludes from jury unless restored to citizenship (art. iv, sec. 27) 285.
Perpetuities, shall not be allowed except for eleemosynary purposes (art. xv, sec. 4) 372.
Person, not to be molested on account of religious sentiment 228.
Shall not be deprived of life, liberty or property without due process of law (art. 1, sec. 8) 237.

Persons not electors excluded from jury (art. iv, sec. 27) 285.
Petition, people have right to petition legislature (art. i, sec. 10) 239.
Plurality of votes, given at election to constitute choice where not otherwise provided by the constitution (art. xv, sec. 14) 382.
Political power inherent in the people (art. i, sec. 2) 231.
Poll tax, legislature to provide for payment and to be expended on public roads (art. ii, sec. 7) 256.
Soldiers and sailors not to pay (art. ii, sec. 3) 252.
Possession, of lands and tenements, legislature may confer power on justice's court in action for, where relation of landlord and tenant exists or where possession has been unlawfully obtained or withheld (art. vi, sec. 8) 323.
Of real estate or mining claims, supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
Of real property, district court has jurisdiction in cases involving (art. vi, sec. 6) 321.
Postage, papers and stationery, payment of expense of for members of the legislature (art. iv, sec. 33) 291.
Power, political, inherent in the people (art. 1, sec. 2) 231.
Powers of government, distribution of, no person in one department to exercise powers in another, exception (art. iii, sec. 1) 258.
Practice of courts of justice, local or special laws relating to, invalid (art. iv, sec. 20) 278.
Preamble 229.
Presentment or indictment, required in prosecutions for capital or infamous crime (art. i, sec. 8) 237.
President of senate, lieutenant-governor to be, has casting vote (art. v, sec. 17) 310.
To receive $2 per diem additional (art. iv, sec. 33) 291.
President pro tempore of senate, to act as governor when vacancy in offices of governor and lieutenant-governor (art. v, sec. 17) 310.
Press, liberty of not to be abridged (art. i, sec. 9) 238.
Probate courts of territory, cases in transferred to state district courts (art. xvii, sec. 23) 407.
Process, style of shall be "The State of Nevada" (art. vi, sec. 13) 328.
Process, civil, elector not to be arrested under on election day (art. ii, sec. 4) 253.
Members of legislature exempt from arrest under during session and for 15 days before (art. iv, sec. 11) 269.
Prohibition, supreme court empowered to issue writ of (art. vi, sec. 4) 319.
Property, foreigner who is bona fide resident has same rights to as native-born citizen (art. i, sec. 16) 245.
Given or bequeathed to state, when pledged to educational purposes (art. xi, sec. 3) 355.
Property—continued.
Not to be molested on account of religious sentiment 228.
Of corporations subject to taxation same as that of individuals, of corporations formed for municipal, charitable, religious or educational purposes may be exempted by law (art. viii, sec. 2) 339.
Of debtor, reasonable amount to be exempt from execution (art. i, sec. 14) 243.
Of Territory of Nevada vested in state (art. xvii, sec. 4) 388.
Person shall not be deprived of without due process of law (art. i, sec. 8) 237.
Right of acquiring, possessing and protecting (art. i, sec. 1) 230.
Shall not be taken for public use without just compensation having been first made or secured, exception (art. i, sec, 8) 237.
Value over $300, supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
Prosecutions, to be conducted in the name of "The State of Nevada" (art. vi, sec. 13) 328.
Publication, of accurate statement of receipts and disbursements of public money to be made (art. iv, sec. 19) 277.
Of constitutional debates (art. xvii, sec. 26) 410.
Of proposed amendments to constitution, when to be made (art. xvi, sec. 1) 383.
Of statutes and decisions of supreme court, legislature to provide (art. xv, sec. 8) 376.
Public administrators, may be elected or abolished (art. iv, sec. 32) 290.
Public arms, legislature to provide for safe keeping (art. xii, sec. 1) 363.
Public defense, no limit to debt which state may incur for (art. ix, sec. 3) 350.
Public funds, not to be used for sectarian purposes; as amended 1880 (art. xi, sec. 10) 362.
Public institutions, for insane, blind, deaf and dumb to be fostered and supported by the state (art. xiii, sec. 1) 365.
Public instruction, superintendent of, legislature to make provision for election, term (art. xi, sec. 1) 353.
Public lands, disclaimer of all right to by state 228.
Public officer, amendment proposed to sec. 8, art. ii, of the constitution, passed at legislative sessions 1909, 1911, subject to ratification by the people at general election 1912, provides that any public officer in the State of Nevada may be recalled 257.
Public roads, poll tax to be expended on (art. ii, sec. 7) 256.
Public safety, writ of habeas corpus shall not be suspended unless necessary for in case of rebellion or invasion (art. i, sec. 5) 234.
Public school, district neglecting to maintain school or allowing sectarian instruction may be deprived of proportion of public school fund (art. xi, sec. 2) 354.

Public school—continued.
Legislature to provide for at least six months annually in each district and to pass laws requiring attendance (art. xi, sec. 2) 354.
Public schools, amendment proposed to art. xv, sec. 3, of the constitution, passed at legislative sessions 1909, 1911, provides that certain females shall be eligible as deputy superintendent of public instruction 371.
Attendance on to be secured by legislature (art. xi, sec. 2) 354.
Certain females eligible as superintendent and trustee (art. xv, sec. 3) 371.
Estates that escheat to the state, fines collected under penal laws and property bequeathed to the state pledged to educational purposes, and interest thereon to be proportioned among counties as legislature may provide; as amended 1889 (art. xi, sec. 3) 355.
Moneys pledged to educational purposes to be apportioned among the several counties by law (art. xi, sec. 3) 355.
Normal and different grades may be established by the legislature (art. xi, sec. 5) 357.
Sectarian education not to be imparted in any public school or university established under the constitution (art. xi, sec. 9) 361.
Teachers required to take constitutional oath (art. xi, sec. 5) 357.
Public squares, local or special laws for vacating are invalid (art. iv, sec. 20) 278.
Public use, property shall not be taken for without just compensation having been first made or secured, exception (art. i, sec. 8) 237.
Punishments, may be commuted by board of pardons, of which governor shall be one, except in cases of treason or impeachment (art. v, sec. 14) 307.
Cruel or unusual not to be inflicted (art. i, sec. 6) 235.
Qualification, certain state officers to qualify on first Tuesday after first Monday in January (art. xvii, sec. 18) 402.
Qualifications of senators and assemblymen (art. iv, sec. 5) 263.
Quorum of supreme court, majority constitutes (art. vi, sec. 2) 317.
Quo warranto, supreme court empowered to issue writ (art. vi, sec. 4) 319.
Writ of, district court or judge may issue (art. vi, sec. 6) 321.
Railroad corporations, county, city, town or municipal corporation may aid (art. viii, sec. 10) 347.
Railroads, freight and passenger rates may be regulated by the legislature (art. iv, sec. 20) 278.
Rates, of railroads, toll roads, ditch, flume and tunnel companies may be regulated by the legislature (art. iv, sec. 20) 278.
Real estate, belonging to minor or person under legal disability, local or special law for sale of, invalid; as amended 1889 (art. iv, sec. 20) 278.
Real estate—continued.
In actions involving title or possession supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
Real property, district court has jurisdiction in cases involving title or possession (art. vi, sec. 6) 321.
Trial of title to not within jurisdiction of justice's court (art. vi, sec. 8) 323.
Rebellion, in case of writ of habeas corpus may be suspended if public safety requires (art. i, sec. 5) 234.
Recall, amendment proposed to sec. 8, art. ii, of the constitution, passed at legislative sessions 1909, 1911, subject to ratification by the people at general election 1912, provides that any public officer in the State of Nevada may be recalled 257.
Record, supreme and district courts and such other as the legislature may designate are courts of (art. vi, sec. 8) 323.
Records, archives of Territory of Nevada vested in state (art. xvii, sec. 4) 388.
Referendum, proposed amendment to constitution by addition to sec. 3, art. xix, passed at legislative sessions 1909, 1911, subject to ratification by the people at the general election of 1912 413.
Ten per cent of voters may have law passed by legislature submitted for approval or disapproval by electors at the next ensuing election (art. xix, sec. 1) 412.
When majority of electors signify approval of law it shall not be annulled except by direct vote of the people, or if they signify disapproval it shall be void (art. xix, sec. 2) 314.
Refunding money paid into state or county treasury, local or special law invalid (art. iv, sec. 20) 278.
Regents, board of, from accruing interest to maintain mining department at university (art. xi, sec. 8) 360.
Legislature to provide for university and define their duties (art. xi, sec. 7) 359.
To control state university, duties to be prescribed by law (art. xi, sec. 4) 356.
To invest in separate fund, to be irreducible, proceeds from land granted by act of Congress of July 2, 1862, for benefit of agriculture, mechanic arts and military tactics (art. xi, sec. 8) 360.
Registration, of wife's separate property (art. iv, sec. 31) 289.
Provision to be made by law for (art. ii, sec. 6) 255.
Soldiers and sailors not to pay poll tax (art. ii, sec. 3) 252.
Release of indebtedness or liability of corporation or person to state, county or municipality, local or special law invalid (art. iv, sec. 20) 278.
Religious belief, witness shall not be rendered incompetent on account of (art. i, sec. 4) 233.
Religious corporation, may be exempted from taxation (art. viii, sec. 2) 339.
Religious profession and worship, freedom of shall be forever allowed (art. i, sec. 4) 233.

Religious sentiment, toleration of secured 228.
Removal from office, for malfeasance or nonfeasance, provision to be made by law for in certain cases (art. vii, sec. 4) 337.
Repeal, not allowed of law providing revenue to pay loan made to state (art. ix, sec. 3) 350.
Representation, to be apportioned according to population (art. i, sec. 13) 242.
Representation in legislature, what census to serve as basis (art. xv, sec. 12) 381.
Representatives, people have right to instruct (art. i, sec. 10) 239.
Reprieve, may be granted by governor not exceeding 60 days except in cases of impeachment (art. v, sec. 13) 306.
Or pardon, governor to communicate to legislature (art. v, sec. 13) 306.
Residence, required to constitute elector (art. ii, secs. 1, 2) 250, 251.
Resident, bona fide, although foreigner, has same property rights as native-born citizens (art. i, sec. 16) 245.
Restoration to civil rights, certain convicts excluded from juries unless restored (art. iv, sec. 27) 285.
Returns of election for state officers, how canvassed by justices of the supreme court (art. v, sec. 4) 297.
Revenue, amendment proposed to constitution, art. ii, sec. 3, passed at legislative sessions 1909, 1911, subject to ratification by the people at general election 1912, provides for the investment of school moneys in bonds of any county in the State of Nevada 355.
Appropriation of taxes required for payment of loan to state not to be repealed or diminished (art. ix, sec. 3) 350.
How moneys pledged to school purposes to be invested and income apportioned (art. xi, sec. 3) 355.
Law must provide for tax levy to pay within 20 years loan made to state (art. ix, sec. 3) 350.
Legislature shall provide for annual tax to defray expenses of state for fiscal year, or ensuing two years, and deficiencies (art. ix, sec. 2) 349.
Legislature to provide equal assessment and taxation except mines, the proceeds of which shall be assessed and taxed, and when mines patented shall be assessed at not less than $500, unless $100 annual labor performed, exemption for municipal, educational, literary, scientific or charitable purposes; as amended 1906 (art. x, sec. 1) 352.
Legislature to provide special tax for maintenance of university and schools; as amended 1889 (art. xi, sec. 6) 358.
Proceeds from land granted state by act of Congress of July 2, 1862, for college for benefit of agriculture, mechanic arts and military tactics to be invested by board of regents of state university in separate fund to be irreducible (art. xi, sec. 8) 360.
Revision of constitution, convention for, how called (art. xvi, sec. 2) 384.
Right of secession denied (art. i, sec. 2) 231.
Rights, declaration of (art. i, sec. 1) 230.
Inalienable proclaimed (art. i, sec. 1) 230.
In general retained by the people (art. i, sec. 20) 249.
Right of suffrage, office-holding not to be withheld from any male citizen by reason of color or previous condition of servitude (art. xviii, sec. 1) 411.
Right of way, not to be appropriated to use of corporation until compensation is made or secured (art. viii, sec. 7) 344.
Riot, in case of, property may be taken for public use, compensation to be made afterward (art. i, sec. 8) 237.
Roads, local or special laws for vacating are invalid (art. iv, sec. 20) 278.
Roop County attached to Washoe County for judicial, legislative and revenue purposes until otherwise provided by law (art. xvii, sec. 25) 409.
Salaries, of county and township officers, legislature may regulate (art. iv, sec. 20) 278.
Of district judges, first term under constitution (art. xvii, sec. 15) 399.
Of district judges, may be changed subject to constitutional provisions (art. xvii, sec. 17) 401.
Of officers fixed by constitution may be increased or diminished, but change not to take effect during term (art. xv, sec. 9) 377.
Of state officers for first term under constitution (art. xvii, sec. 5) 389.
Salary, of district judge to be fixed by law, when and how payable, not to be increased or diminished during term (art. vi, sec. 15) 330.
Of justice of the supreme court to be fixed by law, when and how payable, not to be increased or diminished during term (art. vi, sec. 15) 330.
Sale, forced, of homestead, when not to take place (art. iv, sec. 30) 288.
Of real estate belonging to minors or persons under legal disability, local or special law invalid; as amended 1889 (art. iv, sec. 20) 278.
School district, neglecting to maintain school or allowing sectarian instruction may be deprived of proportion of public school fund (art. xi, sec. 2) 354.
Schools, certain females eligible as superintendent and trustee (art. xv, sec. 3) 371.
Legislature to provide special tax for (art. xi, sec. 6) 358.
Normal and public of different grades may be established by the legislature (art. xi, sec. 5) 357.
Teachers required to take constitutional oath (art. xi, sec. 5) 357.
School trustee, certain females eligible (art. xv, sec. 3) 371.
Scientific improvement, to be encouraged by legislature (art. xi, sec. 1) 353.
Seal, great seal of state to be kept and used by governor (art. v, sec. 15) 308.
Search and seizure, not to take place except on probable cause supported by oath and particulars (art. i, sec. 18) 247.

Seat of government, sessions of legislature to be held at (art. iv, sec. 1) 259.
Terms of supreme court to be held at (art. vi, sec. 7) 322.
To be at Carson City (art. xv, sec. 1) 369.
Secession, right of denied (art. 1, sec. 2) 231.
Secretary of state, bill vetoed after adjournment of legislature to be filed with (art. iv, sec. 35) 293.
Duties of (art. v, sec. 20) 313.
Election, term, eligibility (art. v, sec. 19) 312.
Member of board of state prison commissioners and board of examiners (art. v, sec. 14) 314.
To countersign grants and commissions (art. v, sec. 16) 309.
To keep office at seat of government (art. xv, sec. 12) 380.
To lay before next legislature bill vetoed after adjournment (art. iv, sec. 35) 293.
To perform duties prescribed by law (art. v, sec. 22) 315.
Sectarian instruction, not to be imparted at any school or university established under the constitution (art. xi, sec. 9) 361.
School district allowing, may be deprived of proportion of public school fund (art. xi, sec. 2) 354.
Sectarian purposes, public funds not to be used for; as amended 1880 (art. xi, sec. 10) 362.
Senate, bill may originate or be amended in (art. iv, sec. 16) 274.
Chief justice to preside over on trial of impeachment of governor or lieutenant-governor (art. vii, sec. 1) 334.
Judge of qualifications of its members, may choose officers and punish or expel members (art. iv, sec. 6) 264.
Lieutenant-governor as president to receive $2 per diem additional (art. iv, sec. 33) 291.
May punish or imprison person not member (art. iv, sec. 7) 265.
President of, lieutenant-governor to be, has casting vote (art. v, sec. 17) 310.
President pro tempore to act as governor in case of vacancy in offices of governor and lieutenant-governor (art. v, sec. 17) 310.
To try impeachments, oath of senators, concurrence of two-thirds elected necessary (art. vii, sec. 1) 334.
Senate and assembly, legislative authority vested in (art. iv, sec. 1) 259.
Senator, compensation to be fixed by law, not to be increased during session (art. iv, sec. 33) 291.
Term of office of (art. iv, sec. 3) 261; (art. xvii, sec. 10) 394.
Vacancy in office of, governor to issue writ to fill (art. iv, sec. 12) 270.
United States, when and how elected, when governor may convoke legislature in joint session for (art. iv, sec. 34) 292.
When not to be appointed to office created during term (art. iv, sec. 8) 266.
Senators, compensation not to be increased or diminished during session (art. iv, sec. 28) 286.
Number to be not less than one-third nor more than one-half that of members of assembly (art. iv, sec. 5) 263.
Payment of expense for postage, express charges, newspapers and stationery (art. iv, sec. 33) 291.
People have right to instruct (art. i, sec. 10) 239.
Prohibited from receiving fees or perquisites (art. xvii, sec. 5) 389.
Qualifications (art. iv, sec. 5) 263.
Terms to be four years (art. xvii, sec. 10) 394.
To be apportioned according to population (art. i, sec. 13) 242.
When to be elected (art. iv, sec. 4) 262.
Separate property, of wife defined (art. iv, sec. 31) 289.
Servitude, involuntary, not to be tolerated except as punishment for crime (art. i, sec. 17) 246.
Involuntary, prohibited except for crime 228.
Sessions of legislature, regular not to exceed 60 days, special 20 days (art. iv, sec. 29) 287.
To be biennial, commencing on the third Monday in January; as amended 1889 (art. iv, sec. 2) 260; (art. xvii, sec. 12) 396.
To be held at seat of government (art. iv, sec. 1) 259.
Slavery, not to be tolerated except as punishment for crime (art. i, sec. 17) 246.
Prohibited 228.
Soldiers, not to be quartered in houses without consent of owner (art. i, sec. 12) 241.
Soldiers and sailors, to enjoy right to suffrage, not to pay poll tax (art. ii, sec. 3) 252.
Speaker of assembly, to receive $2 per diem additional (art. iv, sec. 3) 291.
Special or local laws, in certain enumerated cases are invalid (art. iv, sec. 20) 278.
Special session of the legislature, governor to call, what business to be transacted (art v, sec. 9) 302.
Speech, liberty of not to be abridged (art. i, sec. 9) 238.
Standing army, not to be maintained by state in time of peace (art. i, sec. 11) 240.
State, all claims against to be examined by board of examiners except salaries or fixed compensation of officers (art. v, sec. 21) 314.
Became liable for indebtedness of territory (art. xvii, sec. 7) 391.
Contract or indebtedness assumed when liabilities exceed $300,000 shall be void, exception (art. ix, sec. 3) 350.
Indebtedness or liability to, local or special law releasing, invalid (art. iv, sec. 20) 278.
May contract debts, purposes to be specified, not to exceed $300,000, exceptions, provision for payment required (art. ix, sec. 3) 350.
Not to assume debts of county, town, city or corporation unless created to repel invasion, suppress insurrection, or for public defense (art. ix, sec. 4) 351.

State—continued.
Not to donate or loan money or credit or be interested in stock of company, association or corporation except for educational or charitable purposes (art. viii, sec. 9) 346.
Not to maintain standing army in time of peace (art. i, sec. 11) 240.
Not to tax United States property 228.
Peace or safety not to be endangered by religious profession or worship (art. i, sec. 4) 233.
Provision may be made by general law for bringing action against (art. iv, sec. 22) 280.
When claim against not to be passed upon by legislature without being acted upon by board of examiners (art. v, sec. 21) 314.
Rights of Territory of Nevada transferred to (art. xvii, secs. 1, 3, 4) 385, 387, 388.
State of Nevada, grants and commissions to be in name of (art. v, sec. 16) 309,
State banks, notes of not to circulate as currency (art. viii, sec. 6) 343.
State bonds, legislature may invest school moneys in (art. xi, sec. 3) 355.
State boundary, defined, may include additional territory if authorized by Congress and State of California (art. xiv, sec. 1) 368.
State constitution, election for ratification of, ordinance, provisions 414-427.
State controller, to keep office at seat of government (art. xv, sec. 12) 380.
State funds, not to be used for sectarian purposes (art. xi, sec. 10) 362.
State institutions, for insane, blind, deaf and dumb to be fostered and supported by the state (art. xiii, sec. 1) 365.
State militia, legislature to provide for organizing (art. xii, sec. 1) 363.
State office, vacancy, how filled (art. xvii, sec. 22) 406.
State officer, governor to fill vacancy (art. xvii, sec. 22) 406.
Liable to impeachment for misdemeanor or malfeasance (art. vii, sec. 2) 335.
State officers, canvass of returns of election by chief justice and associate justices (art. v, sec. 4) 297.
Certain, prohibited from receiving fees or perquisites (art. xvii, sec. 5) 389.
Certain, to qualify on first Tuesday after first Monday in January (art. xvii, sec. 18) 402.
Election for, if tie legislature by joint vote to elect (art. v, sec. 4) 297.
Election, term, eligibility (art. v, sec. 19) 312.
First, how commissioned (art. xvii, sec. 20) 404.
Salaries for first term under constitution (art. xvii, sec. 5) 389.
Term of certain, until Tuesday after first Monday in January (art. xvii, sec. 18) 402.
Term until Tuesday after first Monday in January (art. xvii, sec. 8) 392.
To perform duties prescribed by law (art. v, sec. 22) 315.
State prison, and house of refuge for juvenile offenders, to be maintained by the state (art. xiii, sec. 2) 366.
State prison—continued.
Board of commissioners, how constituted (art. v, sec. 21) 314.
State seal, to be attached to grants and commissions (art. v, sec. 16) 309.
To be kept and used by governor (art v, sec. 15) 308.
State treasurer, election, term, eligibility (art. v, sec. 19) 312.
To keep office at seat of government (art. xv, sec. 12) 380.
To perform duties prescribed by law (art. v, sec. 23) 315.
State treasury, local or special law refunding money paid into, invalid (art iv, sec. 20) 278.
Money not to be drawn from for officer or employee of legislature except as fixed prior to election or appointment (art. iv, sec. 28) 286.
State university, board of regents from, accruing interest to maintain mining department (art. xi, sec. 8) 360.
Controlled by board of regents, whose duties shall be prescribed by law (art. xi, sec. 4) 356.
Legislature to provide for, to embrace departments of agriculture, mechanic arts and mining (art. xi, sec. 4) 356.
Portion of interest on school moneys may be appropriated for support (art. xi, sec. 3) 355.
Proceeds from land granted state by act of Congress of July 2, 1862, for college for benefit of agriculture, mechanic arts and military tactics, to be invested by board of regents in separate fund, to be irreducible (art. xi, sec. 8) 360.
Sectarian instruction not to be imparted (art. xi, sec. 9) 361.
Teachers required to take constitutional oath (art. xi, sec. 5) 357.
Stationery, postage and papers, payment of expense of for members of the legislature (art. iv, sec. 33) 291.
Statute, amendment not to be made by reference to title only, but section amended to be reenacted at length (art. iv, sec. 17) 275.
Title of, to embrace but one subject (art. iv, sec. 17) 275.
Statutes, and decisions of supreme court, legislature to provide for publication (art. xv, sec. 8) 376.
Enacting clause of (art. iv, sec. 23) 281.
Of Territory of Nevada remain in force in state (art. xvii, sec. 2) 386.
To be free for publication (art. xv, sec. 8) 376.
Streets, local or special laws for vacating are invalid (art. iv, sec. 20) 278.
Style of process, shall be the "State of Nevada" (art. vi, sec. 13) 328.
Successor in office, governor to hold until qualified (art. v, sec. 2) 295.
Suffrage, amendment proposed to sec. 1, art. ii, of the constitution, passed at the legislative session, 1911, subject to approval by the legislature of 1913 and to ratification by the people, provides that there shall be no denial of elective franchise on account of sex 250.

Suffrage—continued.
And office-holding, right of, not to be withheld from any male citizen by reason of color or previous condition of servitude (art. xviii, sec. 1) 411.
Person who has fought duel or sent challenge since adoption of constitution, not entitled (art. xv, sec. 3) 371.
Provision to be made by law regarding exercise of right of (art. ii, sec. 6) 255.
Right of, to be enjoyed by soldiers and sailors (art. ii, sec. 3) 252.
Suit, provision to be made by general law for bringing against state (art. iv, sec. 22) 280.
Summoning and impaneling grand and petit juries and providing for their compensation, local or special laws are invalid (art. iv, sec. 20) 278.
Superintendent of public instruction, certain females eligible (art. xv, sec. 3) 371.
Provision to be made by the legislature for election of (art. ii, sec. 1) 353.
To perform duties prescribed by law (art. v, sec. 22) 315.
Supreme court, clerk of to keep office at seat of government (art. xv, sec. 12) 380.
Decisions, legislature to provide for publication (art. xv, sec. 8) 376.
How constituted, quorum, concurrence of majority necessary to render decision (art. vi, sec. 2) 317.
Is court of record (art. vi, sec. 8) 323.
Judgment not effective until opinion filed with clerk (art. xv, sec. 8) 376.
Jurisdiction defined (art. vi, sec. 4) 319.
Justice thereof may make writ of habeas corpus returnable before (art. vi, sec. 4) 319.
Of the United States, paramount allegiance to constitutional powers as defined by (art. i, sec. 2) 231.
Terms of, until provisions made by law (art. xvii, sec. 15) 399.
Times of holding to be as fixed by law and at seat of government (art. vi, sec. 7) 322.
Surveyor-general, election, term, eligibility (art. v, sec. 19) 312.
To perform duties prescribed by law (art. v, sec. 22) 315.
Tax, district court has jurisdiction of cases involving legality (art. vi, sec. 6) 321.
In action involving legality supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
Legislature to provide special for maintenance of university and schools; as amended, 1889 (art. xi, sec. 6) 358.
Taxation, by cities or towns, legislature to restrict (art. viii, sec. 8) 345.
Legislature shall provide for annual tax to defray expenses of state for fiscal year, or ensuing two years, and deficiencies (art. ix, sec. 2) 349.
Legislature to provide equal assessment and taxation, except mines, the proceeds of which shall be assessed and taxed, and when mines patented shall be assessed at not less than $500, unless $100 annual labor performed; exemption for municipal, educational, literary, scientific or charitable purposes; as amended 1906 (art. x, sec. 1) 352.
Taxation—continued.
Property of corporations subject to same as property of individuals, of corporations formed for municipal, charitable, religious or educational purposes may be made by law (art. viii, sec. 2) 339.
To be provided for payment within 20 years of loan to the state (art. ix, sec. 3) 350.
Taxes, for state, county or municipal purpose, local or special law for collection or assessment invalid (art. iv, sec. 20) 278.
Homestead liable for (art. iv, sec. 30) 288.
Local or special laws not to be passed for assessment or collection of (art. iv, sec. 20) 278.
Not to be higher on land of nonresident citizen of the United States than of resident 228.
Not to be imposed by the state on United States property 228.
Teachers, in public schools required to take constitutional oath (art. xi, sec. 5) 357.
Term, of certain state officers until Tuesday after first Monday in January (art. xvii, sec. 18) 402.
Of state officers until Tuesday after first Monday in January, qualification of successors (art. xvii, sec. 8) 392.
Terms of office, certain state officers to qualify on first Tuesday after first Monday in January (art. xvii, sec. 18) 394.
Of senator and assemblyman (art. xvii, sec. 10) 394.
Terms of supreme court, until provision made by law (art. xvii, sec. 15) 399.
Terms of court, times of holding supreme and district to be as fixed by law (art. vi, sec. 7) 322.
Tenure of office, legislature not to create for more than four years unless provided by constitution (art. xv, sec. 11) 379.
When may be provided by law, when held at pleasure of authority making appointment (art. xv, sec. 11) 379.
Territorial, county and township officers, continued in office under state government (art. xvii, sec. 13) 397.
Territorial officers, continued in office until qualification of state officers (art. xvii, sec. 14) 398.
Territorial probate courts, cases in transferred to state district courts (art. xvii, sec. 23) 407.
Territory of Nevada, acts and laws in force at time of admission of state to remain in force until repealed (art. xvii, sec. 2) 386.
All property and archives vested in state (art. xvii, sec. 4) 388.
Indebtedness of, state became liable for under constitution (art. xvii, sec. 7) 391.
Laws of remain in force in state (art. xvii, sec. 2) 386.
Rights of transferred to state (art. xvii, secs. 1, 3, 4) 385, 387, 388.
Testimony, judge may state to jury (art. vi, sec. 12) 327.
Of two witnesses or confession required for conviction of treason (art. i, sec. 19) 248.
Tickets, lottery, sale of, prohibited (art. iv, sec. 24) 282.

Title, bill or statute to embrace but one subject to be expressed in (art. iv, sec. 17) 275.
Statute not to be amended by reference to only, reenactment at length (art. iv, sec. 17) 275.
To real estate or mining claim, in action involving supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
To real property, district court has jurisdiction in cases involving (art. vi, sec. 6) 321.
To real property or mining claims or questions of boundaries not to be tried in justice's court (art. vi, sec. 8) 323.
Toleration of religious sentiment secured 228.
Toll, district court has jurisdiction of cases involving legality (art. vi, sec. 6) 321.
In action involving legality supreme court has appellate jurisdiction (art. vi, sec. 4) 319.
Toll rates, may be regulated by the legislature (art. iv, sec. 20) 278.
Toll roads, rates may be regulated by the legislature (art. iv, sec. 20) 278.
Town, indebtedness of, liability to, local or special law releasing, invalid (art. iv, sec. 20) 278.
Shall not become stockholder in or loan to any company, corporation or association except railroad companies (art. viii, sec. 10) 347.
State not to assume debt of unless created for public defense (art. ix, sec. 4) 351.
To make provisions for support of its own officers subject to regulations prescribed by law (art. xvii, sec. 21) 405.
Towns, legislature shall provide for organization of by general laws and restrict their powers except for procuring water (art. viii, sec. 8) 345.
Legislature to restrict powers of taxation, assessment, borrowing money, contracting debts and loaning credit except for procuring water (art. viii, sec. 8) 345.
Township business, local or special law regulating, not to be passed (art. iv, sec. 20) 278.
Township government, legislature to establish uniform (art. iv, sec. 25) 283.
Township officers, fees of, may be regulated by the legislature (art. iv, sec. 20) 278.
Local or special law regulating election of prohibited (art. iv, sec. 20) 278.
Treason, defined, two witnesses or confession required for conviction (art. i, sec. 19) 248.
Governor may suspend execution of sentence until next legislature, which may pardon, reprieve or direct execution of sentence (art. v. sec. 13) 306.
Person convicted of, not to be elector unless restored to civil rights (art. ii, sec. 1) 250.
Person convicted of, not to be pardoned (art. v. sec. 14) 307.
When governor may direct execution of sentence (art. v, sec. 13) 306.
Treasurer, state, election, term, eligibility (art. v, sec. 19) 312.
Trial, in civil cases three-fourths of jury may render verdict, but legislature by two-thirds vote may require unanimous (art. i, sec. 3) 232.
Trial—continued.
Right of presentment or indictment and to have counsel (art. i, sec. 8) 237.
Trial by jury, secured but may be waived in civil cases (art. i, sec. 3) 232.
Tribunal, inferior, in cases appealed from, district court has final appellate jurisdiction (art. vi, sec. 6) 321.
Tunnel companies, rates may be fixed by the legislature (art. iv, sec. 20) 278.
Undue influence, laws to be passed preventing at elections (art. iv, sec. 27) 285.
United States, lands granted by to state and proceeds dedicated to educational purposes (art. xi, sec. 3) 355.
May employ armed force to compel obedience to authority (art. i, sec. 2) 231.
Office under, not to be held by governor, exception (art. v, sec. 12) 305.
Property of, not to be taxed by state 228.
United States bonds, legislature may invest school moneys in (art. xi, sec. 3) 355.
United States senator, when and how elected, when governor may convoke legislature in joint session for (art. iv, sec. 34) 292.
University, state (legal and corporate name "University of Nevada," 4638), controlled by board of regents whose duties shall be prescribed by law (art. xi, sec. 4) 356.
From accruing interest to maintain mining department (art. xi, sec. 8) 360.
Legislature to provide for, to embrace departments of agriculture, mechanic arts and mining (art. xi, sec. 4) 356.
Legislature to provide special tax for (art. xi, sec. 6) 358.
Portion of interest on school moneys may be appropriated for support (art. xi, sec. 3) 355.
Proceeds from lands granted state by act of Congress of July 2, 1862, for college, for benefit of agriculture, mechanic arts and military tactics, to be invested by board of regents in separate fund, to be irreducible (art. xi, sec. 8) 360.
Sectarian instruction, not to be imparted (art. xi, sec. 9) 361.
Teachers required to take constitutional oath (art. xi, sec. 5) 357.
Unlawful detainer, district court has jurisdiction (art. vi, sec. 6) 321.
Vacancy, appointee to hold until next election (art. v, sec. 8) 301; (art. xvii, sec. 22) 406.
In legislature, governor to issue writ to fill (art. iv, sec. 12) 270.
In office of governor and lieutenant-governor president pro tempore of senate to act (art. v, sec. 17) 310.
In office, when and how filled by governor (art. v, sec. 8) 301; (art. xvii, sec. 22) 406.
On removal of judicial officer by legislature, member not eligible for position (art. vii, sec. 3) 336.
Vacating roads, streets, public squares or plats, local or special laws are invalid (art. iv, sec. 20) 278.
Venue, legislature not to pass local or special law for change of, in civil or criminal cases (art. iv, sec. 20) 278.

Verdict, legislature by two-thirds vote may require unanimous in civil cases (art. i, sec. 3) 232.
Veto power of governor, how legislature may pass bill over veto (art. iv, sec. 35) 293.
Volunteer corps, legislature to encourage (art. xii, sec. 1) 363.
Vote, lieutenant-governor as president of senate has casting (art. v, sec. 17) 310.
Of people to be by ballot, of legislature viva voce (art. ii, sec. 5) 254.
Plurality of given at election to constitute choice, where not otherwise provided by the constitution (art. xv, sec. 14) 382.
Soldiers and sailors have right to without paying poll tax (art. ii, sec. 3) 252.
Voters, if majority signify approval of law it shall not be annulled except by direct vote of the people, or if they disapprove it shall be void (art. xix, sec. 2) 413.
Qualifications of; as amended 1880 (art. ii, sec. 1) 250.
Ten per cent may have law passed by legislature submitted for approval or disapproval of electors at next ensuing election (art. xix, sec. 1) 412.
War, in case of, property may be taken for public use, compensation to be made afterward (art. i, sec. 8) 237.
Soldiers not to be quartered in house in time of except as prescribed by law (art. i, sec. 12) 241.
Warrant, for search and seizure shall not issue but on probable cause supported by oath and particulars (art. i, sec. 18) 247.
Wife, homestead not to be alienated without consent of (art. iv, sec. 30) 288.
Separate property of, defined (art. iv, sec. 31) 289.
Will, invalid, local or special law giving effect to, invalid; as amended 1889 (art. iv, sec. 20) 278.
Witness, accused not to be required to be against himself (art. i, sec. 8) 237.
Shall not be rendered incompetent on account of religious belief (art. i, sec. 4) 233.
Witnesses, not to be unreasonably detained (art. i, sec. 6) 235.
Two or confession required for conviction of treason (art. i, sec. 19) 248.
Women, certain, eligible to office of superintendent of public schools and school trustee (art. xv, sec. 3) 371.
Worship, religious, freedom of shall be forever allowed (art. i, sec. 4) 233.
Writ of certiorari, supreme court empowered to issue (art. vi, sec. 4) 319.
Writ of habeas corpus, justice of supreme court may issue to any part of the state, returnable before himself, the supreme court or district court or judge (art. vi, sec. 4) 319.
Shall not be suspended unless public safety require in case of rebellion or invasion (art. i, sec. 5) 234.
Supreme court empowered to issue (art. vi, sec. 4) 319.
Writ of mandamus, supreme court empowered to issue (art. vi, sec. 4) 319.
Writ of prohibition, supreme court empowered to issue (art. vi, sec. 4) 319.
Writ of quo warranto, supreme court empowered to issue (art. vi, sec. 4) 319.
Writs, of mandamus, injunction, quo warranto, certiorari, habeas corpus, and other, district court or district judge may issue (art. vi, sec. 6) 321.
Proper to complete exercise of appellate jurisdiction, supreme court may issue (art. vi, sec. 4) 319.
Yeas and nays, in legislature, to be entered at desire of three members (art. iv, sec. 14) 272.
To be entered on final passage of bill in legislature (art. iv, sec. 18) 276.
To be taken in each house on amendment to constitution (art. xvi, sec. 1) 383.
Two-thirds of each house necessary to pass bill over governor's veto (art. iv, sec. 35) 293.

Contagious or infectious disease. See Public Health.
Act preventing spread of 2996-3003. See Public Healtlr.
Among animals. See Live Stock.
Clothing or bedding used by person having, unlawful to use again, penalty 6533.
Exposing person to, penalty 6530.
Contempt. See Civil Practice.
Attorney practicing without license 506.
Bail may be given 5398, 5400.
By failure to obey subpena issued by railroad commission 4561.
Citation, personalty tax suit, refusal to obey 3679.
Civil action, district court 5394-5407.
Civil action, justice's court 5795-5799.
Coroner, subpenas of, failure to obey 7548.
Corporations, refusal to obey order for election of directors 1130.
Criminal, defined 2834, 6368.
District judge, application to other for order, when constitutes 4882.
Disobedience of order of district judge for removal of officer of corporation 1223.
Either house of legislature may punish or imprison for 265.
Estate matters, failure to respond to citation 5954.
Executor or administrator, commitment for 6102.
Failure to attend under subpena for taking of testimony 5432.
Failure to obey order for election of directors of corporations 1130.
Failure to obey order of court in quo warranto, deemed 5679.
Failure to obey order of judge for delivery to officers-elect of books and papers of corporation 1182.
Failure to obey order of justice or judge for correction of error or omission relating to primary election 1763.
Failure to obey subpena to appear before public service commission 4532.
For failure of witness to obey subpena, to be sworn or testify or subscribe to affidavit or deposition 5438.
For refusal to produce book or writing for inspection 5416.
Illegitimate child, orders concerning 766.

Contempt—continued.
Imprisonment for omission of act 5404.
In cases where witness may be punished for disobedience, not subject to civil arrest 5445.
In immediate view and presence of justice's court, proceedings for 5796.
Indictment for contemptuous conduct, sentence 5406.
Justice's court, civil action 5795-5799.
Justice's court, criminal action 7519, 7521.
Legislature, either house may punish for (Nev. Const.) 265.
Municipal court may punish for same as justice of the peace 835.
Not in immediate view and presence of justice's court, proceedings for 5797.
Officer taking acknowledgment may commit witness for refusal to testify 1034.
Orders under juvenile court law, interference with 732, 754.
Party may be adjudged guilty of and fined for failure to obey writ of mandamus 5707.
Party may be punished for removing ore during postponement of trial to allow development of mining claim 5203.
Penalty for 5403.
Person failing to appear as interpreter when summoned may be punished for 5430.
Practicing law without license 506.
Proceedings may be taken against party refusing to testify or give deposition 5421.
Process, resistance of 2833, 2834.
Punished as crime, effect 6299, 6305.
Referee in bankruptcy, before 583.
Service of notices and papers not applicable in certain cases 5368.
To apply for order after application for same has been refused except to judge of higher court 4882.
What acts punishable as in justice's court 5795.
What punishments may be imposed for by justice's court 5798.
When garnishee liable for on failure to deliver to sheriff 5188.
When papers must be served upon party instead of attorney 5375.
Will, failure to produce 5865.
Witness, under criminal parctice act 7361.
Contest. See Election Contest under Civil Practice, Elections, Estates of Deceased Persons, Quo Warranto.
Before U. S. land office as to mineral or agricultural character of land 2397.
For county or township office, complaint or proceedings, when not to be dismissed for want of form 1807.
For nomination under primary election law 1764.
For office, time for commencement of 4972, 4973.
For state lands to be determined by district court 3208.
In proceeding to restore lost records, how made 5644.
Of election 1805-1811, 1818-1820.
For city office, how brought and determined 801.
When time begins to run 1894, 1895.
Of will 5872-5876.
Contested election, action may be brought by district attorney when any person unlawfully holds any public office 1814.
For county or township office, clerk of board of county commissioners to issue certificate in accordance with judgment 1810.
For county or township office, if judgment annuls election and no appeal taken within 30 days certificate becomes void 1812.
For county or township office, issuance and service of subpena, attachment to compel attendance, witnesses 1809.
For district judge, triable in adjoining district court in like manner as contest for county or township office 1813.
For member of legislature, either party may take depositions under rules of district court, forwarding to secretary of state, delivery to presiding officer 1822.
For member of legislature, how started and conducted, service of notice, depositions, how taken and transmitted 1818-1820.
For member of legislature, justice of the peace to issue subpena for taking depositions, witness may be attached and fined, certification of testimony to county clerk 1819.
For member of legislature, presiding officer to notify members of receipt of depositions and papers 1821.
For member of legislature, secretary of state to receive depositions and papers and deliver to presiding officer 1820-1822.
For state office, attorney-general to prosecute, supreme court has original jurisdiction, justice may issue process 1823.
One action may be brought against several claiming same office 1817.
Successful contestant may recover damages 1816.
When district attorney may have person arrested for receiving fees, bail 1815.
Contestee, for nomination under primary election law, when required to appear and abide order 1764.
Continuance. See Civil Practice.
Contracts. See Civil Practice, Husband and Wife, Revenue.
Husband and wife may enter into 2173.
Impairment by state forbidden (U.S. Const). 137, (Nev. Const.) 244.
Indebtedness of state void, when (Nev. Const.) 300.
Land, assessment minimum valuation 3838.
Lawful age to make 431.
Marriage not valid, when 2184.
Obligation of not to be impaired (U. S. Const.) 137, (Nev. Const.) 244.
Of separation not to alter legal relations except, consideration 2174, 2175.
Public officers having interest in, penalty 812, 1522, 2827-2830, 4651, 6331.
State cannot impair obligation (U. S. Const.) 137, (Nev. Const.) 244.
Specific performance, estates of deceased persons 6032, 6033, 6147.
Supplies, warrant for, to withhold, when 4475.
Contractor or subcontractor, when liable to workmen and owner under employers' liability act 1924.

Contributory dependency and delinquency defined, suspension of sentence 728, 757-764. See Juvenile Court Law.
Contributory negligence, 1915. See Employer and Employee.
Controller 4154-4189. See State Controller.
Election, term, eligibility 312.
To perform duties prescribed by law 315.
Controversy submitted without action 5252-5254. See Civil Practice.
Convention. See Elections.
Defined 1834.
National, delegates to, how and when elected 1737, 1760, 1834. See note under Primary Elections, under index to Elections.
To revise state constitution (Nev. Const.) 384.
Conversion. See Estates of Deceased Persons.
Action for 5952-5955, 6023, 6024.
Of estate, before issuance of letters 5952-5955.
Conveyance, evidence of, may be rebutted 1045, 1046.
Judgment or order for execution of, not stayed unless executed and deposited with clerk 5350.
Mortgage of real property, not deemed without foreclosure 5518.
Of lot in federal townsite, execution of, after trial of adverse claims in district court 1984.

CONVEYANCES

ACKNOWLEDGMENT—
Effect of 2188.
Form and certificate of 1022-1026.
Good where taken, valid 1025.
Identity of person making 1023.
May take 4883.
Of wife, form 2143, 2186, 2188.
Officers taking, to keep record 1098, 1099.
Taken out of state 1096, 1097.
What officers may take 1020.
Who may make 1017-1020.
Wife's power of attorney 2187.
Adverse possession does not prevent 1048.
After acquired title 1047.
Agent may subscribe 1082.
Attorney in fact may make 1017, 1082.
Attornment 1060, 1061.
Between husband and wife 2173.
Certificate of acknowledgment 1024-1026.
Certificate, proof of execution by witness 1032.
Community property 2160.
Consideration, not to be adjudged void solely for want of 1086.
Contingent remainder 1059.
Covenants, "grant, bargain and sell" 1062, 1063.
County records impart notice 1093.
DEED—
Conveying homestead, may be authorized by court and recorded when wife insane 2146, 2147.
Derived from sale of real property for delinquent taxes conclusive evidence of title, possession recoverable in justice's court 3666.
Invalid, local or special law giving effect to invalid (Nev. Const. art. iv, sec. 20) 278.
Lost or destroyed, validated 5639.
Deed—continued.
May be made by successor of officer making sale of real estate for delinquent taxes or under execution or order of sale 1662, 1663.
Of sheriff, executor, administrator, guardian, assignee, receiver, trustee or commissioner, when prima facie evidence of regularity of sale when record lost 5631.
Of sheriff under execution sale and subsequent redemption, who entitled 5301.
Or other writing fraudulently or maliciously injuring or destroying, penalty 6671.
Recorded in office of county recorder imparts notice 1093.
Requisites of 1017.
To include all property sold for taxes bid in by county treasurer 3669.
To lot in federal townsite, execution of after trial of adverse claim in district court 1984.
To lot in federal townsite, when to be made to guardian or trustee of minor or insane person 1986.
Under tax sale by treasurer not prima facie evidence of title in purchaser when record destroyed 5631.
DEED OF TRUST—
Lost and restored, limitation 5638.
Sale for taxes on 3787.
Taxes are lien 3786, 3787.
Defined 1089.
Discharge of mortgage or lien 1049-1052.
Estate in fee presumed 1056.
Estate tail 1059.
Evidence, competency of 1043-1046.
Execution, proof of 1027-1034.
Express covenants 1063.
Fee simple estate, presumed 1056.
Form of acknowledgment 1025, 1026.
Fraudulent conveyance, when void 1064, 1065, 1078.
"Grant, bargain and sell," import of 1063.
Handwriting, evidence of 1031.
"Heir," defined 1057.
Homestead 2143, 2146-2148.
Husband and wife 2160, 2180.
In action for partition, must be recorded and are bar against parties 5565.
Lands defined 1088.
Lien, how discharged 1049-1052.
Lien law 2213-2231.
Lineal and collateral warrantees abolished 1062.
Marriage contracts 2181-2185.
Married women, acknowledgment of, officer may take 1037.
Married woman, covenants binding on 1036.
Married woman's, effect of 1018.
Mining claims 1100-1102.
Mining claims by minor 1103, 1104.
Mining rules not affected by act 1091.
Mortgage, failure to discharge, penalty 1052.
Mortgage, how discharged 1049-1052.
Mortgage on personal property 1080.
Mortgage not deemed conveyance without foreclosure 5518.
Mortgage on possessory claim 1090.
Notice of record 1038, 1040.
Patents, entitled to record 1035.
Posthumous child, effect on 1058, 1059.

Possessory claim 1090.
Possession not necessary to 1048.
Power of attorney by wife 2187.
Power of attorney, form and requisites 1041.
Power of attorney, revocation of 1042.
Prior conveyances valid 1053, 1054.
Prior records, validity of 1021.
Proof of execution 1027-1034.
Provisions for revocation, determination or alteration at will of grantor, when void 1066-1068.
Records, certified copy of evidence 1044-1046, 1094.
Recorded in office of county recorder impart notice 1038, 1039, 1093.
Recorded, when entitled to be 1035.
Remainders 1057-1059.
Reversions and remainders 1057-1060.
Revocation, reservation of power, effect 1066-1068.
"Seal" or "L. S." unnecessary 1095.
Specific performance 1073.
STATUTE OF FRAUDS 1069-1092—
Agreements not in writing, when void 1075-1077.
Auction sale 1077.
Bona fide purchaser without notice 1087.
Bottomry or respondentia, contracts of 1081.
Chattel mortgage 1080.
Choses in action 1074.
Contract for sale of goods, chattels, or things in action 1076.
Creditors, contracts to defraud void, when 1083.
Creditors, gifts or transfers, when void as to 1074.
Creditors, sale of merchandise, bulk act 3908-3912.
Fraudulent intent, question of fact 1086.
Heirs, successors, representatives or assigns of creditors or purchasers, rights of 1085.
Judgment, void as to creditors, when 1083.
Lease, agent may subscribe 1072.
Lease for year or more 1069-1072.
Lease longer than ten years, void 1092.
Leases, town or city lots or property, longer than twenty years, void 1092.
Mortgage of personal property 1080.
Sale, when evidence of fraud 1078, 1079.
Sales of merchandise, bulk act 3908-3912.
Specific performance 1073.
Trust 1069, 1070.
Trust, grants or assignments of, when void 1084.
Trust, void as to creditors 1074.
Valuable consideration, want of, effect 1086.
Wills, not applicable to 1070.
Subject to lis pendens 5021.
Subsequent acquired title 1047.
Subsequent purchaser with notice of fraud 1065.
Tenancy in common, when created 1055.
Unrecorded, valid between parties 1038, 1040.
Unrecorded, void as to whom 1040.
Warrantees, "grant, bargain and sale" 1063.
Warrantees, lineal and collateral, abolished 1062.
Wife, sole trader act 2190-2194.
Witness to conveyance, subpena for 1033, 1034.
Witnesses to execution, proof by 1027-1034.

Conviction, and execution of innocent person by perjury deemed murder, penalty 6352.
Of bribery or embezzlement of public funds disqualifies from holding office (Nev. Const. art. iv, sec. 10) 268.
Of certain crimes excludes elector from jury unless restored to civil rights (Nev. Const. art. iv, sec. 27) 285.
Of contempt in justice's court to be entered in docket 5799.
Of lesser degree or attempt 6290, 7219.
Or acquittal in other county, state or country 6279, 6280.
Convicts, under protection of law 6278.
When statute of limitations does not run in civil actions 4976. See State Prison and Jails.
Cooperative associations 1249-1260. See Corporations.
Coordinate departments of government (Nev. Const.) 258.
Coowner of mining claim failing to contribute to expense; forfeiture of interest, how 2382, 2432. See Mines and Mining.
Copies, prepared, fees for certifying to 2045.
Copy. See Civil Practice.
Copyrights, Congress to provide for 118.
On state publications 4307, 4308.
Cord, firewood, measurement, what constitutes 4807.
Coroner. See Officers Generally.
Actions against for official misconduct, may be commenced within two years 4967.
Burial, expense, how paid 7557.
Burial, permit to issue 6549, 6550.
Dead body, duty in relation to 6814.
Deputy, appointment of 7543.
Deputy, responsible for on bond 7543.
District 8542.
Entitled to only one mileage for serving more than one process in same action requiring only one journey 2037.
Fees 1998, 2010.
Fees, payable by county 7556, 7558.
Fees, sheriff acting as 7558.
Fees, when acting as sheriff 2010.
Inquest, contempt failure to obey subpena 7548.
Juror, failure to attend, penalty 7545.
Jurors, number 7544.
Juror, oath of 7546.
Physician or surgeon, may summon 7547.
Testimony reduced to writing, filing 7550.
Verdict, contents 7549.
Warrant of arrest for accused, service and return 7551, 7552.
Witnesses, subpena for 7547.
Jurisdiction, adjoining township 7559.
Jurors, pay of 7560.
Justice of peace, ex officio 7543.
Mileage 2037.
Property found with deceased, disposition 7553.
Property of deceased, affidavit of coroner concerning 7556.
Property of deceased, proceeds paid to representatives 7555.
Property to deliver to treasurer, when 7553.
Sale of deceased's property, when 7554.
Sheriff, acting as, fees 7558.

Coroner—continued.
Sheriff, coroner to succeed, when 2882.
Township, coroner's district 7542, 7559.
Township without, nearest may act 7559.
Treasurer custodian of property, sale of 7553, 7554.
When to return and stay execution pending appeal in district court, D. C. rule xxii, p. 1429.
Corporate authorities, may act in case of death or disability of trustee in federal townsite 1991.
Townsite, federal, may enter, may discharge trust after term expires 1961, 1988. See Townsite.
Corporate elections, revisory power of court over 1130.
Corporate existence, proof of 1184, 5079, 7176. When begins 1109.
Corporate powers, special legislation concerning forbidden 338.
Corporate property, sale of, when, by district court 1197, 1198.

CORPORATIONS

Accident, health and life insurance companies 1310-1324.
Accident insurance companies 1106.
Act, may be amended or repealed but cannot effect rights previously acquired 1214.
Action, of directors or stockholders at meeting held without notice may be ratified, how, when 1212.
After dissolution, collect debts and settle business through trustees 1192.
Agents and factors, may have 1126.
Agent, failure to maintain, liability 1120.
Agent, to be in charge of principal office 1118, 1120.
Agreement merger signed by whom 1146.
Agreement merger submitted to stockholders how, when 1145.
Agreement, proposed merger submitted to stockholders, ratification, how, when 1145.
Already formed, have power, remove directors as if incorporated, when 1183.
Amendments, articles by all corporations except railroads, how, when 1143.
Amendments, articles, mining companies not allowed to assess stock 1200.
Amendments, changes in articles designated 1142.
Amendments, changes after organization made by whom, how, when 1142.
Amount of dividend declared fixed, how 1167.
Ancient Order Hibernians 1410-1415.
Appointment of receiver, made how, when 1194.
Arbitration committee selected, how 1147.
Arbitration committee selected, duties and powers 1147.
Articles amended, secure right, remove officials, court procedure 1183.
Articles incorporation defined 1205.
Articles incorporation not amendable for purpose of assessment 1200.
Articles, what to set forth 1108, 1114, 1115, 1119.
Assessed, how, when 3629. See Revenue.
Assessment, corporate stock, made by whom, how 1132.
Assessor, to demand statement from of employees, when 3718.
Authorized to provide mode and manner subscribing to capital stock, how, when 1200.
Authorized to purchase franchise from other companies, when 1151.
Bank may be resident agent 1119.
Banking corporations 616-694, 1112.
Banking powers restricted 1112.
Banks, 616-694. See Banks and Banking.
Beginning corporate existence, when 1109.
Books and records kept at principal office 1118, 1120.
Book of by-laws to be kept 1125.
Books for names of stockholders kept, by whom 1172.
Bonds, consolidated companies, by whom issued, how 1150.
Bonds issued, convertible into common stock, by whom, how 1138.
Bond for protection required for issuing lost or destroyed certificates fixed, how 1165.
Building and loan 1356-1360, 1361-1364.
By-laws, how made 1125.
By-laws may provide for action, majority directors not at regular meeting may be ratified by all others 1127.
Capital stock, decreased or retired, how 1144.
Distributed on dissolution, when 1169.
May be paid for by mining ground, when 1200.
Not to be reduced, when 1169.
Subdivided, how 1168.
Subscribed for, paid, how 1132.
When divided into shares and certificates issued, deemed personal estate 1131.
Care of delinquent children, forbidden 744.
Cemetery associations 1398-1409.
Certain acts relating to corporations omitted 1440.
Certain companies operating without state may incorporate under general law 1106.
Certificate, adoption merger agreement filed with secretary of state, how, when 1145.
Consolidation, merger recorded, when, where 1145.
Corporation, what to set forth 1108, 1114, 1115, 1119.
Decreasing capital stock, published, how, when, where 1144.
Dissolution, issued by whom, how, where 1190.
Incorporation amended for subdivision or increase capital stock, how, where filed 1168.
Incorporation curing errors and omission, made how, filed where 1141.
Incorporation, deemed filed and recorded, when amended 1139.
Incorporation, defined 1205.
Incorporation, failure to maintain agent or office renders void, how revised 1120.
Removal place of business, filed, when, where 1170.
Renewal, contain what, filed and recorded, where 1209.
Stock, contain what, signed by whom 1157.
Stock destroyed or lost, reissued, how 1164.
Certified copy articles prima facie evidence 1110.

Charters expiring, companies renewed, how 1208.
Cheap transportation lines 1341-1345.
Collateral attack not allowed on incorporation 1154.
Common and general stock synonymous 1114.
Common stock convertible from bond issue by whom, how, when 1138.
Compensation county clerk, services, removal, proceedings 1182.
Compensation receiver determined, how 1199.
Consideration stock issued in lieu labor or property recorded, when, where 1156.
Consolidated, power to issue bonds, how, when 1150.
Constitutional references on corporations, dues may be secured as prescribed by law, but corporators not individually liable for debts 340.
Formed under laws of Territory of Nevada subject to those laws and state laws 341.
May be formed only under general laws, which may be altered or repealed, municipal corporations excepted 338.
May sue and be sued same as individuals 342.
Municipal may be formed under special act 338.
Property of subject to taxation same as individuals, of corporations formed for municipal, charitable, religious or educational purposes may be exempted by law 339.
Rates of certain may be regulated by the legislature 278.
Right of way not to be appropriated to use of until compensation is made or secured 344.
State not to assume debt of unless created for public defense 351.
Contempt, failure or refusal to obey order for election of directors 1130.
Continuance, after dissolution for certain purposes 1191.
Conversion, preferred stock into bonds made how, by whom 1138.
Cooperative associations 1249-1260.
Corporate existence, when begins 1109.
Corporations, criminal proceedings against, complaint against 7402.
Before justice of peace 7405.
Execution for fine 7410.
Indictment, summons on 7409.
Preliminary examination 7406, 7407.
Proceeding, against for misdemeanor 7405.
Summons, form and service 7402-7404.
Corporators, not individually liable (Nev. Const.) 340.
Creditor, of stockholder entitled information from corporate officers, when 1173.
Creditors, rights of stockholders may be granted to 1115.
Cruelty to animals associations 1373-1381.
Cumulative voting 1124.
Decrease capital stock not to release liability stockholder, when 1144.
Decree appointing receiver published 1196.
Deemed in existence after dissolution or expiration franchise, for what purposes 1191.
Deemed merged, when 1146.
Defective articles validated, when 1185.
Destruction books intent to defraud, misdemeanor, when 1178.
Directors, acts binding on company 1128.
And trustees defined 1205.
Appointed to fill vacancy, term of 1129.
Consent necessary transfer unpaid stock, when 1166.
Deemed trustees after dissolution, how long, when 1192.
Election of, district court or judge may require 1130.
Election of, revisory power of district court or judge over 1130.
Executive committee may authorize to act 1127.
Failure call meeting elect director fill vacancy made by removal, contempt, punished, how 1179.
Judgment on labor or value of property exchanged for stock conclusive, when 1155.
Liable declaring dividends except from net profits, when 1169.
Liable reduction capital stock, when 1169.
May assess corporate stock, how, when 1132.
May authorize conversion common stock into bonds, how, when 1138.
May be removed by whom, when 1179.
May cure errors and omissions in articles 1141.
Meetings, where may be held 1118.
Not personally liable to estates owning stock, when 1136.
Or officers destroying books, misdemeanor, when 1178.
Or officers removed, vacancy filled, how 1182.
Or trustees, meetings, quorum 1127.
Proposed merger, may enter into agreement 1145.
Quorum 1127.
Refusal produce list, stockholders or stock ledger, penalized, how 1159.
Special meeting to elect 1128.
Stockholders cannot be sued, certain cases 1137.
Stockholders not liable for debt until judgment obtained and execution returned unsatisfied 1135.
To keep stock ledger 1172.
To take oath 1123.
Vacancies by failure to elect or qualify 1128.
Vacancy in board, may fill 1128, 1129.
When may qualify 1128.
Disobedience order district judge, removal director proceedings, contempt, when 1182.
Dissatisfied stockholders entitled payment stock before merger, how 1147.
Dissolution accomplished how, procedure 1190.
Dissolved, procedure 1189.
District court, jurisdiction upon application to dissolve 1195.
May enforce calling of meeting to elect director to fill vacancy caused by removal 1179.
Or judge may require election of directors 1130.
Revisory power over election directors 1130.
District judge, issue certificate election newly elected director 1182.
Issue notice to stockholders for meeting elect directors, when 1180.

District judge—continued.
Revisory power over election of directors 1130.
Summarily decide who entitled to vote for removal directors, when 1181.
Dividends, by whom declared, how, when 1167.
On preferred stock 1114.
Payable from net profits only, when 1169.
Payable upon corporate stock by married women 1131.
Elections, cumulative voting 1124.
Of directors, district court or judge may require, when 1130.
Of directors and trustees by ballot, exception 1122, 1124.
Of directors, revisory power of district court or judge over 1130.
Of directors, when may be held 1128.
Electric light, heat and power companies 1261-1264.
Employees have lien for wages, when 1187.
Endowment insurance companies 1310-1324.
Errors and omissions in certificate cured by amendment, how 1141.
Estates deceased persons owning stock liable as other stockholders, how, when 1136.
Evidence of incorporation 1110; foreign 1346; 1347; generally 1221.
Executive committee of directors 1127.
Exemption of stock held by nonresidents from taxes, when 1158.
Failure commence business works forfeiture, when 1153.
False entries made by officers, misdemeanor, when 1176.
False statements made or published by directors, misdemeanor 1174.
Fees, secretary state filing articles, computed, how 1203.
Filing copies of articles in other counties necessary 1171.
Fire insurance companies 1105, 1106, 1304-1309.
First meeting, election of directors or trustees 1117.
First meeting, how and when called, notice of 1116, 1117.
For care dependent or delinquent children forbidden 744.
For dependent, neglected or delinquent children 744.
Foreign building and loan societies, furnish evidence incorporation and corporate name 1346-1347.
Given benefit statute limitations 1355.
Owning stock in domestic, exempt from taxes 1158.
Publish annual statements 1351-1354.
Regulated 1356-1360.
To qualify before transacting business in this state 1348-1350.
Forfeiture of charter for failure commence business, when 1153.
Formation, how accomplished 1107-1110.
For what purposes may be formed, general act 1105, 1119.
Franchise and property sold by receiver, how, when 1197.
Franchise sold, how to new company 1151.
Fraudulent accounts kept by directors a crime 1177.
Gas companies 1265.
General corporation law 1105-1215.
General corporation law (old act) 1219, 1241.
General provisions may be inserted in articles 1108, 1109.
Governing board, how styled 1107, 1108.
Grand Lodge Free and Accepted Masons 1418-1423.
Grand Lodge Independent Order Odd Fellows 1418-1423.
Grand Lodge Knights of Pythias 1416, 1417.
Hospitals or asylums 1390-1397.
Incorporation cannot be attacked collaterally 1154.
Incorporation need not be proved, when 1184.
Incorporators may amend certificate before payment capital 1139.
Indemnified for issuance of lost or destroyed stock, how 1164.
Information for creditor of stockholders given by officer, when 1173.
Insolvency of, debts payable before preferred stock 1114.
Insolvent or dissolved, employees deemed to have lien for wages 1187.
Inspectors of election of directors 1160.
Insurance companies 1267-1284.
Insurance companies 1105, 1106.
Issue of bonds convertible into common stock, by whom, when 1138.
Joint-stock building and loan societies, nonresidents furnish securities 1361-1364.
Keeping fraudulent accounts a crime, when 1177.
Liabilities created by statutes of other states not enforced in this state against stockholders or directors 1137.
Liability of corporation not affected by merger or decrease of capital stock 1149.
Liens and liabilities of merged companies satisfied, how 1146.
Liens of employees attached, when 1187.
Life insurance companies 1105-1106.
Limitation for continuance of business or litigation after dissolution 1191.
List of corporations and amended certificates compiled, published 1204.
List of stockholders subject to inspection of stockholders 1159.
Location mine determines district mining laws 1201.
Location principal office changed without amendment 1170.
Lost certificate reissued, how 1164.
Manner of sale of franchise and property 1152.
Marine insurance companies 1105-1106.
Married women, dividends paid to 1131.
Entitled to dividends on shares of stock 1131.
Proxy may give 1131.
Stock transferred, how 1131.
May consolidate, how, when 1145.
May dissolve, for what purposes 1195.
May own stock and bonds of other corporations, how, when 1211.
May issue for labor or property, what 1155.
Meaning certain terms this act defined 1205.
Meetings of directors, trustees or stockholders, where may be held 1118.

Meetings of directors or stockholders without consent, how 1212.
Meetings of directors, within or without state 1127.
Merger does not affect liabilities 1149.
Merger of two or more companies 1145.
Method of decrease of capital stock 1144.
Mining companies 1216-1218.
File annual statements 1330-1340.
Governed by district mining laws 1201.
May become stockholders in tunnel companies, when 1202.
Not authorized to assess capital stock, when 1200.
Mining ground deemed payment for capital stock, how, when 1200.
Mining ground in payment of capital stock transferred, how, and considered paid 1200.
Money may not issue, when 1112.
Municipal corporations, constitutional article on 338-347.
Mutual accident, health, life insurance, live stock 1325-1326.
Mutual fire insurance companies 1285-1303.
Names, restrictions as to 1108, 1105.
Names of original incorporators or subscribers to stock stated in articles 1108, 1105.
Nature of business to be stated in articles 1108, 1103.
Nevada historical society 2545-2547. See secs. 1382-1389.
Nonresident joint-stock building and loan, furnish security 1361-1364.
Not authorized to institute suit when failing to file copy of articles in other counties 1171.
Notice deemed waived, how, when 1213.
Notice of assessment on stock, given how, to whom 1132.
Notice of assessment on stock published, when, where 1132.
Notice of intended dissolution not necessary, when 1190.
Notice of intended dissolution published, when, where 1190.
Notice of meeting, dissolution served, how, on whom 1190.
Notice of removal of place of business published, when, where 1170.
Notice of sale of franchise and property made, how, to whom 1152.
Notice of sale of stock for delinquent assessment advertised, how, when, where 1133.
Notice to stockholders for election of director given by district judge, published, where 1180.
Notice to stockholders of proposed consolidation made, how, when, where 1145.
Notice not necessary to stockholders or directors, when 1212.
Oath of directors or trustees 1123.
Organization perfected by surviving incorporators 1140.
Office failure to maintain liability 1120.
Officers liable for damages caused by false statements, when 1175.
Officers, what prescribed 1126.
Omissions or errors in articles deemed validated, when 1185.
Papers, necessary dissolution filed with secretary state, when 1190.
Payment of stock, to dissatisfied stockholders, made how, when 1147.
Payment of subscribed capital stock, made how 1132.
Payment of subscription capital stock, made how 1132.
Penalty, failure file report election directors with secretary state, what 1186.
Penalty, for making false entries by officers 1176.
Penalty, officer failing to give information to creditor of stockholder 1173.
Pending actions, of proposed consolidated companies, prosecuted how 1148.
Period of limitation, to be stated in articles 1108, 1106.
Place of business, to be stated in articles 1108, 1102.
Pledged stock, voted by stockholder, how, when 1162.
Pledgor of stocks, voting power 1162.
Powers, enumerated 1111, 1113.
Powers of attorney, to vote must be filed 1121.
Power to purchase stock, at assessment sale, how, when 1134.
Powers of trustees, after dissolution 1193.
Preferred stock, converted into bonds, made how, by whom 1138.
Preferred stock, redeemed and retired how, by whom, when 1138.
Preferred stock, restrictions 1114.
President, shall have 1126.
Principal office, agent to be in charge 1118, 1120.
Principal office, books and records kept at 1118, 1120.
Principal office, changed without amendments of articles, how, when 1170.
Principal office, defined 1205.
Principal office, failure to maintain, liability 1120.
Principal office, in this state, defined 1205.
Principal office, where located 1118, 1120.
Principal place of business, defined 1205.
Proceedings, dissolving, may be set aside by creditor, how, when 1193.
Proceedings, for removal of officer, what 1180.
Proceedings, in court, to obtain new certificate when lost or destroyed 1165.
Proceedings, meeting stockholders held without consent, ratified 1212.
Proceedings to organize meeting called by district judge to remove director 1181.
Proceedings when receiver is appointed 1196.
Property and franchise sold by receiver, when 1197.
Procedure for renewing charters of expiring companies 1208.
Protestant Episcopal churches 1425-1433.
Proxies and powers of attorney stockholders to be filed, when, where 1160.
Proxies must be in writing and filed 1121.
Proxy, married women 1131.
Publishing false statements by director or officer, misdemeanor, when 1174.
Purchase of delinquent assessable stock valid, when 1134.
Purposes for which may be formed 1105, 1119.
Qualifications of directors and trustees 1123.
Quorum, directors and executive committees 1127.

Railroad companies 1105, 1106, 3511-3570.
Railroad, cannot amend articles, when 1143.
Receiver authority to sell deteriorating property, how, when 1198.
Receiver compensation, determined, how 1199.
Receiver when appointed to take, what action 1196.
Redemption preferred stock 1114.
Registered office defined 1205.
Religious, charitable, literary, scientific associations 1365-1372.
Removal of director secured, how 1179.
Removal of officer or director decided, how 1182.
Removal place of business without amendment articles, made how 1170.
Renewal of charters of expiring companies secured, how 1208.
Renewal existence continues, what rights 1210.
Report election of directors filed with secretary state 1186.
Requiring insurance companies make annual statements 1327-1329.
Resident agent 1118-1120.
Resident agent, failure to maintain, liability 1120.
Resident agent may be for other corporation 1119.
Restrictions as to issuance of money or circulating medium 1112.
Retaliatory taxation considered how in this state 1207.
Revisory power of court over election of directors 1130.
Sale, deteriorating property allowed, pending litigation 1198.
Franchise and property, made how 1151.
Property and franchise, made how 1152.
Property and franchise by receiver, made how 1197.
Stock for delinquent assessments made where, how, by whom 1133.
Stock delinquent for assessment, advertised where, when 1133.
Stock for nonpayment of assessment, made when 1133.
Seal, contain what 1206.
Seal deemed valid when 1206.
Seal, directors may authorize to be affixed 1127.
Secretary, shall have 1126.
Secretary state, fees for filing articles, computed, how 1203.
Secretary state, issue certificate of dissolution, how, when 1190.
Secretary state must charge fee for amendment to articles 1139.
Secretary state must compile and publish list corporations, when 1204.
Secretary, oath of and duties 1126.
Security demanded on transfer unpaid stock 1166.
Service of legal process, made how 1188.
Shares of stock, increased how 1168.
Shares of stock, personal estate 1131.
Shares of stock, transferred by indorsement, how, when 1131.
Shares of stock, transferred, how 1131.
Stock and shares, amount and character, to be stated in articles 1108, 1104.
Stock belonging to estates deceased persons, voted by whom 1161.
Stock belonging to married women transferred, how 1131.
Stock certificates contain what, signed by whom 1157.
Stock held by nonresidents exempt from taxation 1158.
Stock held by representatives, voted, how 1161.
Stock held for collateral, security may be voted by pledgor 1162.
Stock issuable for labor or real or personal property, when 1155.
Stock issued as paid up not liable to assessment or debt 1142.
Stock, issued in lieu of labor or property nonassessable, when 1156.
Stock, kinds or classes of 1114.
Stock ledger and list stockholders subject to inspection, by whom, when, where 1159.
Stock ledger showing owners of stock, kept by whom 1172.
Stock ledger to determine who may vote 1160.
Stock ledger prima facie evidence of owners of stock, considered, when 1172.
Stock ledger subject to inspection 1159.
Stock of infants held by guardian, voted how 1161.
Stock, not fully paid for transferred, when 1166.
Stock, owned by nonresidents in Nevada, corporation not subject to taxation 1158.
Stock, purchased at delinquent sale, disposed of, how 1134.
Stock, shares of, how transferred 1131.
Stock, whether subject to assessment or not, stated in articles 1108.
Stockholders, and directors cannot be sued, liabilities created by statutes other states 1137.
Defined 1205.
Liable under subscriptions fully paid 1135.
May petition district court to remove officer, how, when 1180.
May pledge stock, when 1162.
May ratify proceedings, meeting held without consent 1212.
May remove director or officer, how, when 1179.
Meeting to dissolve called how, when, where 1190.
Meetings, where may be held 1118.
Must be notified of assessment on stock 1132.
Ratification to agreement of merger secured, how 1145.
Special meeting to elect directors 1128.
Voting power of 1121.
Street railroad may be incorporated under general act 1105.
Subscription to capital stock deemed fully paid, when 1200.
Subdivision capital stock accomplished by whom, how 1168.
Surrender of rights before payment of capital stock, dissolved corporation 1189.
Surviving incorporators may designate others for organization purposes, how, when 1140.
Surety companies 695-701, 1105, 1106, 1242-1248.

Taxation, retaliatory 1207.
Telegraph companies 4603-4630.
Telephone companies 4631-4632.
Term of director, appointed to fill vacancy 1129.
Transfer of property to merger, made, how 1146.
Transfer of stock made, how 1131.
Transfer of stock by arbitration committee, how 1147.
Transfer of stock not valid, when 1131.
Treasurer, bond of 1126.
Treasurer, shall have 1126.
Treasury stock not to be voted, when 1163.
Trustees and directors defined 1205.
Trustees take oath 1123.
Tunnel companies may take mining companies as stockholders, when 1202.
Vacancy in board of directors, how filled 1128, 1129.
Vacancy in directorate made by removal, how filled 1182.
Vacancies in directors by failure to elect or qualify 1128.
Value of stock of dissatisfied stockholder to merger determined, how 1147.
Vested rights cannot be disturbed by amendment or repeal 1214-1215.
Voting list of stockholders and stock ledger 1159.
Voting power of stockholders 1121.
Waiver of notice deemed given, when 1213.
What articles or certificate shall set forth 1108, 1114, 1115, 1119.
Woman's Christian Temperance Union 1434-1439.

[NOTE—The following acts relating to corporations are not printed in this volume:]

Aid in carrying out provisions telegraph act, Stats. 1866, p. 254.
Concerning banking associations, formed in this state, under laws of United States, Stats. 1864-5, p. 353.
Incorporate Grand Lodge Benevolent Bachelor Brothers, Stats. 1893, p. 79.
Promote introduction and use of steam power for transportation purposes, Stats. 1871, p. 62.
Provide consolidation of domestic and certain foreign corporations, Stats. 1883, p. 121.
Provide incorporation Grand Lodge Independent Order Good Templars, Stats. 1869, p. 66.
Provide incorporation wire suspension tramway companies, Stats. 1871, p. 133.
Regulate rafting and running timber and wood on rivers in this state, Stats. 1866, p. 198; amended Stats. 1875, p. 61. (Act upheld, Mandelbaum v. Russell, 4 Nev. 551.)

Corporations, Miscellaneous

Ancient Order Hibernians 1410-1415.
Deemed body corporate, when 1410.
Certificate election directors recorded where, when 1413.
Directors elected, how 1412.
Directors file report when, where 1415.
Dissolution, property disposed of, how 1414.
Powers defined 1411.
Powers vested in board directors, how 1412.
Property disposed of how on dissolution 1413.
Report filed when, where 1415.
Vacancy board of directors, filled how 1412.
Cemeteries, 1398-1409.
Annual report directors made to whom 1403.
Articles incorporation filed how, when, where 1399.
Bequests, property disposed of, how 1406.
Directors elected how, where 1402.
Directors make reports to whom 1403.
Election directors held how, when 1402.
Incorporated, how 1398, 1400.
May hold real and personal property, how, when 1406.
May purchase former cemetery ground, how 1409.
May purchase real estate, when, where 1401.
Penalty destroying property 1405, 6759.
Powers defined 1400.
Power invest proceeds from sale of graves 1404.
Property exempt from taxation, how, when 1407.
Property of lot owners inalienable 1408.
Purchase former cemetery ground, made how 1409.
Taxation not to be levied on property, when 1407.
Wilful injury to property penalized, how 1405.
Certain purposes (old corporation act) 1219-1241.
Articles of incorporation, contain what 1220, 1238.
As to corporations generally 1221.
Authorized assess its stock, when 1222.
Authorized to buy in stock at assessment sale, when 1222.
Bank may be resident agent 1119.
Banking, not privileged issue or circulate currency, when 1219.
Book containing names of stockholders open inspection of whom, when, where 1234.
Books delivered to director or officer elected to fill vacancy of director or officer removed, when 1223.
Capital stock cannot be diminished, when 1236.
Deemed increased or diminished, when 1238.
Divided how after dissolution 1231.
Increased or diminished, 1236.
May be assessed by whom, when 1228.
Not to be reduced, when 1231.
Subscription may be taken how, when 1228.
Certificate of election issued director elected to fill vacancy caused by removal of director or officer by order of district court or judge, when 1223.
Incorporation deemed prima facie evidence of existence, when 1221.
Increasing or diminishing capital stock, contain what, made how 1238.
Compensation county clerk for services at proceedings of stockholders for removal of director or officer, what 1223.

Certain purposes—continued.
Complaint, criminal against 7402.
County clerk, compensation for services at proceedings for removal of director or officer, what 1223.
Creditor entitled receive from officer list of stockholders, when 1234.
Creditors may sue directors who allow debts to exceed capital stock paid in, when 1232.
Cumulative voting, defined 1223.
Debts not to exceed amount of stock paid in, when 1232.
Directors elected, when and in what manner 1223.
Directors' first meeting, called, how 1226.
Limitations of actions against 4984.
Meeting, quorum necessary 1225.
Oath, form of, taken, how 1223.
Powers, defined 1223.
Shall keep books for names of stockholders 1234.
Disincorporation of under act of 1865, 1240.
Disobedience of order district judge in proceedings for removal of director or officer, contempt, when 1223.
Dissolution effected, how 1240.
District judge vested with summary power deciding stockholders entitled to vote for removal director or officer 1223.
Election of directors, must be by ballot, when 1223.
Evidence of incorporation, what 1221.
Execution against, for fine 7410.
Executors of estates, authorized vote stock belonging to estates, how, when 1229.
Failure, election or qualification of trustees, remedied, how 1224.
False entry in books, made by officer, punished, how 1235.
First meeting of directors, called, how, when 1226.
Forbidden issue or circulate currency, when 1219.
Formation of, accomplished, how 1220.
Indictment, summons on 7409.
Increase or diminish capital stock, made, how, by whom 1237.
Limitation of actions against directors or stockholders 4984.
Married women, stock transferred, how 1227.
May be formed, for what purposes 1219.
Not to issue bills or notes as money 1233.
Notice application for dissolution published, by whom, when 1240.
Notice, assessment of stock to stockholders, given how, when, where 1228.
First meeting of directors given how, published where 1226.
Proposed removal principal place of business given how, when, by whom 1241.
Stockholders meeting purpose removal of director or officer, given how, when 1223.
To stockholders of proposed increase or decrease in capital stock given how, by whom 1237.
Number of persons necessary to form 1220.
Number of shares of stock represented at proceedings, removal director or officer 1223.
Oath of director, what, taken how 1223.
Officers and agents to be reported 1136.
Certain purposes—continued.
Penalty making false entry in books 1235.
Place of business deemed established, when 1241.
Pledge of stock made, how 1230.
Pledged stock, how represented at meeting 1230.
Powers and privileges defined 1222, 3513.
Powers of director defined 1228.
Powers of directors after dissolution 1239.
Powers exercised by directors, how 1223.
Preliminary examination 7406, 7407.
Privileges and powers, defined 1222.
Procedure to fill vacancy made by director failing to qualify when appointed place caused by removal of former director or officer 1224.
Proceedings against, for misdemeanor 7405.
Property and assets distributed after dissolution or expiration of charter, how 1231.
Property distributed after dissolution, by whom, when 1239.
Purposes for which corporation may be formed 1219.
Quorum of directors necessary at meeting 1225.
Railroad, charter to file, with whom 3513.
Removal place of business secured, how 1241.
Renewal certificate to issue 1208, 1209.
Sale of stock for assessments, made by whom, when, where 1228.
Shares of stock deemed personal estate, when 1227.
Necessary to effect dissolution 1240.
Owned by married women transferred, how 1227.
Transferred how, when 1227.
Stock held by executors represented at meeting by whom, how 1229.
Stock may be pledged how, when 1230.
Stockholders, limitations of actions against 4984.
Stockholders remedy, removal of director or officer, what 1223.
Summons, service on 1178, 5023-5026, 7402-7404.
Time and manner of election of directors 1223.
Transfer shares of stock allowable when, by whom, how 1227.
Trustees liable for excess of capital stock over debts, when 1232.
Vacancy in directorate filled, how 1223.
Vote of stockholders for removal director or officer taken, how 1223.
Cheap transportation lines 1341-1345.
Act regarding restricted as to railroads 1345.
Formed how 1341.
Incorporated how 1341.
Map and description, how and where filed 1343.
Not required operate more than six months each year, when 1344.
Powers defined 1342.
Restricted in amount of stock prescribed 1345.
Chinese or Mongolians not to be employed by, when 3483-3485.
Cooperative associations 1249-1260.
Articles incorporation contain, what 1251.
Articles incorporation filed, where 1251.

Cooperative associations—continued.
Amendment articles, filed, where 1255.
Board arbitration determine expulsion of member, when 1252.
By-laws adopted and amended, how 1252.
By-laws filed and recorded, where 1253.
Certificates issued to whom, how, when 1249.
Certificates membership transferable, how, when 1249.
Consolidated effected, how 1258.
Deceased member's interest disposed of, how 1259.
Deemed dissolved, when 1258.
Dissolution effected, how 1258.
Formed, how 1251.
Insolvency makes members liable, how 1250.
Interests of members equal 1250.
Lawful business, defined 1260.
Member entitled to how many votes 1250.
Member not liable for debts in excess of personal interest 1250.
Not to issue corporate stock 1249.
Powers, defined 1257.
Profits, divided how 1256.
Property subject to execution, when 1254.
Purposes may be changed or modified, when 1255.
Qualifications, membership and liabilities, defined 1250.
Receiver appointed, how, when, by whom 1258.
Succession of members determined, how 1259.
Transfer certificates of membership authorized, when 1249.
Withdrawal from accomplished, how 1252.
Who authorized to organize 1249.
Criminal action against 7402-7410.
Cruelty to animals, prevention 1373-1381.
By-laws made, how 1374.
Cruelty to animals, defined 1378.
File reports how, when, where 1375.
Formed how 1373.
Game and other laws not subject penalties this act 1381.
Maimed or diseased animals not allowed go loose, disposed of, how 1378, 6715.
Members may wear badges and make arrests, when 1377.
Officers elected, how 1375.
Peace officers may arrest those violating provisions this act 1376-1377.
Penalty, persons causing animals to fight, when 1378.
Penalty, violation this act 1379, 6285, 1376, 1377.
Penalty violation provisions this act, defined 1378.
Property, person violating this act seized how, when 1378.
Prosecution, violations this act conducted how, by whom 1380.
Reports filed by officers how, when 1375.
Resistance of arrest, punished how 1377.
Society by-laws made how 1374.
Society incorporated how 1373.
Violators provisions of this act arrested how, punished how 1376-1377.
Debts, record of 3521.
Electric light, heat and power 1261-1264.
Appurtenances must be of best make 1263.
Duration of franchise granted limited 1264.
Franchise granted limited in duration 1264.
Must file gross receipts and expenditures, where 1264.
Must keep appliances in good order 1262.
Must pay percentage of profits in consideration of franchise, how, when 1261.
Plant must be of best make 1263.
Poles must be certain height 1262.
Procedure for securing franchise 1261.
Wires must be kept in repair 1262.
Foreign 1346-1354, 1355, 3574.
Annual statement 1352.
Articles incorporation contain what, filed where 1346, 1348, 1349.
Attorney-general to prosecute, when 1350, 1354.
Bringing children into state for adoption 747.
Copy charter filed when, where 1348.
Conditions precedent to doing business in this state 1316.
District attorneys to prosecute violations of law 1354.
Entitled benefit statute limitations, when 1355.
Failing to file certificates incorporation county recorders, penalized how 1347.
Failing to file and publish annual statements, punished how 1353.
Fees filing articles incorporation 1203, 1349.
File articles with recorder 3531.
Fines imposed on officers failing to comply with law 1350.
License of 1356, 1357, 1359.
Mining, may consolidate with domestic 1218, 1337.
Must file certificates county recorders, when 1346, 1348, 1350.
Must file copy annual statements assessors of counties 1352.
Must file copy charter with secretary of state 1348.
Must publish annual statements how, when, where 1351.
Officers failing to comply with law, punished how 1350.
Penalty failure to comply with law 1347, 1350, 1353.
Resident agent to appoint 5024.
Statute limitations applicable to, how, when 1355.
Summons served on, how 5023-5026.
Service of summons on secretary of state, when 1273, 1276, 1316, 1325, 5223-5026.
Foreign building and loan 1356-1360
Annual statements filed with whom, where 1357, 1351, 1354.
Disposition moneys received 1360.
Duties as to 1361.
Expenses insurance commissioner examination business, what 1359.
Failure to comply with law, officers to bring suit 1354.
Failure to pay license, penalized, how 1358.
File annual statements, when, where 1357, 1351, 1354.
Insurance commissioner examine business, when, how 1359.

Foreign building and loan—continued.
License required annually 1356, 1361, 1372.
Pay annual license, how much 1356, 1361, 1372.
Penalty failure pay license, designated 1358.
Foreign joint-stock building and loan 1361-1364.
Annual statements filed, when, where 1362.
Cannot do business in this state until collateral deposited, where 1361.
Collateral deposited with state treasurer 1361.
Failure to comply with corporation law, punished, how 1363.
Must deposit collateral with state treasurer 1361, 1356, 1360.
Must file annual statements, how, when, where 1362.
Penalty failure comply corporation law, designated 1363.
Franchises refused, when Chinese or Mongolians employed, when 3483-3485.
Gas companies 1265.
May erect buildings and lay pipes in cities and towns, how, when 1265.
Privileges, designated 1265.
General corporation act adopted 691.
Grand Lodge Free and Accepted Masons, Grand Lodge Independent Order Odd Fellows 1418-1423, 1424.
Benevolent societies existing this state extended additional privileges 1424.
Election certificate board trustees I. O. O. F. filed, where 1421.
Election certificate board trustees Masonic filed, where 1421.
Grand Encampment I. O. O. F. extended additional privileges 1424.
Grand Lodge F. A. M. deemed body corporate, when 1418.
Grand Lodge I. O. O. F. deemed body corporate, when 1418.
Grand Chapter Royal Arch Masons extended additional privileges 1424.
Powers granted I. O. O. F., what 1419.
Powers granted Masonic lodge, what 1419.
Powers I. O. O. F. vested in board of trustees, how, when 1420.
Powers Masonic lodge vested in board of trustees, how, when 1420.
Property exempt, when 3621.
Property subordinate lodges when dissolved reverts to whom 1422.
Property subordinate Masonic lodges dissolved reverts to whom 1422.
Subordinate lodge I. O. O. F. dissolved, how, when 1422.
Subordinate lodge Masonic dissolved, how, when 1422.
Trustees I. O. O. F. report annually to whom 1423.
Trustees Masonic lodge report annually to whom 1423.
Vacancy in board trustees I. O. O. F. filled, how 1420.
Vacancy in board trustees Masonic lodge filled, how 1420.
Grand Lodge Knights of Pythias 1416-1417.
Deemed body corporate, when 1416.
Provisions of act I. O. O. F. and Masonic lodges, applicable hereto 1417.
Historic and literary societies 1382-1389.
Articles incorporation filed, where 1383.
As to corporations generally 1221.
Certified copy, certificate incorporation prima facie evidence, when 1384.
Directors elected, how 1386.
Election directors 1386.
Formed how 1383.
Indebtedness limited 1389.
Nevada historical society 2545-2547.
Notice first meeting directors given, how 1388.
Powers and privileges, designated 1385.
Society may be formed how, when 1382-1383.
Time election directors 1387.
Hospitals and asylums 1390-1397.
Articles of incorporation, contain what, filed where 1391.
Compensation not allowed directors, when 1394.
Directors elected, how 1392.
Directors entitled compensation 1394.
Funds invested how 1395.
Incorporated how 1390.
May hold real and personal property, how 1393.
Penalty, failure report conditions county commissioners 1397.
Powers directors designated 1392.
Property exempt from taxation, when 1396.
Real and personal property held in limited way 1393.
Report to be made to county commissioners 1397.
Taxation not to be levied when 1396.
Insurance 1266-1284.
Agent failing or refusing secure license deemed guilty misdemeanor 1280.
Agents must pay license to solicit business 1280.
Assessment of stock, purpose repairing capital allowed, when 1271.
Cannot be organized until certain conditions complied with 1267.
Cannot make loans to stockholders, exception 1268.
Company not incorporated United States not permitted to do business this state until complying with certain conditions 1275.
Compensation controller examining books, what 1279.
Controller's duties and powers regarding 1274.
Controller entitled compensation for examination books, how, when 1279.
Controller may require filing incorporation papers in his office 1281.
Controller must examine financial condition outside companies 1274.
Controller must order repair capital stock if not satisfactory 1270.
Controller to estimate liabilities, how, when 1277.
Controller to have access to books for purpose examination 1272.
Controller to make examination financial standing, how, when 1270.
Controller to order officers keep books properly, when 1272.

Insurance—continued.
Doing business after certificate revoked 1270, 1274.
Doing business without license 1280.
Duty to aid controller in examination, how 1272.
Failing comply with orders state controller works revocation of certificate to do business, when 1270.
Fines, penalties from business payable into school fund, how, when 1279.
Foreign, refusing controller right of examination of books subject revocation license do business, when 1274.
Incorporated, how 1267.
Life, privileged to appoint agents collect premiums this state, when 1276.
License and fees, what 1279.
Loans prohibited in certain cases 1268.
Must have certain amount assets before license is issued do business 1276.
Must invest capital in bonds and mortgages, when 1267.
Organized outside state must have agent in state for service of papers 1273.
Organized outside state not authorized do business until, when 1273.
Penalty failure comply with order of state controller, what 1270.
Penalties failure allow controller examine foreign insurance companies' books 1274.
Prohibited doing business without certificate from controller 1266, 1218.
Prohibited from investing assets in mining stocks 1267.
Regulation of licenses to do business 1278.
Refusing allow controller examine books liable revocation certificate, when 1272.
Showing required of companies other than state corporations 1273.
State controller must issue certificate before company can do business 1266, 1218.
Stockholders prohibited from being interested in loans of company 1268.
Term "company" as applied to insurance 1282.
Terms of insurers, limited 1269.
Unearned premiums returned in certain cases to insurers 1284.
Violation of act 1283.
Insurance, fire 1304-1309.
Affidavit must be attached to annual statement 1308.
Annual statement attached to affidavit 1308.
Before doing business must be legally authorized 1305.
Cannot reinsure when not authorized transact business this state 1307.
Cannot transfer risks to companies not authorized to do business this state 1306.
Doing business without authority 1309.
Not authorized to do business except through authorized resident agents 1304.
Reinstatement to do business 1309.
Resident agents to transact business alone, when 1304.
Violating provisions of this act, authority revoked 1309.
Violating provisions of this act, penalized how 1309.
Insurance—continued.
Whose authority revoked reinstated to do business, how 1309.
Insurance, mutual fire 1285-1303.
Amendments proposed to articles of incorporation submitted to attorney-general 1298.
Articles incorporation, contain what 1289.
Attorney-general investigate articles incorporation before filing 1290.
Authority amend articles incorporation 1298.
Authorized issue assessments on stock, when 1296.
Authorized begin suits how, when 1296.
Authorized to do business, when 1287.
Bond receiver made by whom, before whom, approved 1302.
Certificate articles incorporation filed, where 1286.
Controller file statement, when 1299.
Controller furnish full statements required, when 1295.
Controller may examine into affairs and close up business, when 1293.
Copy form of statement filed with county clerk 1293.
Copy statement of controller of failure comply with orders, published where 1299.
Deemed incorporated, when 1297.
Directors and officers failing perform duties, guilty of felony, when 1295.
Directors authorized make by-laws, when 1291.
Duty to make statement to controller annually 1292.
Exempt from other insurance law, when 1303.
Failing comply with requirements controller, subject to penalty 1294.
Formed, how 1285, 1286.
Notice requiring company pay outstanding claims, given by whom 1299.
Officers or directors failing perform duties guilty of felony, when 1295.
Publication of notice given by controller 1299.
Purposes formation, defined 1303.
Receiver appointed at request of controller to take charge affairs, when 1301.
Receiver's bond on taking charge, made how, before whom approved 1302.
Receiver's duties relation affairs disabled company 1301.
Receiver keep account moneys and other property received, how, when 1302.
State controller authorized examine affairs, when 1300.
State controller privileged make examination articles incorporation, when 1290.
Statement made to controller contain, what 1292.
To hold real estate and sell same certain cases 1288.
Insurance, life, endowment 1310-1324, 1327-1329.
Abstracts annual statements to publish 1329.
Annual statements contain what, filed where 1327.
Cash amount paid in capital, how much 1311, 1218.

Insurance—continued.
Controller may examine affairs company, when 1320.
Controller may revoke license, how, when 1316.
Controller must annually report abstract of statements to governor 1329.
Controller to issue license, when 1316.
Domestic and foreign must report to controller, when 1319.
Domestic organized, must accumulate reserve or emergency fund 1314.
Expenses controller or board examination affairs, paid how 1323.
Failure file annual statements controller's office, penalized how 1327-1328.
False annual statements to controller, penalized how 1328.
False statement regarding age or insurance contract deemed perjury 1317.
False statement to annual report, perjury 1328.
Fee for license, what 1322.
Foreign and domestic must report to controller, when 1319.
Foreign must deposit with controller certain papers before authorized to do business 1316.
Formed how 1311.
Fraternal societies not bound by provisions of this act 1324.
Fraud in annual statements, penalized how 1317.
Insurable age of person defined 1317.
Liabilities not limited to premiums, when 1310.
License fee for doing business, what 1322.
May reincorporate but not obliged to, when 1313.
Membership, how acquired 1311.
Money and other assets exempt from attachment, when 1318.
Must begin business within what time 1312.
Mutual insurance defined 1310.
Payments on contracts issued, how 1314.
Penalties for violation of this act, what 1323.
Policy not to lapse without notice 1321.
Provisions this act do not apply to fraternal societies 1324.
Reserve or emergency fund disposed of, how 1315.
Reserve or emergency fund must be accumulated by domestic company, when 1314.
Shall not issue contracts to persons under or over certain ages, what 1317.
Insurance, live stock 1325-1326.
Comply with general law 1326.
Defined 1325.
Enter the state to do business, how 1325.
General corporation law to govern 1326.
Must comply with general corporation law 1326.
Laws concerning to be general 338.
Liable for poll tax of employees, when 3718.
Mining 1200-1202, 1216-1218, 1330-1340.
Amendments not allowed to articles incorporation making stock assessable 1200.
Annual statements filed with county recorders, contain what 1330-1340.
Articles incorporation not amendable for purposes assessments 1200.
Mining—continued.
Attorney-general to prosecute for failure to designate character stock sold 1338.
Auditor may demand books of 3691, 3694.
Authorized to provide mode and manner subscribing to capital stock 1200.
Capital stock may be paid for by deed to mining ground, when 1200.
Certificate consolidation contain what, filed with secretary state 1216.
Company to furnish statement of property to assessor 3690.
Consolidation allowed, when 1216.
Consolidation not authorized without consent stockholders 1216.
Corporate stock not to be assessed unless power reserved in certificate of incorporation 1200.
District attorney to enforce provisions of mining act 1340.
District recorder violating duty 2455, 2468, 2474.
Domestic may consolidate with foreign, how, when 1218.
Failure to maintain agent 1218.
Foreign and domestic consolidated must keep agent in Nevada 1218.
Foreign failing to designate character stock sold, penalized, how 1337.
Foreign may consolidate with domestic, how, when 1218.
Formed for mining purposes, 1105, 1217-1218, 1241, 1200, 1201, 1202, 1216.
Governed by district mining laws, when 1201.
Kinds of stock defined 1334.
Location of mine determines district mining laws 1201.
May become stockholders in tunnel companies, when 1202.
May consolidate how, when 1216-1218.
Mining ground deemed payment for capital stock, how, when 1200.
Mining ground in payment capital stock transferred how and considered paid 1200.
Mining ground must be located in Nevada to permit consolidation foreign and domestic companies 1218.
Must designate character of stock sold, how 1332.
Must mail statements its condition to stockholders, contain what, how, when 1331.
Not authorized to assess capital stock when not provided for in articles 1200.
Notice proposed consolidation mining companies must be given 1216.
Officers to prosecute companies guilty failure comply with provisions of act 1340.
Pay taxes 3687.
Payment of taxes receipted for by assessor 3701.
Penalty failure consolidated foreign and domestic companies keep agent in Nevada, what 1218.
Penalty failure print mining stock 1338, 1336-1339.
Penalty violation not branding stock certificates as required 1336, 1338-1339.
Principal place of business consolidated companies situated, where 1218.
Promotion stock defined 1334.

Mining—continued.
Promotion stock stamped on certificate, how 1333.
Property of, sold for taxes, when 3700.
Report annually to attorney-general and county recorder 1330-1340.
Report to assessor 3695.
Statements of 1340.
Stock certificate marked what character of stock 1335.
Stockholders' consent necessary to secure consolidation 1216.
Stockholders' consent in writing necessary to consolidate 1217.
Stockholders may be represented by proxy at meeting purpose consolidation 1217.
Stockholders' stock voted how at meeting proposed consolidation 1217.
Subscription to capital stock deemed fully paid by transfer of mining ground, when 1200.
Treasury stock defined 1334.
Treasury stock stamped how, on certificate 1332.
Tunnel companies may take mining companies as stockholders, when 1202.
Nonresident joint-stock companies. See Foreign Joint-stock Building and Loan 1361-1364.
Proceedings against 7402-7410.
Protestant Episcopal Church 1425-1433.
Annual election warden or vestrymen, held when 1428.
Churches already organized, privileged to avail themselves provisions this act 1433.
Corporate name defined 1425.
Duties, trustees defined 1430.
Elections held irregularly, not deemed to invalidate act 1429.
Limitation in annual income, what 1432.
Powers and duties, defined 1430.
Quorum vestry necessary do business, when 1428.
Real estate sold how 1431.
Sale real estate, conducted how 1431.
Treasurer of file and record financial condition, when, where 1432.
Vacancy in vestry filled how 1428.
Vestry constituted how 1427.
Vestry legal trustees, when 1427.
Violation provisions limitation in annual income works forfeiture charter 1432.
Wardens, vestrymen elected how, when, where 1426.
Religious, charitable, literary and other societies 1365-1372.
Annual report made how, when 1372.
Building used for, exempt 3621.
Articles incorporation contain what, acknowledged, how 1366-1367.
Certificate election trustees contain what, filed where 1366.
Directors make annual reports how, when 1372.
Directors, powers defined 1368.
District court may allow sale of property 1369.
Incorporated how, when 1365.
Lands and property held in trust, how 1370.
Limitation property interests, what 1371.
Powers of directors defined 1368.
Property descends, how 1370.
Religious—continued.
Property exempt from taxation, when 3621.
Real estate limited, how 1371.
Real estate sold, how 1369.
Surety companies, 1242-1248.
Articles incorporation recorded, where 1247.
Attorney-general must approve articles, when 1243.
Certificate incorporation, to whom submitted, contain what, filed where 1243.
Domestic, consolidated how, when 1245-1246.
Duty district attorney prosecute stockholders or officers, when 1248.
Liabilities limited 1246.
Liabilities of stockholders must be less than assets 1244.
May be incorporated how, by whom 1242.
Oath of officer or stockholder 1244.
Power to incorporate given, to whom 1242.
Stockholder forfeits his stock therein, when 1244.
Stockholder guilty of misdemeanor falsely subscribing to stock 1244.
Stockholder may be examined as to financial worth, when, by and before whom 1244.
Stockholder must take oath 1244.
Stockholder responsible for par value stock held by company 1245.
Taxpayer may complain against sufficiency of stockholder's worth, to whom, when 1244.
Who qualified to be stockholder 1244.
Woman's Christian Temperance Union 1434-1437.
Articles incorporation, contain what 1436.
Certified copy articles deemed prima facie evidence, when 1437.
Limitation in value property held by 1436.
May erect and own certain property, when 1438.
May incorporate, how 1434-1435.
Subject to general corporation law, when 1439.

"Corrupt" or "corruptly" defined 6294(2).
Corrupt influence of agent or employee, penalty 6796.
Corrupt practice at elections, penalty 6802, 6803. See Elections.
Costs, civil action. See Civil Practice.
District court 5376-5393.
Justice's court 5812-5814.
Supreme court 5333, 5357, 5381, S. C. rule vi, p. 1422.
Witness fees 2000, 2012.
Costs, criminal action, escape, prosecutions for 6820.
Judgment for 7499.
Malicious prosecution 7501, 7502.
Not to be deducted from fine 3760, 7463.
Counsel, right of accused to appear by (Nev. Const.) 237. See Civil Practice.
Counselors. See Attorneys under Civil Practice 498-525.
Counter-claim. See Civil Practice.
Counterfeiting, chapter concerning, crimes act 6663-6694.
Coins or paper money 6667.
Congress to provide punishment for 116.

Counterfeiting—continued.
Expert testimony on trial for 7175.
Gold bars or other articles 6686.
Having or making die, plate or machine 6681.
Money, advertising, making or having with intent to pass 6667, 6678-6680.
Private stamp, labels or designs 4619, 6437, 6689.
Public or corporate seal 6685.
Trademark 4619, 4636, 4637, 4646, 6437, 6689-6694.
Counties. See County Government and Various County Officers.
Actions by, against or between 5013.
Apportionment of moneys pledged to school purposes to be made by law 355.
Change in boundaries, justice of the peace successor of predecessor 5805.
Creation, boundaries and seats, Churchill 390. 1449, 1451, 1453-1455.
Clark 1456, 1457.
Douglas 390, 1442, 1450.
Elko 1458, 1459, 1464.
Esmeralda 390, 1441, 1450, 1451, 1452, 1460, 1461.
Eureka 1462-1465.
Humboldt 390, 1446, 1448, 1467.
Lake 1447, 1484, 1485.
Lander 390, 1455, 1467-1470.
Lincoln 1471-1473.
Lyon 390, 1445, 1474-1478.
Mineral 1479, 1480.
Nye 390, 1451, 1468, 1472, 1481, 1482, 1487.
Ormsby 390, 1443, 1450.
Roop 390, 409, 1447, 1484, 1485.
Storey 390, 1446, 1450.
Washoe 390, 409, 1444, 1447, 1450, 1483-1485.
White Pine 1486-1488.
How mortgaged property situated in two or more to be sold on foreclosure 5501.
Indebtedness of state not to assume 351.
To provide for indigents as may be prescribed by law 366.
Government of 1501-1701.
Removal of county-seats, election for, canvass of 1496, 1497, 1500.
Officers to remove to new location 1498.
Petition for 1496, 1499.
Survey and establishment of boundary, act construed 1495.
Commissioners to authorize 1489.
County surveyors to make, reports and maps 1490-1492.
Expenses of 1493, 1494.
Surveyor-general to run line 4349.
Surveyor-general, custodian of boundary maps 4355.
County. See County Government, County Commissioners.
Abatement of nuisance in, to be ordered by county commissioners, district attorney to bring action 1562.
Action against on rejected claim must be commenced within one year after rejection thereof 4967.
Action by or against, district attorney to prosecute or defend 1598.
Action not to be brought against until claim is first presented to commissioners and auditor, costs when recoverable 1523.
County—continued.
As a party to action, when bond or undertaking not required 5487.
Attached to another for judicial purposes, sheriff has same power 1658.
Business, local or special law regulating, invalid 278.
Claim against, if taxpayer objects, commissioners to defer action at least ten days to allow institution of proceedings to determine validity 1521.
Commissioners, board of, legislature to provide for in each county 284.
Costs not payable by in action or abuse of apprentices 493.
Demand against, not presented within six months after notice that it is payable funds may be paid for other purposes, but demand becomes due again on representation 1563.
District attorney not to advocate claim against 1520, 1605.
Funds, not to be used for sectarian purposes 362.
Government, legislature to establish uniform 283.
Indebtedness or liability to, local or special law releasing, invalid (Nev. Const. art. iv, sec. 20) 278.
Jail, each to build one 7610.
May have contract declared void if public officer interested 2829.
Need not give undertaking on appeal 5346.
State not to assume debt of, unless created for public defense 351.
Stockholder, not to become or to loan to any company, corporation except railroad company 347.
When losing party, costs payable out of county treasury 5393.
When may recover for relief furnished indigent of another county 2922.
County and executive committees for political parties 1709. See Elections.
County assessors. See Officers Generally, Revenue.
Absence, leave of 1566-1568.
Assessment of land, minimum, liability for 3838-3840.
Assessment, when made 3624.
Assessment roll, deliver to county clerk 3636.
To prepare, form of 3633.
When completed, oath to 3635.
Attendance on state board meeting compelled 3798.
Auditor, information to furnish to 1585.
Auditor, report on statistics 1586.
Blanks, unused, to return 3686.
Bond, additional, when required 3705.
Bond of, approval and filing 1571, 2786.
Bond, suit on 1575.
Books for, commissioners to furnish 3623.
Books of mining company, may demand 3691, 3694.
Books open to inspection 3752.
Commissioners, compensation to fix, when 1573, 1579.
May authorize appointment, when 1573, 1579.
Suit against, to direct, when 3704.
Vacancy in office, to fill 1572.

County assessor—continued.
Commissions, on what allowed, how paid 1581.
Compensation 3765.
Delinquent list, proceeds of mines, notice of 3699.
District attorney, proceedings against, when 3625, 3681, 3840.
Duties, neglect of, penalty 3625, 3751, 3753.
Duties of other office, not to perform 3751.
Election of 1569, 2765, 2773, 2781.
Ex officio poll-tax collector 3713.
Express companies, assessment 3791, 3792.
Foreign corporation, annual statement 1352.
Franchise, grantee to file sworn annual statement with 2136.
Full cash value 3623.
Giving false receipt felony 3684.
Improper assessment, penalty 3809.
Land, state, contracts and sales, surveyor-general to report to 3199.
Land, minimum assessment 3838-3840.
Leave of absence 1566-1568.
Liability for taxes 3625, 3839.
List of taxpayers, to prepare and print 3632.
Live stock, assessment 3843, 3845-3861.
Map, to prepare, when 3634.
Member of state board of county assessors 3797.
Monthly statements to make, penalty for failure 3680, 3681.
Mortgaged property, assessment 3786, 3790.
Neglect, excused, when 2625.
Neglect of duty, penalty 1574, 3704.
Neglect to make monthly statement proceedings 3681.
Neglect to make settlement, suit against 3704.
Oaths, may administer 1576.
Oath of 1571, 2786.
Oath to assessment roll 3635.
Owners absent or unknown 3624.
Patented land, assessment 3838-3846.
Patented mines, assessment of 352, 1578.
Personal property, collection of taxes 3678, 3866.
Personal property, sale on summary process 3679, 3680.
Personal tax, collection of 3678, 3866.
Poll-tax collector 3713.
Bond, additional may be required 3715.
Collection enforced 3718, 3719.
Information, refusal to, penalty 3720.
Penalty false receipt 3714.
Receipts from auditor 3713.
Roll to keep 3724.
Settlement with auditor and treasurer 3722, 3723.
Poll-tax receipts to sign 3841.
Printed list of taxpayers 3775, 3776.
Proceeds of mine, assessment 3687-3709.
Property, how assessed 3623.
Quarterly statement as to mines 3695-3697.
Railroads, assessment 3814, 3838-3840.
Records, altering or stealing 2817.
Removal or suspension 3753.
Report to assessor of other county 3627.
Report to auditor 1586.
Report to district attorney, person refusing statement 3624.
Resignation 2787, 2801, 2813.
Returns, neglect to make, penalty 3726.
Salary, state to allow for part 1701, 3749.
Sale of personal property for taxes 3700.
Settlements as to revenue 3754.
Sheep, number and value, statement to prepare 4590.
State board of county assessors 3797-3812.
Statement, franchises to file annual with 2136.
Statement to demand, penalty for refusal 3624.
Statistical reports to make 1586-1591, 4352.
Statistics to furnish, compensation for 1586, 1591.
Surveyor-general, contracts and sales of land to report to 3199.
Surveyor-general, reports from to obtain quarterly 4352.
Surveyor-general to send circular letter to 1589, 4352.
Tax levy, copy to file 3763.
Tax list to prepare, form of 3633.
Taxpayers, printed list of 3775, 3776.
Taxes, proceeds of mines to collect and pay over 3700-3704.
Term of office 1570, 1577, 2786.
Term, expiration of refusal to surrender records, penalty 2819.
Transient stock, duties 3847, 3851, 3854, 3858, 3859.
Unincorporated towns, duties 878, 890.
Vacancy, how filled 1572, 2787, 2801, 2813.
County auditor. See County Government, Revenue, Officers Generally.
Affidavit of observance of law 2844.
Annual report to controller 1584, 3835.
Assessment roll, duty concerning 3641, 3642, 3794.
Assessment roll, mines, to examine 3697.
Assessor, to report on statistics to 1586.
Audit claims against county 1509.
Board of examiners, member of 1549-1551.
Bond, liability on for neglect 3685.
Bond of clerk, filed with 1690.
Bond of sheriff, filed with 1644.
Books of account, to keep 1511.
Books of, open to inspection 1511, 3752.
Certificate or duplicate to issue on claims, fee for 1535.
Certificates or warrants of indebtedness, payment of 1563.
Circular of surveyor-general to deliver to assessor 1585.
Claims, audit in part 1510.
Conveyance of prisoners to audit 1509-1512, 1545.
Duty to audit 1535, 1544, 1545.
Indebtedness deducted 1512.
To number and keep record of 1511.
Vetoed, warrant to draw on unanimous vote of commissioners 1510.
Compensation 1592, 3765.
Constitutional provisions for office of 290.
Controller, to report to 3748.
County finances, to have knowledge of 1511.
Court order, warrant on 1583.
Delinquent list, duty concerning 3657.
Delinquent list, proceeds of mines, duty concerning 3706.

County auditor—continued.
Delinquent taxes, adjustment of accounts with treasurer 3862, 3863.
Deputy, may appoint 2848.
District attorney to file receipts with 1599.
District attorney to notify, neglect of assessor 3681.
District attorney to receipt to, for money or property received 1599.
District judges, salary, warrant for, to draw 1508.
Duties as to revenue, neglect of, penalty 3751, 3753.
Duties generally 1511.
Duties of other office, not to perform 3751.
Fees, counties less than eight hundred 2002.
Fees, counties more than eight hundred 2014.
Fees, oath to claims 1535.
License, glove contest, to prepare 3883.
Licenses, settlement with sheriff for 3740, 3741.
Licenses, sheep, to prepare 3771.
Orders of district judges for payments to, number 1583.
Property not assessed, duty as to 3625.
Recorder, ex officio 2765.
Redeemed warrants deposited with 1684.
Report, to controller 3748.
To controller, assessment and taxes 3642.
To controller, delinquent taxes 3649.
To controller on poll taxes 3725.
To surveyor-general, certain statistics 1584-1591.
Salary, state to allow for part 1701, 3749.
School funds, duties as to. See Public Schools.
Settlements with, by revenue officers 3754.
Settlements with tax receiver 3648, 3796.
Sheep license, to prepare 3771.
Sheriff, bond of, filed with 1644.
Statement, quarterly, to commissioners 3746.
Statement to controller 3750.
Statistical report to controller 1584.
Tax levy, copy to file 3763.
Tax receiver to charge with assessment roll 3642.
Town government, duties 78-890.
Warrant, not to draw unless money in treasury to pay 1510.
Warrants of, when payable 1582.
Warrant on court order 1583.
Warrants to draw for treasurers, settlement with state, expense of collecting revenue 3749.
Weather bureau, reports to make to 4410.
County board of education, election, powers and duties 3417-3419. See Public Schools.
County board of health, created, who constitutes, duties, what 2981, 2982.
County business, local or special law regulating, invalid 278.
County clerk. See Clerk of Court under Civil Practice, Criminal Practice, Officers Generally.
Absence, leave of 1566-1568.
Acknowledgments, may take 4883.
Actions, register of to keep 5480.
Agents, registry, to report to persons subject to military duty 3981.
Assessment roll, correct and deliver to auditor 3640.
County clerk, assessment roll—continued.
Custodian of 3636.
Notice to give for inspection 3636.
Bond of, approval and filing 1690, 2786, 2872, 2887.
Bond, surety company may furnish 2888.
Books of revenue open to inspection 3752.
Certificates of election, to issue 1513.
Certificates of transient stock, duties as to 3846, 3847.
Certificates of true name of persons transacting business under assumed name filed with, index to keep 6729.
Certify tax levy to revenue officers 3763.
Certify vacancies to secretary of state 2795.
Clerk of board of county commissioners 290, 1505-1507, 1691, 2765.
Clerk of court, duties as, any may administer oath or affirmation 5483.
Certificate and duty of on stay of execution pending motion for new trial in district court, D. C. rule xxvi, p. 1429.
Certificate that appeal is perfected, when to stay execution, D. C. rule xxii, p. 1429.
Deposition of witness for perpetuation of testimony to be filed with 5468.
Deposition taken out of state to be forwarded to 5461.
Deposition to be sealed and forwarded to 5456.
Duties of concerning investments in action for partition 5569.
Duties of in relation to judgment-roll in certiorari proceedings 5693.
Duties of on application for naturalization 2518, 2525.
Execution to be returned to 5283.
Fees of in contested election for county or township office same as in district court 1811.
Fees of in proceedings for removal of directors or officers of corporation 1182.
Fees upon naturalization, half to be transmitted 2526.
Filing of certificate of district judge as to which of two justices of the peace entitled is successor 5807.
How to indorse, file and open deposition in district court, D. C. rule xvi, p. 1428.
How to make up court calendar 5200.
In absence of district judge may commit insane person to asylum 2210.
May attest copy of records of other states 5410.
May be required to take down testimony 5473.
May certify to certificate of incorporation 1221.
May certify to statement and papers on appeal 5356.
May certify transcript of judgment for filing as lien in another county 5277.
May file and enter consent of tenant in action for partition 5556.
May issue execution in action for delinquent taxes 3665.
May issue execution on judgment for deficiency after sale on foreclosure 5501.
May take affidavit to be used in this state 5450.

County clerk, clerk of court—continued.
Mortgage or security may be taken in name of on sale in partition 5555.
Must include interest and costs in judgment and docket 5388.
On removal of officer for malfeasance, to transmit copy of judgment to governor or county commissioners 2853.
Pleadings and transcript to be certified to on transfer of case from justice's court to district court 5721.
Security or investment of proceeds on sale in partition to be invested in name of 5567.
Service of notices and papers may be made upon when party has no office at county-seat 5369.
Service upon of notice of taking testimony for perpetuation 5466.
Service upon of notice of motion to permit plaintiff to occupy premises pending action under eminent domain 5615.
Sheriff to file affidavit and order of arrest with, D. C. rule xxxiii, p. 1430.
To accept deposit in lieu of bond or undertaking 5486.
To add his costs to judgment, although not in cost bill 5387.
To annex examination to undertaking on justification of bail in civil action 5105.
To arrange judgment docket to facilitate inspection 5276.
To ask jury if they have agreed upon verdict 5218.
To attach certificate to judgment roll and enter a minute of the judgment of the supreme court on appeal 5360.
To be furnished with copy of order or judgment by attorney in district court, D. C. rule xxxii, p. 1430.
To certify copies of judicial records of this state or the United States 5408.
To certify to genuineness of signature of judge taking affidavit out of state 5453.
To certify to writ of attachment in justice's court for service in another county 5751.
To certify under seal to summons in justice's court for service in another county 5732.
To collect fee upon commencement of action or proceeding 2030.
To deduct fees paid juror in civil case from amount due him from county 2013.
To deliver statement and amendments on appeal 5331.
To deliver to district judge calendar showing business, D. C. rule ii, sec. 3, p. 1426.
To enter certificate of judgment of supreme court when appeal taken from order 5360.
To enter judgment 5266.
To enter judgment in judgment book 5270.
To enter judgment upon acceptance of offer of compromise 5265.
To enter name of minister of gospel authorized to solemnize marriage 2340.
To enter proceedings for right of way for railroad 3550.
To enter satisfaction of judgment 5279.

County clerk, clerk of court—continued.
To enter verdict and judgment or order on special verdict 5225.
To file and docket abstract of judgment from justice's court 5780.
To file and enter submission to arbitration 5257.
To file complaint and may issue summons in civil action 5016, 5034.
To file decision of arbitrators in voluntary submission of dispute between employer and employee 1930, 1931.
To file petition for changing name of person 5835.
To file receipt from parties to referees in action in partition 5568.
To file statement and enter judgment on confession of judgment, costs 5251.
To give receipt to garnishee 5180.
To give notice of application of alien for naturalization 2518.
To give notice of disincorporation of city 875.
To give notice of time of holding district court, D. C. rule iii, p. 1426.
To give receipt for court fees upon demand 2033.
To include interest and costs in judgment and docket 5278.
To inform judge and give notice of election contest 1808.
To issue commission to justice of the peace to take depositions on contest for member of the legislature 1818.
To issue copy of order of guardianship under juvenile court law 739.
To issue execution 5281.
To issue execution for costs when remittitur of supreme court filed 5361.
To issue execution to other counties on abstract of judgment from justice's court, docketed in district court 5781.
To issue subpena requiring attendance before public service commission 4532.
To issue subpenas and subpenas duces tecum in contest for county or township office 1809.
To issue writ of attachment 5148, 5149.
To keep register of actions and make entries 5480.
To make entries in docket for judgment lien 5274, 5275.
To make up judgment roll 5273.
To notify persons appointed on probation committee 734.
To pay on order of court money transmitted in lieu of undertaking on appeal from justice's court 5792.
To procure seal 4876.
To publish notice of application of corporation for its own dissolution 1240.
To receive and disburse money paid for boarding and lodging jurors 2035.
To receive depositions in contest for members of the legislature and indorse and transmit to secretary of state 1819, 1820.
To receive docket and papers on death or removal of justice of the peace 5804.
To record verdict, jury to assent 5220.

County clerk, clerk of court—continued.
To take deposition of witness on continuance 5203.
To transmit copy of judgment in certiorari proceedings to inferior tribunal or officer 5692.
To transmit verdict in mandamus proceedings, argument, notice 5703.
To withdraw name of excused juror from box, D. C. rule xxviii, p. 1429.
When may adjourn court 4872.
When may make order for inspection of mine by stockholder, registration, oath, fee 2492, 2495.
When service may be made upon for nonresident 5375.
When to enter default and judgment 5236.
When to file and enter award of arbitrators and judgment 5260.
When to file statement on appeal 5337.
When to pay to county treasurer surplus money in action on lien for charges on animals 5500.
When to refund money deposited on arrest in civil action 5108.
Clerk of courts of record 290.
Commanding officer to furnish list of members state militia to 4074.
Compensation 1506.
Corporations, duties relative to, amendments and changes, certificates of filed with 1171.
Cooperative associations, copy of certificate filed with 1251, 1255.
Cooperative associations, dissolution 1258.
Directors, certain corporations, court proceedings, fee of clerk 1223.
Foreign, copy of charter filed with 1348.
Merger, certificate of filed with 1145.
Mutual fire insurance companies 1290, 1298.
Place of business, certificate of filed with 1170, 1171.
Place of business, removal of 1241.
Religious, fraternal or benevolent, certificate filed and recorded 1367.
Reduction of capital stock, certificate of filed with 1169.
Renewal of charter, certificate of filed with 1209.
Subdivision of stock certificate of filed with 1168.
Deputy, may appoint 2848.
Deputy, salary in certain counties 1693-1695.
District court, clerk of 290, 2765.
District court, may adjourn, when 4872.
District court, to collect fee, how applied 331.
Duties and liability 890.
Duties as to revenue, neglect of, penalty 3751, 3753.
Juvenile court law 733.
Of other office, not to perform 3751.
To discharge as prescribed 1691.
Election of 2765.
Election, duties concerning, abstract vote, copy to secretary of state 1797, 1799, 1801, 1881.
Ballots, custody of 1795.
For primary, to provide 1747, 1748.
County clerk, election duties—continued.
Printed ballots, to provide 1843-1847, 1868, 1885, 1897.
Supervise printing 1840.
Candidates, list of (primary) to publish 1745.
Certificates of nomination to file 1837, 1839.
Certificates of, to issue 1513, 1796.
Constitutional amendments 1842, 1879.
Contests 1805-1811, 1818-1820.
Custody of ballots 1795.
Fees, certifying prepared copy 2045.
Fees, counties eight hundred or less 1995.
Counties over eight hundred 2007.
From to pay treasurer 1743.
General provision concerning 1696-1700.
Laws, to furnish officers of 1832.
Nominations, list of to publish 1841.
Notice of election, primary 1770; general 1880.
Poll books and supplies to furnish 1769.
Primary election, notice of to publish 1739.
Primary, nomination papers, filed with 1741.
Primary, report result to secretary state 1757.
Registration agents to file lists with 1734, 1735.
Registration list, copy to secretary state 1735.
Registration list, furnish inspector 1713.
Sample ballots to provide 1857.
Estates of decedents, records to keep 6103.
Estates, letters of administration and letters testamentary signed and sealed by 5891.
Estates, notice, may give without order 6143.
Ex officio clerk of courts of record and commissioners 290.
Fees, counties eight hundred or less 1995.
Counties over eight hundred 2007.
Corporate elections 1223.
Court, to pay to treasurer 2033.
Delinquent children proceedings 749.
Directors certain corporations, court proceedings 1223.
District court 331, 2030.
Grand jury to assist in selection 4931.
Guardianship 6196.
Limitation on amount of 1995, 2007.
Marriage license, to receive 2341-2345.
Monthly statement of 2021.
Public land matters to retain 1614.
Soldiers, pensions not to charge 3914.
Fines, justice court, paid to county treasurer 7508, 7509.
Fish and game licenses to issue 2102, 2104.
Fish and game licenses, record of to keep 2104.
Insane, examination, when 2210.
Insane, may commit, when 2210.
Juries, drawing and venire 4930, 4931.
Jurors, expenses of to disburse 2035.
List of to keep 4930.
Jury box, custodian of 4937.
Justice of the peace, bond filed with 4927.
Leave of absence 1566-1568.
Legislative control over office 290.
Marriage license, to issue 2341.
Record to keep 2340.

County clerk—continued.
Militia, arms, application for to be filed with 4042.
Militia, unorganized, to report 3981.
Mines, inspection by stockholders, duties concerning 2492-2495. See Mines and Mining.
Ministers, authorized to marry, record to keep 2340.
Notary public, bond and oath filed with 2746.
Notice of meeting, board of equalization to give 3636.
Oath of 1690, 2786.
Oath to claimant against county, to administer without charge 1613.
Officers elected, appointed, removed or vacancy in, to certify to secretary of state 2795, 2853.
Office hours 1564, 1565.
Partnership, to keep register of. See Partnership.
Pharmacists, to be notified of certificates to, list to keep 4497.
Physicians, record of licenses 2367.
Prepare ballots of names of jurors summoned and deposit in box 5204.
Records or documents, altering or stealing 2817.
Resignation and vacancy 2797, 2801, 2813.
Seal, how affixed 5481.
Seal of court, to keep 4878.
Subpena, to issue blank to defendant 7352.
Taxation and revenue, duties. See Revenue.
Transient stock, certificate 3846, 3847.
To enter name of minister of gospel authorized to solemnize marriage 2340.
Town government, duties 878-890.
Townsite, federal, to certify decision to corporate authorities or judge in case of adverse claimants to lots 1984.
County commissioners. See Officers Generally.
Absence, leave of to grant county officers 1566-1568.
Absence of chairman, procedure 1505.
Accounts against county, settlement and approval 1508.
Accounts of officers, examination and audit 1508.
Accounts of revenue officers, examination of to provide for 2855-2860.
Action for removal for contracting floating indebtedness 3834.
Advertise for contracts, when, lowest bidder 1530, 3005, 3019.
Advertising, contracts for 2867.
Apiaries, instructors of to appoint, compensation to fix 477, 478.
Appointed by governor, when 2805.
Appointments, temporary, officers 2805.
Apportionment of revenues, into funds 1555-1559, 3764.
Apprenticing children 483-497, 2919.
Artesian wells, to examine 704, 709, 713.
Assessment, books for to furnish 3623.
Assessor, suit against, to direct, when 3704.
Auditor to report to, quarterly 3746.
Authentication of proceedings 1505.
Authorizing contract when money not in treasury, action for removal of 3830, 3834.
County commissioners—continued.
Board of canvassers 1503, 1513.
Board of equalization 3638-3641, 3678, 3693, 3793, 3797, 3839, 3844.
Board of equalization, cannot equalize assessment by state board 3797.
Board of equalization, duties of other officer not to perform 3751.
Board of equalization, meeting, powers and duties 3638, 3693, 3793, 3797, 3839, 3844.
Board of equalization, quorum 3639.
Board of examiners, members of, duties 1549-1551.
Board of health 2981, 2982.
Board of, legislature to provide for in each county 284.
Bond of assessor, to approve 1571.
Bond of constable, to approve 4927, 4928.
Bond of district attorney, to fix 1594.
Bond of justice of peace, to approve 4927, 4928.
Bond of recorder, to fix 1628.
Bond of surveyor, to approve 1665.
Bonds of county officers, to approve 1664, 1665, 1675, 2872, 2873, 2890, 4928.
Bonds of officers, may require additional 1616, 2873, 2874, 3705.
Bonds of officers, new may be required 1514.
Bonds, official, settlement with sureties 5886.
Boundary of county, may require line run 4349.
Boundary of water districts, to define, when 4725. See Water.
Bounties, artesian wells, allowance of 704-716.
Bounties, noxious animals, to pay 722-727.
Branch jail, may establish 7614.
Bridges and highways, to control 1508. See Roads, post.
Budget of expenses, to make 3826-3829.
Buildings, public, build or purchase bonds and tax for 1552-1524.
Canvass election returns, when 1503, 1513.
Certify vouchers, expense of collecting revenue 3749.
Chairman, duty of as to roads 3023.
Chairman, election of 1505.
Children, may apprentice, when 483-497, 2919.
Claims, against county, action on 1509.
Allowed, publication of 1541, 1542.
Conveyance of prisoners 1544.
For printing list of taxpayers, to allow 3632.
Indebtedness deducted 1512.
Objected to, procedure 1521.
Printing list of taxpayers 3775.
Rejected, bar 1526.
Unaudited, when presented 1524, 1525.
Unpaid, reallowance, when 1536.
Vetoed by auditor, action on 1510.
Clerk of 1505.
Combustible materials, storage, regulation of, penalty 1946-1948.
"Commissioner districts" 1531, 1534.
Compensation of 1517, 1547.
Compensation to assessor for statistics 1586.
Contagious diseases, duties 2996.
Contracting obligations, limited, penalty 3834.

County commissioners—continued.
Contracts, advertised for, when 1530, 3005, 3019.
Beyond term of office 1537.
By, when money not in treasury, penalty 3830.
For public buildings, lowest bidder 1508.
Not to be interested in 1522, 1530, 2827-2830, 6331.
To make exclusively 1539.
Control of suits 1508.
County buildings, to provide for 1508, 1552-1554.
County funds, transfer of 1540, 1700.
County offices, declare vacant, when 2802.
County officers, leave of absence to 1566-1568.
County property, to control 1508.
County surveyor, bond to approve 1665.
Dead body, permits, disinterment or removal 6553.
Deaf, dumb and blind, duties concerning 1703, 1704.
Debts or liabilities, not to contract, when 1516.
Declare county offices vacant 2802.
Delinquent taxes, duties as to 3862, 3863.
Demands against county, to act on 1509.
Deputy assessor, compensation to fix 1573, 1579.
Deputy assessor, may authorize appointment 1573, 1579.
Detention homes, when to maintain 742.
Disincorporated towns, duties as to 967-974.
District attorney, may deduct salary of, when 1597.
District attorney, to attend and give opinions 1519, 1520, 1602, 1604.
District attorney, vacancy to fill 1607.
District judge, to provide office for 2941.
Election of 284, 1501, 1531-1534, 2765, 2773, 2781.
Elections, duties as to, abstract of vote, district election 1800.
Abstract or returns, failure to transmit, penalty 1801.
Ballot boxes, to provide 1777.
Ballots, custody of 1795.
Board of canvassers 1513.
Booths and supplies to furnish 1769, 1850.
Canvass of votes 1796.
Certificate of, not withheld for informalities 1798.
Certificates of, to issue 1513, 2794.
Claims for, to allow 1716.
Deputy sheriffs, number of to determine 1789.
District judge, to canvass 1573.
Duties pertaining. See Elections.
Expenses, to allow 1802.
Inspectors, to appoint 1768, 1772.
Judges and inspectors of, to appoint 1508.
Messenger to convey returns, expense 1799.
Precincts, establish, change or abolish 1508, 1768, 1865.
Proclamation of, to make 1770, 1880.
Public schools, duties as to. See Public Schools.
Recount, when 1513.
Registration list, printing 1720.
County commissioners—continued.
Registry agents, to supply with books 1706, 1726.
Registry agents, vacancy to fill 1721, 1725.
Special to call, vacancy in legislature 2797.
Tie vote, other election called 1796.
Eligibility 1502.
Emergency tax levy 3832.
Equalization, board of, duties 3638, 3693, 3793, 3797, 3839, 3844.
Excavations, to require fenced 3238.
Exceeding budget of expenses 3826-3829.
Excessive tax levy, voting for, penalty 3828.
Exhibits of county products, may provide for 3935-3940.
Expenses, extradition to allow 7444.
Expenses, limitation of 1516.
Explosives, storage, regulation of, penalty 1946-1948.
Extradition, expenses, to allow 7444.
Fees and costs, tax suit, to allow from sale 3673.
Fees of officers, reports of, to 2021.
Finances, statement of, to publish 1515.
Fish and game, closed season, may extend 2056, 2057.
Ordinance, to pass, when 2098.
Orders, violation of, penalty 2058.
Fish and game licenses, to furnish 2102, 2104, 2110.
Fish and game wardens, to appoint, salaries, reports 2050, 2052, 2054, 2055.
Five, when 1501.
Franchises, may grant 1261-1264, 2121-2141.
Funds, transfer of 1540, 1700.
Game, birds, etc., ordinance for protection of 2098.
Governor to appoint, when 2805.
Governor to fill vacancies in board 1501.
Guideboards on highways, to erect 3026-3028.
Health, board of, duties 2981, 2982.
Highways, control of 1508, 3004-3062. See Roads and Bridges, post.
Highways, prisoners, may order to work on 7616-7619.
Horses, sheriff as inspector of, to report to 2291-2296.
Horticultural commissioner, to appoint 446.
Hospital or asylum associations, private to report to 1397.
Incurring unlawful obligations, penalty 3824.
Index to county records, contract for 1560, 1561.
Indigent sick, care of 1508.
Internal improvements 4351.
Irrigation ditches, duties 4724, 4725, 4744.
Jails, to provide 1508, 7604, 7614.
Judgment to be entered against for costs on proceedings to set aside covenants of apprenticeship 493.
Juries, grand and petit, drawing 4930-4939.
Jurisdiction and powers, general 1508.
Justice peace, vacancy, to fill 4852.
Leave of absence to officers, may grant 1556-1568.
Lease or purchase property for county use 1508.
Legislature to provide for election of and prescribe duties (Nev. Const.) 284.

County commissioners—continued.
Levy of sheep tax for sheep commission 4589.
Levy of taxes 3618, 3762, 3763, 3818.
Libraries, public, tax levy for, claims 3230, 3297.
Licenses, list of, sheriff to report quarterly 1661.
License, may revoke 3867-3871, 6841.
Licenses, reports concerning to 3740.
License, stationary engineers, revocation 3898-3904.
Loan, may negotiate, when 3831.
Long and short term 1501, 1502.
Maps for assessment purposes 3634.
May be removed or suspended and others appointed to perform duties pending charges 3753.
May instruct district attorney to bring suit against assessor for failure to make settlement for taxes 3704.
May order payment and action against person for support of poor kindred 2916,2917.
May order sale of property bid in by county treasurer for delinquent taxes 3667.
May order treasurer to sell property to which he holds deed from delinquent tax sale 3767.
May remove county treasurer when action commenced on his bond 1685.
May revoke licenses, proceedings 3868.
May suspend from office county or revenue officer under presentment 3753.
May suspend revenue officer pending charges and appoint other to perform duties 3753.
Meetings, general and special 1503.
Militia, duties of 4033.
Militia, state, chairman may call, when 2835, 2839, 2840, 3982.
Mining districts, to order election to determine consolidation 4786. See Water.
Mining recorders, to provide with books 2465.
Minors, may apprentice, when 483-497, 2919.
Newspapers, claims for preserving 1641.
Notice of special meeting 1504.
Nuisances, to abate 1562.
Number of 1501, 1546.
Oaths, may administer 1528.
Obligations, contracting limited 3834.
Officers, accounts of to examine and audit 1508, 1514.
Books of, may examine 1514.
Monthly reports to 1514.
Neglect of duty, to prosecute 1514.
Of revenue, may require report from 1514.
Vacancy in, to fill 2813.
Ordinance, may adopt 2098.
Orphans under supervision of, until when 4094.
Penalty for wrongful use of contingent fund 1559.
Petitions to open roads, procedure 3008, 3015.
Poll-tax collections to set aside, how 3841.
Pollution of streams, institute suit, when 4716. See Water.
Pollution of streams, levy tax for suit, when 4717.
Poor, to provide for 367, 2915-2928.
Powers and jurisdiction, general 1508.
Prisoners, may require to work 7616-7619.
Prisoners, reports to concerning 7608, 7620.
Probation officer, to recommend 733.
Proceedings recorded, authentication 1505.
Proceedings to determine whether breach of contract of apprenticeship 491.
Public administrator, new bond may require 1616.
Public highways. See Roads and Bridges, post, Public Highways.
Pure food law, expenses, to allow 3501.
Qualifications 1502.
Quarantine regulations 2996-3003.
Quarterly statement of finances, to publish 1515.
Quorum 1505.
Railways, permission to use highways and streets 3532.
Reallowance of unpaid claims 1536.
Record of proceedings 1505.
Records, where kept, open to inspection 1507.
Resignations to 2793.
Revenues, duty to apportion 1555-1559,3764.
Revenue officers, accounts of, to have examined 2855-2860.
May suspend 3753.
Part compensation, certificate, to issue 1701, 3749.
Revocation of license 3867, 6841.
Rewards for murder 3906.
Roads and bridges—
Bridges, and culverts, to construct at expense of water user 3023, 3024.
Contracts for construction or repair, advertisement for bids 3019, 3020.
Funds applicable to 3018.
Maintenance of 3017-3021.
Necessity for and character of to determine 3021.
Petition for 3020, 3021.
Road fund used for, when 3012, 3013.
Special tax for 3018.
Toll bridges, powers over 3056, 3057, 3059.
Roads, contracts for work on, when to be advertised 3005.
Culverts and bridges to construct at expense of water user 3023, 3024.
Funds, to apportion 842.
How opened, viewers, damages, how paid 3008, 3015.
How to be run 3015.
Inspector, may appoint, compensation to fix 3030-3033.
Legal subdivisions to follow 3015.
Limitation as to width 3016.
Petition to open, establish change or vacate 3008, 3015.
Road district, fund 3014.
Funds apportioned to 3007.
How created or disorganized 3011.
Road fund, apportioned to cities 842.
Created 3006, 3014.
How disbursed 3007, 3013.
Surplus may be used, how 3013.
Transfer of moneys in 3012.
Supervisors, appointment and compensation, counties with 1,800 votes 3037-3040.
With 3,000 votes 3041-3044.

County commissioners—continued.
Tax levy for road fund 3006, 3014.
Tax, may be worked out 3014.
Taxation, duties as to. See Revenue.
Toll roads, franchise or lease, may extend 3056.
Reduction of tolls 3057.
To declare free highway, when 3056.
Water user, duty and liability of 3023.
Width of, to establish 3016.
Work by convicts, agreement with prison commissioners 7601.
Work on, in excess of $500 to be advertised 3005.
Rewards may offer, when 3906.
Salary and mileage 1517, 1547.
Sale of property acquired by delinquent taxes 3652, 3667, 3670, 3767.
Saloon near construction camp, license to revoke 6841.
School districts, to establish 3316, 3326.
School fund, not to transfer 1540.
School tax levy 3378.
Seal of 1527.
Select jurors 4939.
Sewerage systems in towns 984-990.
Sheep inspection, tax levy for 4589, 4590.
Sheep inspector, to appoint 2298.
Sheriff, as horse inspector, to report to 2291-2296.
Bond of, to approve 1644.
Claim of, not to allow, when 3740.
Or jailer, to report on prisoners 7608, 7620.
Special meetings, notice business restricted 1504.
State exhibits, expenses to pay 3930.
State militia, duties of as to 4033.
State militia, may command, when 3982, 4058.
State orphans' home, superintendent to notify of age 4094.
State orphans' home, to send to and support 4099.
Stationary engineers, license, revocation 3898, 3904.
Suit to institute to prevent pollution of streams, when 4716.
Supplies to purchase 3480.
Surplus money, transfer of 1540.
Suspend revenue officer, when, appoint successor 3753.
Taxes, assessment of transient stock 3853-3859.
Books for assessment, to furnish 3623.
Delinquent, duties concerning 3862, 3863.
Fix rate and make levy 3618, 3762-3765, 3818, 3826-3833, 3837.
Levy 1508, 3618, 3762, 3763, 3818, 3826-3828, 3837.
Levy, emergency 3832.
Levy, floating debt 3833.
Levy for expenses, pollution of water, suit 4716, 4717.
Levy for sheep inspection fund 4589, 4590.
Levy, may raise or reduce 3818.
Levy, school 3378.
Suits, costs and fees in to pay 3673.
Telephone lines, may construct or purchase 4633, 4634.
Terms of office 1501, 1502.
County commissioners—continued.
Testimony (criminal) to take, procedure 7365-7384.
Tie vote, effect 1529.
To act in regard to apprentices 490.
To appoint successor to officer removed for malfeasance 2853.
To bring action for abatement of nuisance 1562.
To have notice of proceeding before justice of the peace to set aside covenants of apprenticeship 493.
To order abatement of nuisance in county, and institution of suit 1562.
Toll-road franchise, violation of, duty as to 3759.
Toll roads to forfeit franchise 3757, 3759.
Town government, powers in relation to 842-990. See Towns.
Townships, creation and division 1508.
Transient stock, duties as to, taxes on, suit for 3853, 3855, 3859.
Transfer of county funds 1540, 1700.
Transmission to, of copy of judgment removing officer for malfeasance 2853.
Treasurer, action against, may direct 3650.
Annual settlement with 1686.
Bond of, to approve 1675.
Delinquent, may remove 1685.
Money and books of, to examine 1680.
To allow certain compensation to 3671.
To report to, quarterly 3746.
Trial jury panel to draw, when 4930.
Under presentment, may be suspended from office by district judge 3753.
Vacancies, how filled 1501, 1502.
Vacancy, office of assessor, to fill 1572.
Vacancies, to declare and fill 1518, 1607, 2802-2805, 2813, 2853, 2874, 2882.
Vermin inspectors, to appoint 454.
Veterinarian, services of, may require 4379.
Voting for excess taxes, action for removal 3828.
Voting population over four thousand, five commissioners 2765.
Water districts, to define boundaries, when 4725.
Waters, public, suits for pollution, tax for costs 4716, 4717.
When to pay fees and costs from sale of property bid in by county treasurer in action for delinquent taxes 3673.
County funds, assigned to payment of claim, if not collected within two years payable on other claims, new demand and reallowance necessary or claim barred 1536.
Not to be used for sectarian purposes 362.
County government. See also the several county and township officers under respective titles.
Action against county 1523.
Actions against counties, where brought 5013.
Actions, bonds not required in 5847.
Actions by or against county, how brought, control of 1508(12), 1513.
Accounts of officers, examination of 2855-2860.
Advertising, official 2867.
Annual report of revenues 3835.

County government—continued.
Appraisement of property for county use 1508(9).
Auditor, audit all claims 1509.
Bank, county money may be deposited in 1687.
May act as fiscal agent of 1119.
Board of examiners, duties, neglect of, penalty 1550, 1551.
Members of 1549.
Bonds, for public buildings 1553, 1554.
Not required in actions 5487.
Of officers, additional may be required 1616, 2873-2874, 3705.
Of treasurer, premium paid by 2889.
Books of revenue officers, open to inspection 3752.
Boundary map, where kept 4355.
Boundary lines run, when 4349.
Branch jail 7614.
Buildings, public, build and purchase, bonds and tax for 1552-1554.
Bureau of industry, agriculture and irrigation, contributions to 4490.
Certificate of indebtedness, how paid 1563.
Certificates of indebtedness, paid in order 1582.
Claims against county, what to show 1509.
Allowed, publication of 1541, 1542.
Approved, unpaid, barred when, reallowance 1536.
Audited in part 1510.
Auditor not to draw warrant unless money in treasury to pay 1510.
Auditor refusing to audit, procedure 1510.
Certificate of auditor 1535.
District attorney, duty concerning 1519, 1520.
Duplicate certificate of auditor, fees for 1535.
Indebtedness of claimant deducted 1512.
Must be verified 1535.
No charge for verification 1613.
Oath to, clerk administer without charge 1613.
Objected to, procedure 1521.
Publication of, allowed 1541.
Rejected, when, bar 1510, 1526.
Sheriff or constable for transporting prisoners 1544, 1545.
Suit on, limitation, costs 1523.
To be sworn to 1535.
Unaudited, when presented 1524, 1525.
Unpaid, reallowance 1536.
Veto by auditor 1510.
When not to be allowed 1512.
Condemnation of property 5606-5629.
Consolidation of officers, legislature may make 290.
Contingent fund, inviolate 1558, 1559.
Contracts, commissioners only may make 1539.
Contracts for public buildings, lowest bidder 1508(11).
Convicts, expense of transportation, when county charge 7591.
Corporation may act as fiscal agent of 1119.
Corporations, counties not to aid 347.
Costs, change of venue 7466, 7477.
Court held at county-seat 4841.
Court house, provision for 1508(11).
County government—continued.
Credit, not to loan, except for railroads 347.
Debts not to be assumed by state 351.
Debts not to be contracted, when 1516.
Demands against county, form of 1509.
Election expenses 1802.
Election of officers, legislature to provide for 290.
Emergency loan 3831.
Emergency tax 3831.
Exhibits, county may aid 3935-3937, 3940.
Expenses, budget to be made 3826, 3829.
Expense, transporting prisoners, claim for 1544, 1545.
Fish and game, powers concerning 2110.
Fiscal agent, bank or corporation may be 1119.
Floating debt tax 3833.
Franchises, percentage payable to 1261.
Funds, apportionment to 1555-1557.
Contingent, restrictions 1558, 1559.
How kept 3747.
Misappropriation of, penalty 3751.
Not to be used for sectarian purposes 362.
Surplus to transfer 1540.
Highways 3004-3062.
Horticultural districts 449.
Indebtedness of county, state not to assume 351.
Indigents, must provide for 367, 2915, 2925.
Interest on warrant, when allowed 1681.
Jails, provisions for 1508(11), 7603, 7614.
See State Prison and Jails.
City may use 794(77).
Jury, expense of, charge against 7204, 7205.
Juvenile courts in 728, 764.
Legislature may increase, diminish, consolidate or abolish officers 290.
Legislature, powers over county officers 290.
Legislature to establish uniform 283
Licenses. See Revenue.
License taxes go into treasury 3743.
Military property, counties charged with 4045.
Neglect of duty by revenue officers, penalty 3751, 3753.
New townships created 2785.
Noxious animals, bounties for 722-727.
Officer, claim of when not to be allowed 1512.
Officers, ex officio city officers 890.
Legislature may increase, diminish, consolidate or abolish 290.
Legislature may regulate fees and compensation 278.
Legislature not to pass special law regulating elections 278.
Office hours 1564, 1565.
To hold office at county-seat 375.
Orphans, expense county charge, when 4093.
Pauper, penalty for bringing into or leaving in 2925.
Poll taxes for road district funds 256, 3841.
Poll-tax receipts furnished 3841.
Poor, must provide for 367, 2915-2925.
Presenting fraudulent claim for audit or payment, penalty 6715.
Prisoners, earnings of 7609.
Prisoners, removal, expense 7613.
Public buildings, provisions for 1508(11).

County government—continued.
Public highways 3004-3062. See Public Highways.
Publication of allowed claims 1541, 1542.
Publication of claims allowed 1541.
Railroads to file articles in each county 3574.
Records, index of, provisions for 1560, 1561.
Redemption fund 3764.
Revenue act, violation 3830, 3834.
Revenue, annual reports of 3835.
Revenue, how apportioned 1555-1557.
Revenue officers, examination of accounts of 2855-2860.
Revenue officers, supplies furnished to 3682, 3683, 3710, 4177.
Road district, funds, poll taxes for 3841.
Road supervisor, counties with over 1,800 votes 3037-3040.
Road supervisor, counties with over 3,000 votes 3041-3044.
Road work by convicts, part expense to pay, skilled labor to employ, bridges and structures to build 7601.
Roads 3004-3062, 7601.
Sale of county property 1508(10).
Sale of property, proceeds how applied 3767.
School funds not transferable 1540.
Script, tax to cover 3833.
Seal of county 1527.
Sectarian purposes, funds not to be used for 362.
Settlements by revenue officers 3754.
State to allow part compensation revenue officers 1701, 3749.
Stockholder in corporation, joint-stock company or associations forbidden 347.
Suits against county 1523.
Supplies for revenue officers 3682, 3683, 3710, 4177.
Tax levy 1508.
Tax rate 3826, 3837.
Toll-road receipts, proportion paid to county 3055.
Treasurer, bond of, premium paid by 2889.
Transfer of county funds 1540, 1700.
Transfer of funds 1582.
Transient stock, taxes 3850.
Warrants of indebtedness, how paid 1563.
Warrants of indebtedness paid in order 1582.
County high school, how established 3413-3415. See Public Schools.
County normal training school 3425-3430. See Public Schools.
County office, time for beginning election contest 4973.
County officers. See Officers Generally.
Commissioners may declare office vacant, when 2802.
Leave of absence 1566-1568.
Legislature may regulate fees and compensation (Nev. Const. art. iv, sec. 20) 278.
Local or special law for regulating election invalid (Nev. Const. art. iv, sec. 20) 278.
May be removed for malfeasance 2851, 2852.
County platform, how and by whom formulated 1759. See Elections.
County recorder. See Officers Generally.
Absence, leave of, 1566-1568.
Action against, for entering satisfaction of mortgage without affidavit that taxes are paid 3755.
County recorder—continued.
Acknowledgments, may take, fees for 1629.
Apprenticeship, contracts of to record 489.
Appropriators' rights, to receive and record 4689.
Artesian wells, statement of filed with 703, 708.
Assessment and taxation, duties and fees. See Revenue.
Bond and oath 2786.
Bond, county clerk ex officio, where filed 2887.
Ballots, when custodian of 1795.
Bond, district judge to approve 1628.
Bond of commissioner, to fix 1628.
Bonding companies, copy of, charter file with 1247.
Book "records of chattel mortgages," to keep 1080.
Brands, similar, recording of, penalty 2246, 2248.
Certificates, to receive and record 4689.
Chattel mortgages, records, fees for 1080.
Conversion, recorded, when entitled to be 1035.
Conversion, records of impart notice 1093.
Corporations, foreign, to file articles with 3531.
County attached or divided, records, how kept 1633.
Deputy, may appoint 1630, 2848.
Powers of 1631.
Salary in certain counties 1693-1695.
Ditch claim to record 4712.
Documents filed to be numbered 1637.
Election 2765, 2773, 2781.
Estrays, book and record of 2275, 2282.
Ex officio auditor 2765.
Ex officio district mining recorder at county-seat 2463. See Mines and Mining.
Fee book, inspection of 1637.
Fee book, to keep 2020.
Fees of 1080, 1996, 2008.
Fees, certifying, prepared copy 2045.
Counties 800 or less 1996.
Counties more than 880 2008, 2019.
General provisions concerning 1696-1700.
Marriage license, to receive 2341-2345.
Monthly statement to commissioners 2021.
Payable in advance 1632, 2027.
Proof of labor on mining claims 2046.
Table of, to post, penalty for failure 2025.
To charge 2219, 2234.
To receive for recording water certificate 4689.
Under estray act 2282.
Unlawfully taking, penalty 2024.
Foreign corporations, copy of charter to file with 1346.
Franchises, acceptance filed with 2139.
Franchises, applicant for, to file agreement with 2135.
Leave of absence 1566-1568.
Liens, book of, to keep 2219.
Marks and brands, record of 2234-2236, 2244, 2248.
Marriages, to record 2344-2346.
May certify to certificate of incorporation of foreign corporation 1346.
Mining companies, annual statements, to file with 1330-1340.

County recorder—continued.
Mining grubstake, contracts to record 2475.
Mining, mill, tunnel locations, annual labor to record 2424, 2431, 2435, 2438, 2442, 2446, 2448, 2451, 2463, 2469-2473.
Mining records impart notice, evidence 1635, 1636.
Mortgages and liens, to discharge, how 1049-1051.
Mortgages, duties as to 3789.
Report to board of equalization 3638.
Satisfaction of, oath to administer 3755.
Neglect, may be sued for, penalty 2236.
Newspapers, purchase and preserve, compensation for, penalties 1639-1642.
Notary public, records of 2757.
Oath of office 1628.
Office and office hours 1564.
Office hours 1564, 1565.
Permanent limitation of taxation for county purposes, what 3826.
Physicians, certificates of to record 2369.
Property sold to county, record of 3669.
Receiving book, entries in 1637.
Records, altering or stealing, penalty 2817.
Records, transfer of 1634.
Resignation and vacancies 2787, 2801, 2813.
Separate property of wife, inventory to keep 2157, 2159.
Term, expiration of, refusal to surrender records 2819.
Term, when begins 2786.
To certify copy of mortgage deed, assignment on or payment as evidence 3789.
To file duplicate of sale under execution 5298.
To file notice of pendency of action to demine adverse claim to real property 5522.
To note on mortgages all assignments and payments 3789.
To record order making sole trader 2191.
To record order of adoption of child 5832.
To record plat of survey of public lands as basis for possessory action 5851.
To record without charge deeds for property bid in by county treasurer on sale for delinquent taxes 3669.
County records, impart notice 1093.
Reference may be made to on motion for new trial 5321.
County-seat, district court to be held at (Nev. Const. art. vi, sec. 7) 322.
Officers, county, to hold their offices at (Nev. Const. art. xv, sec. 7) 375.
County superintendent of public instruction, office abolished 3245.
County surveyor. See Officers Generally.
Bond and oath 1665, 2786.
Book of surveys 1671.
Certificate of as evidence 1667.
Charcoal bins, to estimate 4825.
Deputies, appointment, qualifications 1666.
Duties of 1670, 4826.
Election of 1664, 2765, 2773, 2781.
Fees 1674, 2017.
Fees, statement, monthly, to make 2021.
Field notes, to preserve 1671.
Interested party, other surveyor 1668.
Neglect of duty, penalty 1673.
Office at county-seat 1664.
County surveyor—continued.
Office created 1664.
Records and documents, altering or stealing 2817.
Record of surveys 1671.
Reports from surveyor-general, to obtain quarterly 4352.
Road work by convicts, may recommend 7601.
Salt lands to survey 2448, 2454, 2455.
Successor, books and records, to surrender to 1671.
Surveyor-general, letter of instruction to 4352.
Surveyor-general, to send circular letter to 4352.
Surveys, how expressed 1672.
Term of office 1664, 2786, 2819.
Vacancy 1518, 1669, 2803.
County treasurer. See Officers Generally.
Absence, leave of 1566-1568.
Action against district attorney for failure to pay over moneys 1601.
Accounts, how to be kept 1679.
Advertise sale of delinquent property 3651, 3865.
Annual reports 3835.
Annual settlement 1686.
Baggage sales, proceeds paid to 2152.
Ballots, custodian, when 1795.
Bank, may deposit money in 1687.
Board of examiners, to assist 1550.
Bond, by surety company, county to pay premium 2889.
Liability on 3672.
Liability on, town funds 952.
Of approval 1675, 2786.
Bondsmen may permit deposit in bank 1687.
Bondsmen released, when 1688.
Books, how to show accounts, 1679.
Subject to inspection 1680, 3752.
Certificates or warrants of indebtedness paid in order 1563.
Compensation, state to allow part 1701, 3671, 3675.
Coroner, deliver property to, when 7553.
County money, to apportion 1557.
Custodian of property, sale of 7553, 7554.
Deed, property sold for taxes 3653.
Delinquent taxes, adjustment of accounts with auditor 3862, 3863.
Delinquent tax sale 3865.
Deputies, may appoint 1677, 2848.
District attorney, action against 1601.
Compel accounting from 1600, 1601.
To account to 1600.
District court clerks to pay money to 2033.
Duties of and liabilities 889, 1676.
Duties, neglect of, penalty 3751, 3753.
Duties of other office, not to perform 3751.
Duty to attend delinquent tax sale 3667.
Election of 2765, 2773, 2781.
Escheats to pay to state treasurer 1619.
Ex officio tax receiver, duties 3643, 3648, 3796.
Failure to settle with auditor, penalty 3650.
Fees of officers kept in salary fund 1700.
Fines and forfeitures under marriage act, action for, 2352.
Fines, justice's court paid to 7508, 7509.

County treasurer—continued.
Funds, duty to apportion 1557.
How kept by 3747.
Improper use of, penalty 3751.
How to pay fee received from occupant of public land for absence under act relating to possessory actions 5853.
Indebtedness, certificate of payment 1563.
Interest on warrants, when 1681.
Leave of absence 1566-1568.
May be ordered by county commissioners to sell property to which he has deed under sale for delinquent taxes 3767.
May be removed by county commissioners when action commenced on his bond 1685.
May make deed for real estate sold by predecessor 1662, 1663.
May sell unclaimed stolen property 7449.
Misappropriating funds or securities, or other malfeasance or misfeasance in office 6660.
Money deposited in bank, when 1687.
Money from escheated estates, to pay state treasurer 1625.
Moneys paid to 879.
Moneys, school, semiannual payments to 3385.
Moneys, to exhibit to commissioners 1680.
Moneys, to receive and pay, how 1676.
Oath of office 1675, 2786.
Office, location and hours 1564, 1565, 1678.
Officers to account to, for fees 1696-1700.
Orders not paid for want of funds, interest on 1681.
Orders or warrants, payment of, how endorsed 1681.
Property not assessed, duty as to 3625.
Records and documents, altering or stealing 2817.
Redeemed orders or warrants deposited with auditor 1684.
Redemption of warrants 1682, 1683.
Removal of 1685.
Resignation and vacancy 2797-2799, 2801-2806, 2813.
Salary of officers, to pay fees to 1696.
Salary, state to allow for part 1701, 3749, 3671, 3765.
Sale for delinquent taxes 3651, 3653.
School funds, duties as to. See Public Schools.
Semiannual settlement with controller 3748.
Settlements as to revenue 1701, 3748, 3754.
Settlements with 1701, 3748.
Settlements with commissioners 1686.
Settlements with controller, and treasurer 3748.
Settlements with, state expenses for collecting revenue 3749.
Sheep commission, to notify 4590.
Sheep inspection fund, duty concerning 4590.
State treasurer, settlements with 1701.
Statement, quarterly, to commissioners 3746.
Successor, surrender office to 1686.
Tax levy, copy to file 3763.
Taxation and tax money, duties. See Revenue.
Taxes, warrants unredeemed, receivable for 1683.
County treasurer—continued.
Term, expiration of, refusal to surrender records 2819.
Term, when begins 2786.
To bid in property on sale for delinquent taxes if no other bidder, on order of commissioners to execute deed to purchaser 3667.
To sell property for delinquent taxes amounting to less than $300 3651.
Toll-road owners, to pay percentage to, reports to controller 3055.
Town government, duties 878-890, 910-912, 897, 898, 990.
Trustee of property purchased at tax sale 3667-3672.
Warrants not paid for want of funds, interest 1681.
Warrants, order of payment 1582.
Warrants, transferred unlawfully, may refuse to redeem 2845.
When may pay to person entitled money of deceased person received from coroner 7555.
When may sell property and place money of deceased person in county treasury 7553.
When to bring action against district attorney for failure to account 1601.
When to pay costs incurred in delinquent tax sale from rental or sale of property 3671.
When to receive surplus on sale of animals on lien for charges 5500.
County treasury, local or special law refunding money paid into, invalid (Nev. Const. art. iv. sec. 20) 278.
County uses, eminent domain may be exercised for 5606.
County work house, may be established 2924.
Court. See Constitution.
Boisterous conduct toward is contempt 5394.
District, jurisdiction of (Nev. Const. art. vi, sec. 6) 321.
May issue writs of mandamus, injunction, quo warranto, certiorari, habeas corpus and other writs (Nev. Const. art. vi, sec. 6) 321.
Times of holding to be as fixed by law and to be at county-seat, but legislature may divide county into two or more districts and designate place of holding court (Nev. Const. art. vi, sec. 7) 322.
Held in another place, appearance of persons required 4874.
Inferior, in cases appealed from, district court has final appellate jurisdiction (Nev. Const. art. vi, sec. 6) 321.
Justice's, change of place of trial in civil action 5717.
Has such criminal jurisdiction as may be prescribed by law (Nev. Const. art. vi, sec. 8) 323.
Jurisdiction of (Nev. Const. art. vi, sec. 8) 323.
Legislature may prescribe regarding appeals from (Nev. Const. art. vi, sec. 8) 323.
Place of trial of civil actions 5715.
When and where held, always open, jurisdiction in civil cases 5714.

Court, justice's—continued.
When place of trial in civil action ordered changed, parties may agree upon court 5718.
May determine controversy without action 5252.
May determine value of real property, judgment, costs 5377.
May fix amount of undertaking to stay execution of judgment or order pending appeal 5351.
May order actions consolidated 5478.
May order deposition taken out of state 5459.
May order execution in officer's own name for unpaid fees 2027.
May order property attached to be sold 5158.
May provide how cases shall be entered on calendar 5200.
May shorten time for notice of motion 5364.
Municipal, jurisdiction of 832-835.
Of record, justices of the peace not to try cases in conflict with jurisdiction of (Nev. Const. art. vi, sec. 8) 323.
Or clerk to ask jury if they have agreed upon verdict 5218.
Or judge may order injunction 5136.
Or judge may settle cost bill at chambers 5387.
Power of, in proceedings under eminent domain 5614.
Sessions to be public, exception 4862, 4865.
Supreme, times of holding to be as fixed by law and to be at seat of government (Nev. Const. art. vi, sec. 7) 322.
To fix stay bond on appeal in certain cases 5349.
To instruct jury to find special verdict 5222.
When may be held at another place 4973.
When may dispense with undertaking on appeal if applicant is executor, administrator or trustee 5352.
When may fix costs at discretion 5380, 5381.
When may proceed upon in matter not affected by judgment or order appealed from 5352.
Court fee, appeal not deemed perfected until paid 2031.
On appeal to supreme court 2032.
Special to be paid (Nev. Const.) 331.
To be advanced to clerk by party bringing action or taking appeal and applied to compensation of judge (Nev. Const. art. vi, sec. 16) 331.
To be paid on appeal from justice's court 2031.
Upon commencement of action or proceeding in district court 2030.
Courts of justice, local or special laws relating to practice, invalid 278.
Court proceedings, to be in the English language, abbreviations and numbers permissible 4885.
Court reporter 4908-4903.
Appointment and qualifications 4908-4909.
Duties and oath 4910, 4911.
Fees 4913.
Not required to perform services until fees have been paid or deposited with clerk 4913.
Transcript certified by as evidence 4912.
Court reporter—continued.
Pro tempore 4910.
Removal 4908, 4910.
Court rules, publication of 4845. See District Court, Supreme Court.
Court seal, how may be affixed 4880.
Inscription 4876.
To what papers or proceedings to be affixed 4879.
Courtesy, no estate in 2161.
Courts. See District Court, Supreme Court.
Inferior, in cases appealed from district court has final appellate jurisdiction 321.
Inferior to supreme court may be established by Congress 119, 153.
Judicial power of state vested in supreme court, district courts, justices of the peace and municipal courts (Nev. Const. art. vi, sec. 1) 316.
Local or special laws relating to practice, invalid (Nev. Const. art. iv, sec. 20) 278.
Of inquiry, military, how ordered, rules and power 4078.
Of record, legislature to designate (Nev. Const.) 323, 4861.
Persons having judicial powers not to exercise functions pertaining to legislative or executive departments (Nev. Const. art. iii, sec. 1) 258.
Proceedings of in other states, how certified and proved 5410.
Rules of. See Civil Practice.
Supreme and district, and such other as the legislature may designate, are courts of record (Nev. Const. art. vi, sec. 8) 323.
To take judicial notice of change in class and organization of cities 775.
What business allowed to transact on nonjudicial days 4870.
Where to be held 4871.
Courts and court officers, schedule of acts and of sections of general act, statutory and constitutional cross-references 4828.
Courts-martial. See State Militia.
Coyote, bounty for 718-722.
Craps, gambling game, penalty for conducting 6518.
Credibility of witness, jury to be exclusive judges 5420.
Credit, on judgment to be ordered by judge or justice on release of joint debtor 5848.
Power of cities or towns to loan restricted (Nev. Const.) 345.
State not to loan to corporations (Nev. Const.) 346.
Creditor. See Civil Practice.
Creditors. See Sales of Merchandise.
Sale of merchandise under bulk act 3908-3912.
Credits, how attached 5153, 5169.
Court rules. See Civil Practice.
District court rules, pp. 1421-1425.
Supreme court rules, pp. 1425-1431.
Crime, against nature, penalty 6459.
Against nature, assault with intent to commit, penalty 6413.
Also contempt 6305.
Also under laws of other states or counties 6304.
Capital or infamous, when tried 237.

Crime—continued.
Classified 6266.
Definition of 6266.
Trial, evidence 7171.
Crimes, district court has jurisdiction when not otherwise provided (Nev. Const. art. vi, sec. 6) 321.

CRIMES AND PUNISHMENTS

Abandonment of wife or child 6446.
Abduction 6419-6421.
Abortion, defined 6403, 6405, 6447.
Accessory defined 6275, 6276.
Accessory to avoidance of writ of habeas corpus 6264.
Acknowledgments, failure to keep record 1099
Acknowledgments, false certificate 6669.
Act and intention or criminal negligence must exist 6271.
Adultery 6458, 6460.
Adulterated liquors, sale of 3486, 6816.
Adulterated milk, sale of 6536-6539.
Adulteration, foods, drugs or liquors 3486.
Advertising for divorce business 6462.
Advertising on property of another 6753.
Advertising to prevent conception 6451-6455.
Advising suicide 6381-6383.
Advocating anarchy 6614, 6617, 6618.
Affray defined 6594.
Age of discretion 6268, 6269.
Agent or employee, violation of duty 6786.
Aiding prisoner to escape 6340.
Altering or destroying evidence 6358.
American eagle, killing 6811.
American flag, desecration 6603.
Anarchy 6613-6618.
ANIMALS—
Cruelty to 6815.
Diseased, bringing into state 2995.
Diseased, exposing 6530-6532, 6815.
Diseased, sale of 2995.
Driving or removing from range 6642.
False certificate of registration 6746.
False representation of breed 6746.
Killing, maiming, disfiguring or poisoning 6753.
Vicious, allowing at large 6591.
Vicious or dangerous causing death, manslaughter 6407.
Anonymous letters or writing 6438.
Antedating location notice 6675.
Apiaries, spreading disease among 481
Appraiser asking or receiving bribe 6320.
Apprentice, runaway, aiding or concealing 495, 496.
Aqueducts, injury to 6757.
ARBITRATOR—
Asking or receiving bribe 6320.
Influencing or attempting to influence unlawfully 6323.
Receiving communication unlawfully 6324.
Unlawful promise or agreement of 6324.
Armed association 6604.
Arms, concealed, carrying 6568.
Arms, state, unlawful use of 4048.
Arrest, refusal to make on lawful command 2833, 4290, 6361, 6606, 6863, 6956.
Arrest, unlawful 6806.
Arrested person, refusing communication with attorney or intimidation of 6807.
ARSON 6624-6631—
Attempt, what is 6631.
To defraud insurer 6626.
"Set on fire" defined 6628.
Asking or receiving compensation or reward for compounding or concealing crime or impeding prosecution thereof 6363.
Asking or receiving subscriptions without authority 6718.
ASSAULT 6412—
And battery 6414.
Provoking or attempting to provoke 6415.
Where mayhem attempted 6418.
With deadly weapon 6413.
With intent to kill or commit felony 6413.
With whip or stick with intent to intimidate by reason of possession of deadly weapon 6411.
Assayers, failing to identify bullion or amalgam or keep record of 2483-2486, 6763-6764.
Assemblage of anarchists 6615.
Assembling to disturb peace 6593.
ASSESSOR—
Asking or receiving bribe 6320.
Failure to make returns of poll taxes 3726.
Giving false receipt 3684.
Making assessment contrary to state board 3809.
Misdemeanor in office 3681.
Neglect of duty 1574.
Refusing inspection license and tax agent 4245.
See Officer; Public Officer; post.
Assumed name, transacting business under 6728-6731.
ATTEMPTS 6291—
At suicide, advising or encouraging 6381-6383.
To intimidate public officer 6364.
To provoke assault 6415.
To suborn perjury 6351.
Attorney-general, refusal to perform duties 4134.
Auditing, allowing or paying, false or fraudulent claims 6376.
Automobiles, running for rent without license 3878.
Automobile, wrongful use of 6707, 6753.
Badge or insignia of G. A. R. etc., unlawful wearing 2503-2505, 6715-6717.
Baggage, wilfully or carelessly breaking or injuring 6755.
Bailee of animal, vehicle or automobile, wrongful use by 6707.
BANKS—
Banking board, violation of act 685.
Certifying check when no funds on deposit 647.
Credit, circulation of false reports concerning 661.
Defrauding 648.
Deposits, receiving or assent to reception in failing 634, 635, 6724, 6725.
Examiner, violation of duty 685.
Embezzlement of funds 648.
False oaths or statements by officials 631, 660.
False reports, circulation of as to credit 661.
Funds, misappropriation of 648.
General penal provisions 689.

Banks—continued.
Insolvent, failure to prevent or receipt of deposits in 634, 635, 6724, 6725.
Interest, paying excessive 644.
Loans, indorsed by officials 632.
Officials borrowing without approval of directors 633.
Officials transacting business after authority revoked 655.
Reports, failure to furnish 637.
Time deposits, paying more than 4% for 644.
Violation of bank act 645, 689.
Battery 6414.
Bees, spreading diseases among 481.
Bigamy 6456, 6457.
Birds, duty of officers to prosecute for killing certain 6813.
Birds, protected, unlawful killing or interference with eggs 6811, 6812.
BIRTH—
False certificate of 2987.
Concealing 6450.
Failure to record 2986.
Failure to report 2972.
Certificate, altering of 2972.
Blacklisting 6780-6782.
Board of examiners (county), neglect of duty 1551.
Board of examiners (state), neglect of duty 2859.
Board of examiners, state, false testimony before 4462.
Board of pardons, false oath before 7627.
Boat, definition 6294 (6).
Boats, rafts or other water craft, injury to or unlawful interference with 6756.
Boat or vessel, for passengers, overloading, death caused by 6406.
Bond defined 6294 (12).
Bonding company, false affidavit of stockholder 1244.
Brand, failure to keep record of 6641.
Branding or marking animals unlawfully 6640.
Breach of peace, refusal to prevent 6606.
"Break," word defined 6294 (20).
Bribe, asking or receiving 6312.
Bribery defined 6311.
Bribery of officer 6311-6328.
Bribing or attempting to bribe employee or agent 6796.
Bribing or receiving bribe, labor representative 6794, 6795.
Bridges, fast riding or driving on 6772.
Bridges, injury to 6757.
Bringing or instigating false suit 6336.
"Building" defined 6294 (18).
Building, destruction by explosive 6572, 6573.
Bullion, purchaser failing to inquire concerning or keep record of 2483-2486, 6763, 6764.
Bunco steering 6464.
Bureau of industry, distributing unreliable literature 4494.
BURGLARY 6634-6636—
Committing other crime therewith 6636.
Presumption of intent 6635.
Property restored 6650, 6651, 7448.
Burglar tools, making or having 6637.
Burial of dead, without permit or certificate 6549-6553.
Butter, imitation, sale of 6526, 6528.
Camp fire, failure to extinguish 6632.
Capitol grounds, defacement or obstruction 6774.
Carrying concealed weapons 6568.
Cattle or domestic animals, wounding or poisoning 6747.
Cemetery, constructing road or public utility through 6477.
Cemeteries, injury to 6759.
Challenging, or delivering challenge to fight duel 6423, 6426.
Checks, drawing without deposit 6672.
Child or wife, abandonment of 766, 6446.
Child or wife, failure to support 6481-6483.
Child, substitution of 6371.
CHILDREN—
Certain employments or exhibitions of, unlawful 6823, 6824.
Contributory dependency and delinquency 757-764.
Foreign corporations placing 747.
Illegitimate, abandonment or neglect of 766.
Liability to punishment 6268.
Under fourteen, certain employments prohibited 6824.
Church, injury to property of 6760, 6761.
Cigarettes or cigarette papers, selling or giving to minors 3874-3875, 6502.
Circulating false report as to bank 661.
Cities and towns, sale of lots in, without plat 959.
Cities and towns, presenting fraudulent claim to 6715.
City council, malfeasance in office 808.
CITY OFFICERS—
Accepting bribe 812.
Interested in contracts 812.
Refusing information to revenue examiner 983.
Voting for excessive tax 976.
Voting for unlawful indebtedness 981.
See Officer; Public Officer; post.
Civil rights and remedies 6297, 6302.
Classification of crimes 6266.
Coercion, when unlawful 6740.
Collars, sleeves and pulleys, failure to protect 6797, 6798.
Combination to resist process 6605.
Commission, retention not larceny 6652.
Common-law crimes 6827.
Common law, to supplement statute 6300.
Communication with prisoner 6373.
Compounding crimes 6363.
Concealing birth 6450.
Concealing escaped prisoner 6343.
Concealed weapons, carrying 6568.
Conception, advertisements designed to prevent 6451-6455.
Confession, extortion of 6807.
Conspiracy 6377, 6378.
Conspiracy, overt act not essential to proof 6378.
Constable buying or inducing action 2821, 6367.
Constable purchasing judgment 2821.
Construction of crimes act 6295, 6301, 6831.
Construction camps, sale of liquor near 6839-6841.
Contagious diseases, again using clothing or bedding 6533.
Contagious diseases, exposing person to 6530.
Contagious disease, violation of act preventing spread of 3003.

Contempt, criminal, defined 2834, 6368.
Contempt proceedings not affected by act 6299.
Contempt, when punished, mitigation of offense for same act 6305.
Continuation of former statutes, construction 6301.
Contracts, public officers interested in 812, 1522, 6331.
Contributory delinquency or dependency 757-764.
Controller, malfeasance or misfeasance 4170.
Controller, receipts from, false affidavit of loss 4187.
See Officer; Public Officer; post.
Convict under protection of law 6278.
Conviction and execution of innocent person by perjury 6352.
Conviction of lesser degree or attempt 6290.
Conviction or acquittal in other county, state or country 6279-6280.
CORPORATIONS—
Failure (mining) to maintain agent 1218.
Failure to report to secretary of state 1186.
False entry by officer 1176, 1235.
False statements relative to 1174.
Fraudulent issuance of stock 6722.
Officer destroying records 1177, 1178.
Officer keeping false records 1177, 1178.
Officer receiving or possessing property unlawfully 1177, 1178.
Punishment, when not fixed 6287.
Refusing inspection or copy 1176, 1235.
Stock subscription, signing fictitious name or name of other without authority or with understanding that terms of subscription are not to be complied with 6721.
Store or boarding house, compelling employee to trade at 6791.
"Corrupt" or "corruptly" defined 6294 (2).
Corrupt influence of agent or employee 6796.
Corrupt practice at elections 6802, 6803.
COUNTERFEIT—
Money, advertising same 6680.
Money, having with intent to pass 6678, 6679.
COUNTERFEITING—
Chapter concerning 6663-6694.
Coins or paper money 6667.
Gold bars or other articles 6686.
Having or making die, plate or machine 6681.
Private stamps, labels or designs 4619, 6437, 6689.
Public or corporate seal 6685.
COUNTY. *See Officer; Public Officers, post*—
Clerk, certificate of true names of persons transacting business under assumed name filing and indexing 6728, 6730.
COMMISSIONERS—
Failing to comply with act relative to storage of explosives 1947.
Failure to abate nuisance 1562.
Failure to investigate licensed business upon complaint 3868.
Failure to order examination of accounts 2859.
Interested in contracts 1522.
Voting unlawful indebtedness 3834.
Voting on contract extending beyond term 1537, 1538.
County—continued.
Government, presenting fraudulent claim to 6715.
Officers, office hours, failure to keep 1565.
Officers, refusing inspection to state auditor 4152.
Recorder, recording unlawful brand 2248.
Recorder violating recorder's act 1638.
Surveyor, neglect of duty 1673.
CRIME—
Against nature 6459.
Against nature, assault with intent to commit 6413.
Also contempt 6305.
Classified 6266.
Definition of 6266.
Under laws of other states or countries 6304.
Crimes and punishments act 6266-6835.
CRIMINAL—
Anarchy 6613-6618.
Contempt 2834, 6368.
Literature, selling or giving 6461.
Negligence, when element 6271.
Cruelty to animals 1378-1380, 6815.
Custodian suffering prisoner to escape 1657, 6341.
Cutting timber 2114-2116.
Dams and aqueducts, injury to 6757.
Damage, injury or destruction of property 6752-6754.
Dangerous exhibitions 6590.
Dangerous or vicious animal causing death 6407.
Daytime, defined 6294 (19).
DEAD BODY—
Attachment or detention of 6476.
Burial of, without certificate or permit 2972, 6549, 6550.
Burial or cremation of 6474.
Person accompanying, obstructing or detaining 6476.
Removal without authority 2972, 6475.
Stealing or receiving unlawfully 6475.
Unlawful dissection 6473.
Unlawful removal or interference with 6814.
DEADLY WEAPON—
Or instrument, setting of 6567.
Peace officer, use of by 6439.
Unlawful use or exhibition of 6439.
DEATH—
Failure to record 2986.
False certificate of 2987.
DEATH CERTIFICATE—
Altering of 2972.
Carrier shipping without 2972.
False issuing 2972, 2987, 6551.
Physician failing to issue or issuing false 2972, 6551.
Death penalty, for what crimes may be imposed 6352, 6386, 6413, 6422, 6442, 6572, 6573, 6625, 6818.
Debtor, defrauding creditors 6701, 6702.
Deeds or other writings fraudulently or maliciously injuring or destroying 6671.
Defacing or destroying legal proclamations or notices 6674.
Defacing or obliterating marks or brands 6640.
Definition of attempt 6291.
Definition of crime 6266.
Definition of terms used in crimes act 6294.

Defrauding hotel, inn, restaurant, boarding or lodging house 6726.
Degree of guilt, reasonable doubt as to, rule 6277.
Dental examiners act, violation of 4439.
Dentistry, practicing without license 4427.
DESTRUCTION—
Alteration or concealing messages, papers or instruments, with intent to injure 6712.
Of building by explosives 6572, 6573.
Of property by unlawful assembly 6612.
Of public records 2817, 6344, 6345.
Dipsomaniac, sale of liquor to 6523, 6836-6838.
Discharging firearms 6569, 6570.
Disclosing transactions of grand jury 6374, 7031.
Discounting time checks 6788-6790.
Diseased animal, exposing 6530-6532.
Diseased meats, poultry and fish, sale of 2995. 6535.
Diseases, contagious, exposing to 6530, 6533.
Diseases, spreading among bees 481.
Disfranchisement for dueling 250, 370, 371, 6423.
Disorderly house 6484.
Dissection, when crime 6473.
DISTRICT ATTORNEY—
Misfeasance or malfeasance 1606.
Nuisance, failure to abate 1562.
Partners opposing in same action 1611.
Property from person arrested, liability for 6651.
Taxes, failure to account for 3676.
See Officer; Public Officer; post.
District recorders, violating recorder's act 1638.
Disturbing assembly or meeting 6607.
Disturbing legislature 6333.
Disturbing religious meeting 6478, 6597.
Disturbing the peace 6589, 6592, 6593.
Disturbance of church or school 3455, 3456, 6760, 6761.
Disturbance on street or highway 6589.
Divorce business, advertising for 6462.
Dog, malicious poisoning of 6775.
Dog stealing 6647.
Dog, vicious, unlawful to keep 6441.
Domestic animals working without consent 6744.
Doors of public buildings, swing outward 6581.
Drawing checks or instrument without deposit or credit 6672.
Drawing jury, misconduct of officer 6325.
Drawing or exhibiting deadly weapon unlawfully 6439.
DRUGS—
Adulteration of 4511.
Narcotic, sale without prescription 6543, 6544.
Negligence in compounding 4503.
Omitting or wrong label 6542, 6543.
To produce miscarriage, sale of 6448, 6449.
Drunkards, sale of liquor to 6523, 6836-6838.
Drunkenness 6523.
Drunkenness as mitigation 6282.
Drunkenness in office 2861-2863.
Dueling 250, 370, 371, 2823, 6422-6426.
Duel, seconding 6426.
Duress, obtaining property or advantage by 6821.
"Dwelling house," defined 6294 (17).
Dynamite machine, making or having 6571.
Eagle, American, killing 6811.
Editors and publishers, liability 6618.
Eight-hour day, violation of, mine top men 1941; public works 3482, 6778; underground mines 6554; smelters and mills 6555; open-pit or cut mines 6557; plaster and cement mills 6559.
ELECTIONS—
Abstracting ballot lawfully polled 1826.
Aiding, advising or assisting fraudulent voting 1827.
Attempt to add additional ballot to those cast 1826.
Attempting to vote twice or more 1827.
BALLOT—
Applying for at wrong precinct 1862.
Elector delivering other than one received 1862.
Not to be shown or examined 1862.
Or stub, marking for identification 1859.
Paper, disclosing design or watermark 1859.
Paper, printing, furnishing, or having possession of, imitation 1859.
Placing identifying mark on 1862.
Receiving by person other than election board 1862.
Receiving from other than clerk of election 1862.
Removal from election place before closing polls 1862.
Soliciting elector to show 1862.
Bribe, giving or offering 6319.
Candidate offering appointment as inducement 1829.
Cards of instruction, defacing or tearing down 1860.
CERTIFICATE OF NOMINATION—
False, filing of 1859.
Falsely making 1859.
Fraudulently defacing or destroying 1859.
Suppressing 1859.
Changing ballot after same has been deposited 1826.
Communicating offer of appointment by candidate as inducement 1829.
Corrupt practices at 6803.
Destroying or attempting to destroy poll list, ballots or boxes 1826.
Electors, corrupting, intimidating or deceiving 6802, 6803.
Elector refusing to answer lawful questions or be sworn 1825.
False swearing before registry agent 1719.
False swearing unable to mark ballot 1859.
Fraudulent voting 1826.
Giving or offering bribe to officer or member of political caucus, convention, primary or gathering 6319.
Interfering with election officers 1826.
Liquor, selling or giving on election day 1830.
Officers failing or refusing to perform duty 1824.
OFFICER—
Fraudulently obtaining or attempting to obtain information of ballot 1828.
Of attempting to influence votes 2814.
Opening folded ballot or attempting to obtain information thereof 1828.
Wilful neglect of duty 1861.
Person not entitled, attempting to vote 1827.

Elections—continued.
Primary, misconduct of officer in filing nomination paper 1765.
Primary, penal provisions of general election laws applicable to 1765.
Prompting voter upon examination for identification 1731.
Registering illegally 1718.
Returns, counterfeiting or substituting false for original 1828.
School, violation of 3294, 3296.
Secretary of state or election officer, fraudulent or corrupt conduct or wilful neglect of duty 2815.
Supplies, removing or destroying 1860.
U. S. senator, candidate, paying or promising money or reward 1900.
Voter, asking for whom he intends voting, within 100 feet of polls 1862.
Voting or attempting to vote illegally 1718.
See also index to Elections.
Electric wires, public utility refusing to connect 6844-6846.
Embalming, practicing without license 4451.
EMBEZZLEMENT—
Bailee defined 6653.
By bailee 6653.
By bank official 648.
By officer, public money 6656-6660.
Chapter concerning 6653-6662.
Contractor failing to pay for labor or material 6655.
Defined 6653.
Evidence of 6653, 6654.
Of bank funds 648, 6648.
Property restored to owner 6650, 6651, 7448.
Public money by officer 6656-6660.
Emblems or insignia, illegal use or wearing of 2503-2505, 6715-6717.
Embracery 6323.
Employment agent, fraud or misrepresentation by 6785.
EMPLOYER OR EMPLOYEE—
Agent or employee, violation of duty 6786.
Contractor failing to pay, when deemed embezzlement 6655.
Crimes by or against 1941, 3482, 6554, 6555, 6559, 6778, 6801.
Demanding money of, when unlawful 6783-6786.
Employment, obtaining by false letter or certificate 6787.
Hospital fees, collecting unlawfully 1943.
Issuance of non-negotiable paper for wages 1939.
Preventing employment 6779.
Endangering life by refusal to labor 6588.
Endangering vessel, train or car by false signal or interference with signals 6750.
Engine or boiler liable to cause fire, operating of 6580.
Engineer who cannot read, employment of 6582.
"Enter," word includes what 6294 (21).
ESCAPE—
Causing death in attempt 6819.
Concealing 6343.
From custody 6338.
From prison or jail 6339.
Permitting 1657.
Escape—continued.
Soliciting or receiving bribe to permit or assist 6342.
Evidence, false, offering knowingly 6357.
Evidence, wilful destruction or alteration of 6358.
Excavations, failure to protect 3236.
Exhibitions, dangerous, permitting 6590.
Exhuming remains unlawfully 6552, 6553.
EXPLOSIVES—
Commissioners failing to comply with act relative to storage 1947.
Destruction of building by 6572, 6573.
Endangering life or property by 6751.
Keeping unlawfully 6565.
Kept unlawfully, death caused from 1947, 6409, 6560.
Selling or delivering for transportation without word "Explosive" in large letters 6566.
Violation of duty by dealer in 6574, 6575.
Express malice, defined 6385.
EXTORTION—
By offering to prevent publication of libel 6433.
By blackmail 6739.
By public officer 6738.
By threats 6437-6438.
Threats to induce 6335, 6438, 6639, 6801.
Failure to support wife and child 766, 6481-6483.
FALSE. *See Perjury.*
Account or entry by officer 6658.
Certificate by officer 6375.
Certificate of birth or death 2987.
Certificate of registration of animals 6746.
Entry in corporate records 1176, 1178, 1235.
Entry in public record 6664.
Evidence, knowingly offering 6357.
Financial statements, publication of 6720.
Fire alarm 6601, 6602.
Impersonating of another 6735.
Imprisonment, defined 6440.
Making or issuing document purporting to be that of corporation, state or government 6666.
Oath, bank officers 660.
Or forged instrument, offering for filing, register or record 6348.
Or fraudulent claim, auditing, allowing or paying 6376.
Or misleading statement by public officer in official report 6349.
Or misleading statement or report to public officer 6805.
Permit, license, diploma or writing, filing for record or conducting business under 6719.
Personating of officer 4291, 6734.
Pretenses, credit or property obtained by 6696, 6704, 7179.
Pretenses, obtaining signature by 6705, 7179.
Pretension of heirship 6370.
Representations affecting real property of another 6706.
Representations as to property subject to mortgage or lien 6691-6700.
Statements, designed to affect market price 6723.
Statements, relative to corporations 1174.
Suit, bringing or instigating 6366.
Felony, definition of 6266.

Felony, punishment when not fixed 6283.
Female, placing in house of prostitution 6445.
Female, slander of 6434-6436.
Fictitious checks, notes or other paper, uttering or passing 6665.
FIRE—
Alarm, giving false 6601, 6602.
Apparatus, destruction or injury to 6576.
Failure to extinguish 6632.
Negligently setting or failing to extinguish 6579, 6632.
Obstructing extinguishment 6576.
Precautions, failure to take 905, 906.
Setting negligent 6579, 6632.
Firearms, aiming or discharging 6569, 6609.
Firearms, officers, duty of 6570.
Firearms, use of by minor 6610.
Firemen, obstructing or interfering with 6577.
First degree murder 6386.
FISH—
Catching otherwise than by hook and line 2061.
Closed season, selling or possessing during 2060.
Closed season, violation of 2058.
Excessive amount shipping 2064.
Ladders, failing to provide 2048.
Ladders, destruction or interference 2049.
Ladders, fishing within 100 feet of 2049, 2066.
Limit of catch 2065.
Night fishing 2068.
Pollution of streams 2047.
Private hatchery act, violation of 2084.
Selling or having, caught otherwise than by hook and line 2062.
Transporting or offering for, for sale outside state 2051.
Undersized, catching or having 2063.
U. S. reclamation dam one-mile limit 2067.
Warden, failure to aid on command 2070.
Fish and game license, penalties 2101, 2108, 2109.
Flag, desecration of 6603.
FOOD AND DRUG ACT—
Refusing information or sell samples 3502.
Violation of, general provisions 3508.
FOREIGN BUILDING AND LOAN ASSOCIATION—
Agent doing business contrary to law 1363.
Unlicensed, soliciting business for 1358.
Foreign conviction or acquittal, defense 6279.
FOREIGN CORPORATIONS—
Doing business without authority 1350.
Failure to file annual statement with assessor 1353.
Failure to file copy of charter with recorder 1347.
Forcible entry and detainer 6743.
Forcing woman to marry 6444.
Forest fire, setting 6633.
Forestry, cutting timber 2114-2116.
Forestry, young trees, selling 2118.
Forfeitures, certain abolished 6278.
FORGERY—
Chapter concerning 6663-6694.
Definition of terms 6673.
False certificate of acknowledgment 6669.
Signature of public officer 6685.
Signing or indorsing by fictitious or own name 6668.
Forgery—continued.
Signing one's own name with intent to represent other person of same name 6668.
What acts considered 6663-6670.
Witnesses and proof in 6683, 6684.
Forged instruments or bills having or receiving with intent to utter or pass 6682.
Forging or counterfeiting signature of public officer 6685.
Former jeopardy 6279, 6280.
Fornication 6458, 6517.
Fraud on owner by bailee of animal, vehicle or automobile 6707.
FRAUDULENT—
Conveyance 6695.
Conveyance, receiving knowingly 6703.
Bank transactions 648.
Issuance of corporate stock 6722.
Schemes or devices 6463, 6464.
FRAUDULENTLY—
Destroying or injuring deeds or other writings 6671.
Or maliciously executing or filing for record instrument affecting title of another to real property 6706.
Procuring filing of trademark, stamp or design 6693.
Selling real estate twice 6727.
Furnishing libelous information 6432.
Gambling 6518-6522.
Game, transporting or receiving for 2113.
Game law, violation of 2085, 2097, 2100.
Gates, failing to close 6769.
Giving, offering or promising compensation or reward for office or employment or for permission to exercise function of office or to receive emolument of 1829, 2822, 6317.
Glove contest act, violation of 3889.
Goats, permitting to run at large in towns or cities 2330.
Grafting by agent or employee 6786.
Grafting, defined 6330.
Grand juror acting after challenge allowed 6369.
Grand juror, perjury by 7033.
Grand jury, disclosing transactions of 6374, 7031.
GRAND LARCENY—
Animal, stealing, taking, carrying, leading, driving or enticing away 6640.
Assault with intent to commit 6413.
By lodger 6646.
Defined 6638, 6640.
Killing animal of another running at large 6640.
Marking or branding or altering or defacing mark or brand of animal of another with intent to steal or defraud 6640.
Purchasing or selling carcass or hide of animal, brand or mark, cut out or obliterated 6640.
Realty, conversion into personalty 6643.
Gross misdemeanor defined 6266.
Gross misdemeanor, punishment when not fixed 6284.
Guardian of female under age of 18 consenting or permitting in house of prostitution 6445.
Guideboards on highways, failure to erect, defacing or destroying 3028.
Habeas corpus, disobedience of writ or process 6263-6265.

Habitual criminals 6292.
Hatpin, wearing dangerous 6829, 6830.
Health, public, crimes against 6529-6560.
Health, quarantine, failure to observe 2999, 3000.
Health officer, neglect of duty 2972.
Heir, pretended, production of 6370.
Hide, failure to keep or exhibit 6641.
HIGHWAYS—
Driving diseased or infected animal on 2266, 2268.
Driving or riding in dangerous manner on 6589.
Guideboards, defacing or destroying or not erecting 3208.
Obstructing of 3009.
Running water upon 3045, 3046, 6757, 6770, 6771.
Wilful and malicious injury to 6752.
Hoisting machinery, operating without license 3904.
HOMICIDE—
Burden of proof, justification or mitigation 6399.
Committed in attempt to escape 6819.
Death within year and a day 6392.
Excusable by misadventure 6400.
Justifiable defined 6384, 6394-6402, 6859-6861.
When justifiable or excusable 6397.
HORSES—
False certificate of sheriff 2294.
Furnishing false pedigree of 2287.
Pedigree, failure to keep posted 2288.
Receiving for transportation out of state without inspection 2289-2291.
Removing out of state without inspection 2295.
Shipping out of state without inspection 2290.
Horse meat, sale of, when unlawful 6524, 6525.
Hospital, near school 6534.
Hotel, inn, restaurant or boarding or lodging house, defrauding 6726.
Houses of ill-fame, crimes in relation to 3457, 6445, 6510.
Houses of prostitution, location near school 3457, 6570.
Hunting on enclosed ground 6766-6768.
Illegitimate child, abandonment or neglect 766.
Ill-fame, house of, crimes in relation to 3457, 6445, 6510.
Imitating brand 6745.
Immoral, show, act or performance 6461.
Impeachment, other laws applicable 6298.
Implied malice defined 6386.
Imprisonment on two or more convictions 6303, 7256.
Impure water, furnishing for domestic use 6540.
Incest 6468.
Incestuous marriage 6458.
Indecent exposure 6460.
Indians amenable to criminal law 6270.
Indian, selling or giving liquor to 6507-6509.
"Indictment" or "information," terms include what 6294 (23).
Infernal machine, making or having 6561.
Injury to property 6752-6754.
Injury to public records 2817, 6344, 6345.
Injuring or tampering with property of public service companies 6732, 6733, 6735.
Inn, keeping disorderly 6484.
Innocence presumed 6277.
Insane or idiots not liable to punishment 6268.
Insectivorous birds, killing or destroying eggs 6812.
Insolvent banks, failure of officers to prevent deposit in 634, 635, 6725.
Insolvent banks, receiving deposits in 634, 635, 6724.
Instituting suit in name of another 6372.
INSURANCE COMPANY—
Doing business after certificate revoked 1270, 1274.
Doing business without license 1280.
Doing certain business without authority 1309.
Failure to file annual statement, doing business upon 1327, 1328.
False affidavit relative to death or disability deemed perjury 1317.
False statement to 1317.
False statement to annual report 1328.
Violation of act 1283.
Intent to defraud, proof, when sufficient 6306.
Intent to defraud, averment and proof 6294 (5).
Intent, when element of crime 6268.
Intent, how manifested 6272.
Interference with officer in performance of duty 6329, 6804, 6828.
Intimidating legislator 6333.
Intimidation of arrested person 6807.
Intimidation, when unlawful 6740.
Intoxicated physician or surgeon, death caused by 6410.
Intoxication of railway employees 3564, 6583.
Intoxication, when mitigation 6282.
Involuntary manslaughter 6390.
Jail breaking 6339.
Jail, communicating with prisoners in 6817.
Jail, injury to 6758.
Jailer, failure to report to commissioners 7607.
Jailer, permitting escape 1657.
"Judge," word includes what 6294 (15).
JUROR—
Asking or receiving bribe 6320.
False claim of military service to evade duty 4016.
Failing to attend 4934.
Influencing or attempting to influence improperly 6323.
Receiving communication unlawfully 6324.
Unlawful promise or agreement of 6324.
"Juror," word includes what 6294 (25).
JURY—
Misconduct of officer drawing 6325.
Officer in charge, misconduct of 6327.
Duty, soliciting 6326.
JUSTICE OF PEACE—
Buying or inducing action 2821, 6367.
Neglect of duty relative to estrays 2277, 2279.
Purchasing judgment 2821.
See Officer; Public Officer; post.
Justifiable homicide 6394-6402.
Kidnaping, consent when defense 6421.
Kidnaping defined 6419, 6421.
"Knowingly" defined 6294 (4).

LABOR—
Endangering life by refusal 6588.
Organization, agreements to become or not to become member 6792, 6793.
Public works 3482.
See Employer or Employee; Eight-Hour Day, supra.
Representative, bribing, or receiving bribe 6794, 6795.
Laborers, false advertising or deception to change from one place to another 1936.
Landmarks, removal of 6676.
LARCENY—
Chapter concerning 6638-6652.
By lodger 6646.
Grand, defined 6638.
Dog 6647.
From person of another 6822.
Negotiable or other instruments 6645.
Part interest in property no defense 6652.
Petit, defined 6639.
Property restored 6650, 6651, 7448.
Legal notices posted, malicious removal or injury of 6752.
LEGISLATURE—
Bills or laws, fraudulent alteration 6346, 6347.
Bribery or receiving bribe 6311, 6312.
Disturbance of 6333.
Intimidating member 6333.
Witness refusing to attend or testify 6334.
Letters or writings, threatening, accusing, exposing, anonymous or obscene, sending or delivery 6438.
Letter sending when complete, venue 6307.
Levy, unlawful 6806.
Lewdness 6460.
LIBEL 6428-6433—
Denial of, how published 6826.
Threatening to publish, blackmail 6739.
Who may be liable for 6430-6433.
LICENSE—
Auctioneer doing business without 3895.
Automobiles for rent, running without 3878.
Bogus, possession or delivery of 3744.
Doing business without 3737, 6808, 6810.
Failure to deliver on payment 3744.
Failure to post 6809.
Forfeited, failure of officers to enforce 3871.
Insurance company doing business without 1280.
Itinerant peddler doing business without 3895.
Peddling without 3735.
Required, acting without 6808.
Revoked, doing business after 3870.
State liquor, violation of 3784.
Vending without 3737, 6808, 6810.
License and bullion tax agent, refusing inspection to 4243-4246.
LIQUOR—
Adulterated, sale of 3486, 6816.
Sale of, near construction camp 6839-6841.
Sale of, to drunkards or dipsomaniacs 6836-6838.
Sale or disposal at religious or camp meeting 6598.
Selling or giving away on election day 1830.
Selling or giving away to Indian 6507-6509.
Livery men, fraudulent use of animals or vehicles of 6707.
Literature, obscene or criminal, offenses concerning 6461.
Location notices, antedating 6675.
Lottery defined, penalties for engaging in business concerning 6494-6501.
Lottery, property forfeited to state 6500.
Machinery, failure to protect 6797, 6798.
Malfeasance or misfeasance of city officer 808.
Malfeasance or misfeasance of officers generally, see Officer and Public Officer, *post.*
Malice, express and implied 6385, 6386.
"Malice" or "maliciously" defined 6294 (3).
Malice, when inferred 6294 (3).
Malicious injury to private property 6753.
Malicious injury to public or private property 6752.
Malicious mischief 6752-6762.
Malicious prosecution 6365.
Maliciously destroying or injuring deeds or other writings 6671.
Maliciously wounding or poisoning cattle or domestic animals 6747.
MANSLAUGHTER—
Death caused by intoxicated physician 6410.
Death caused by overloading passenger vessel 6406.
Death caused by reckless or negligent operation of steamboat or boiler, causing death 6408.
Death caused by vicious or dangerous animal 6407.
Death caused from unlawful keeping of explosives 1947, 6409.
Dueling, when deemed 6426.
Killing unborn quick child 6403.
To aid suicide 6381, 6383.
Voluntary and involuntary defined 6387-6391.
MARKS AND BRANDS—
Failure to keep or exhibit 6641.
Failure to keep record of 6641.
Imitating 6745.
Marking or branding animals unlawfully 6640.
MARRIAGE—
Between races 6514-6516.
Between races, performing ceremony 6516.
Ceremony by unauthorized person 2348.
Certificate of, failure to deliver or record 2346.
False certificate of 2347.
Incestuous 6458.
Legal impediment, when known exists 2348.
Performing ceremony without license 6479, 6480.
Produced by force 6444.
Married woman under threats of husband 6268.
Marrying a married person 6457.
Mayhem, assault with intent to commit 6413.
Mayhem defined 6416-6418.
Mayor or councilmen, malfeasance 808.
See Officer; Public Officer; post.
Meat, selling without having hide 6641.
Medicine, issuing false certificate to practice 2373.
Medicine, practicing without license 2371.
Merchandise, false representations as to 6709.
Merchandise pure food act, violation of 3486.
Merchandise, sale of in violation of bulk act 3910.
Milk, sale of adulterated, skimmed or impure 6536-6539.

Military property, refusal to return 4052.
Military tribunal not affected by act 6299.
Mills or smelters, hours of labor in 6555, 6556.
MINES—
Excessive number on cages 4235.
Failure to provide safety cages 6799.
Inspector act, noncompliance with 4238.
Open, hours of labor in 6557, 6558.
Owner refusing inspection of books to license and bullion tax agent 4246.
Proceeds of, false oath concerning 3690.
Underground, hours of labor 6554, 6556.
Using metal tamping bar in 4212.
Mining company, annual statements 1336-1340.
Mining corporations, failure to maintain agent 1218.
Mining district recorder, violating duty 2455, 2468, 2474.
MINOR—
Allowing in pool or billiard rooms without consent 6506.
Certain employments or exhibitions of unlawful 6823, 6824.
Decoying, enticing or inducing to visit houses of prostitution 6445.
District judge to permit employment of 6824.
Employing as barkeeper 6506.
Exhibiting obscene literature to, or permitting to sell same 6461.
Falsely representing age to procure liquor 6506.
Permitting in saloon or resort where liquors are sold 6842, 6843.
Sale of tobacco to 6502.
Selling or giving cigarettes or papers to 3874, 3875.
Use of firearms by 6610.
Misbranding of foods, drugs or liquors 3486.
Miscarriage, selling drugs to produce 6448, 6449.
Miscarriage, woman attempting to produce 6405.
Misconduct of officer in charge of jury 6327.
Misdemeanor defined 6266.
Misdemeanor, punishment when not fixed 6285, 6286.
Misdemeanor to perform prohibited act 6288.
Misprision of treason 6310.
MORTGAGE—
Satisfaction of, false affidavit 3755.
Personal property, selling or removing with intent to defraud 6697, 6700.
MUNICIPAL—
Indebtedness, unlawful voting for 981.
Officers, refusing inspection of finances 983.
Tax, excessive, voting for 976.
MURDER—
Assault with intent to commit 6413.
Death by dueling deemed 6422.
Defined 6384, 6389.
Degrees of 6386.
Perpetrated by arson 6625.
While attempting to escape 6819.
Mutual fire insurance company, violation of act 1295.
Narcotic drug, physician or surgeon under influence of, causing death 6410.
Narcotic drug, sale of without prescription 6543, 6544.
"Neglect," "negligence," etc., defined 6294 (1).
Negligence, criminal, when element 6271.
Negligent fire 6633.
Negligent or reckless operation of steamboat or boiler, causing death 6408.
Negotiable or other instruments, larceny of 6645.
Newspapers, defacing or abstracting from recorder's office 1642.
"Nighttime," defined 6294 (19).
Notary public, wilful violation of duty 2756.
Nuisance 6546.
Nuisance, failure to abate 1562.
Nursery stock, transporting without certificate of inspection 6776, 6777.
"Oath" includes affirmation 6353.
Obscene, indecent or immoral show, act or performance 6461.
Obscene letters or writing, sending or delivering 6438.
Obscene literature, offenses concerning 6461.
Obtaining license, diploma, permit or other writing by false representation 6719.
Obtaining or seeking to obtain money or value on promise of influence of legislator 6318.
Offenses committed prior to act taking effect 6832, 6833.
Offering false evidence 6357.
Office, exercising functions of without authority 6332.
Office, wrongful exercise of 6804.
OFFICER. *See Public Officer, post.*
Asking or receiving bribe 6331.
Drawing jury, misconduct of 6325.
Embezzlement of money or property 6345.
Exceeding authority or using unnecessary force in serving search warrant 6742.
Failing in duty to pay over money 6658, 6659.
Failure to furnish report, statement or information to 6805.
Impeachment, removal or suspension, other laws not affected 6298.
In charge of jury, misconduct of 6327.
Interference with duty of 6329, 6804, 6828.
Justifiable homicide by 6396.
Keeping false account or making false entry 6658.
Public, misconduct of 6331.
Refusing to aid on command 2833, 4290, 6361, 6606, 6863, 6956.
Refusing or neglecting to receive person into custody 2820, 6360.
Tampering with public records 6345.
Officers of revenue selling or dealing in scrip 2824, 2825.
Officer or deputy, agreement to divide salary with principal 6313-6316.
"Officer" or "public officer," terms include what 6294 (24).
Oleomargarine, sale of, when unlawful 6526-6528.
Omission, performance by another 6281.
Open-pit mines, hours of labor in 6557, 6558.
Opium, leasing house or room for resort 6490-6492.
Opium, selling or smoking 6485-6493.
Optometry, violation of act concerning 2896.
Oppression by officer or one pretending to be 6806.
Ores, false or fraudulent statements or transactions concerning 6710.

Ores, substituting or changing value of 6710.
Overloading passenger vessel, death caused by 6406.
"Owner," who included in term 6294 (16).
Paper to circulate as money, issuance of 6688.
Parties to crimes, classified 6273.
Partnership doing business without filing certificate of names 6730, 6731.
Pauper, bringing into state 2928.
Pauper, bringing or leaving in county 2925.
PAWNBROKER—
Defined 6471.
Duties, violation of 6465-6471.
Failure to record transactions or report to police 6465-6467.
Rate of interest, charging excessive 6470.
Records subject to inspection 6466.
Peddling without license 3735.
PERJURY—
Before board of examiners 4462.
Before registry agent 1719.
By bank officer 660.
By grand juror 7033.
Chapter concerning 6350-6356.
False affidavit as to taxes or satisfaction of mortgage 3755.
False affidavit of loss of receipts received from controller 4187.
False affidavit to insurance company relative to death or disability 1317.
False oath as to proceeds of mines 3690.
False oath by official of public utility 4513, 4543.
False oath or affirmation before board of pardons 7627.
False oath or list of taxable property 3630.
False statement to annual report of insurance company 1328.
Irregularities no defense 6354.
Permitting use of premises for assemblage of anarchists 6616.
Person authorized to determine any question or proceeding asking or receiving bribe 6320.
"Person" defined 6294 (14).
Persons liable to punishment 6267.
Persons not liable to punishment 6268.
Personating another 6735.
Personating physician 2372.
"Personal property" defined 6294 (11).
PETIT LARCENY—
By lodger 6646.
Defined 6639.
Realty, conversion into personalty 6644.
Petition authorized by law signing name of another or of fictitious person 6670.
PHARMACY—
Adulteration of drugs 4511.
Compounding drugs without license 4513.
Drugs, negligence in compounding 4503.
Narcotics, sale without prescription 6543, 6544.
Poisons, retailing without label 4512.
Practicing without license 4509.
Presenting fraudulent diploma of 4500.
PHYSICIAN—
Failing to issue death certificate 2972.
False impersonation of 2372.
Giving or prescribing narcotic 6544.
Intoxicated, causing death 6410.
Issuing false death certificate 2972, 6551.
Placing female in house of prostitution 6445.
Plaster or cement mills, hours of labor in 6559, 6560.
Plume birds, unlawful to kill or destroy eggs 6812.
Poison, administering with intent to kill 6404.
Poisoning dog 6775.
Poisoning food, water or medicine 6541.
Poll tax, issuing fraudulent receipt for 3714-3717.
Posting bills or advertisements unlawfully 6754.
Posse comitatus, refusal to join 6606.
Possessing or receiving counterfeit gold bars or other material 6687.
Posting for not fighting duel 6425.
Prescription for narcotic, making or presenting false or fraudulent 6545.
Presenting for audit or payment fraudulent claim against state, county, city, town or school district 6715.
Presumption of innocence 6277.
Pretended heir, production of 6370.
Prevention of procreation 6293.
Principal defined 6274.
Prior offenses, what law governs 6296.
Private books or accounts, failing to make entry or fraudulent entry with intent to defraud 6711.
"Prison," word includes what 6294 (27).
PRISONER—
Aiding to escape 6340.
Custodian suffering escape 1657, 6341.
Escaped, concealing 6343.
Escaping from custody 6338.
Escaping from prison or jail 6339.
Inhumanity to 2818.
Rescue of 6336.
"Third degree," administering to 6807.
Unlawful communication with 6373, 6817.
"Prisoner," word includes whom 6294 (26).
Process, combination to resist 6605.
Procreation, prevention of 6293.
Prohibited act, commission of, misdemeanor 6288.
"Property" defined 6294 (9).
Property, in custody of officer, taking of 6337.
Property, malicious injury to 6760-6762.
Property subject to mortgage or lien, sale, removal or destruction thereof 6700.
Prostitution, crimes in relation to 6445.
Prostitution, house of, habitually resorting in 6460.
Prostitution, house of, near school house 3457, 6510.
Provoking assault 6415.
Public administrator, misdemeanor in office 1621.
PUBLIC—
Building, doors, to swing outward 6581.
Buildings, malicious injury to 6752.
Conveyance, disturbance upon 6611.
Conveyance, failure to pay fare 6611.
Health, crimes against 6529-6560.
Nuisance defined 6561.
Nuisance, maintaining or permitting 6561, 6564.
Office, unlawful intrusion into or refusal to surrender 6332.
PUBLIC OFFICER—
Asking or receiving bribe 6331.

Public officer—continued.
Asking or receiving excessive fee or compensation or where none allowed 6738.
Blackmail of 6739.
Conviction forfeits trust 6287.
Failing in duty to pay over money 6658, 6659.
Failure of duty, misdemeanor 6289.
Falsely personating 4291, 6734.
Forging or counterfeiting signature of 6685.
Interested in contract for public 812, 1522, 6331.
Knowingly making false or misleading statement in official report or statement 6349.
Making false certificate 6375.
Misconduct of 6331.
Obstruction of 6805.
Resisting, delaying or obstructing 4291, 6362.
Violation of duty 6828.
See Officer, supra.
PUBLIC—
Or corporate seal, counterfeiting 6685.
Record, failure to make true entry or making false entry 6664.
Records, removal, destruction or injury to 2817, 6344, 6345.
Public school, disturbance of 3452, 3453, 6599, 6600.
Public service companies, certain acts against to injure or defraud 6732, 6733, 6735.
Public service companies, injuring or defrauding, penalty 6732, 6733, 6735.
PUBLIC UTILITY—
Books and papers, witness refusing to exhibit 4537.
Books, failure to produce 4529.
Failure to report to commission 4522.
False oath by official 4513, 4543.
Labor on, violation of act regulating 3482.
Refusing to connect pipes or wires 6844-6846.
Removing maliciously, damaging or destroying 6752.
Violation of general provisions of act 4542.
Works, employment over eight hours 6778.
Publication of libel, what deemed 6429.
Publishing or circulating book or paper advocating or inciting crime 6617.
Pure food, drugs or liquors, adulterating or misbranding 3486, 6816.
Quarantine, failure to observe 2999, 3000.
Quick child, killing unborn 6403.
Rafts, setting adrift 6756.
RAILROADS—
Combinations to prevent continuous carriage 3577.
Confining stock over 36 hours 3572, 3585.
Discrimination, unjust 4570.
Employees, intoxication of 3564, 6583.
Employee violating duty 6585.
Excavating under 3565.
Failure to give notice of live stock killed 3600.
Failure to make returns or exhibit books and papers 4575.
Failure to whistle or ring bell at crossing 3552, 6584.
False devices by 4572.
Full crew act, violation of 3591, 3594.
General penal provisions concerning 3581, 4576.
Railroads—continued.
Granting rebates, drawbacks, etc. 3581.
Injury to property of 3565.
Intoxication of engineer, conductor or other employee 3564, 6583.
Making illegal charge 6737.
Maliciously removing, damaging or destroying property of 6752.
Officer, making false report 3567.
Obstructing, hindering or delaying 6586.
Passes, issuance or acceptance of 4573.
Permitting animal on enclosed right of way 6753.
Property, wilful or malicious injury to or interference with 6749.
"Railroad" or "railway," term includes what 6294 (22).
Rebates, discrimination, false devices by 4570-4572.
Sheep, transportation without health certificate 2309(c).
Subpena, disobedience of 4566.
Telegraph operators working over eight hours 3597.
Wilfully or maliciously obstructing 6748.
Rape, assault with intent to commit, death penalty may be inflicted, when 6413.
Rape defined 6442, 6443.
Referee asking or receiving bribe 6320.
Referee, influencing or attempting to influence 6323.
Referee, receiving communication unlawfully 6324.
Referee, unlawful promise or agreement of 6324.
"Real property" defined 6294 (10).
Realty, conversion into personalty with intent to steal 6643, 6644.
Reasonable doubt as to degree, conviction of lowest 6277.
Receiving stolen goods 6648.
Reception or assent to reception of deposit in insolvent bank 634, 635, 6724, 6725.
Records, refusal to deliver to proper custodian 2819.
Records, stealing, altering or defacing 2817.
Recorder or deputy filing map or plat unlawfully 965.
Recorder's office, newspapers, abstracting or defacing 1642.
Referendum or other lawful petition, filing false or fictitious or subscribing to false oath thereto or signing fictitious name or name of other person thereto or withdrawing therefrom for reward 6670.
Refusal of inspection or examination of bank to examiner or deputy, revocation 654.
Refusal to join posse, prevent offense or assist officer 6606.
Refusal to make arrest or aid officer 2833, 4290, 6361, 6606, 6863, 6956.
Registry agent, refusal to perform duties 1712, 1719.
Religious meeting, disturbance of 6478, 6597, 6607.
Religious or camp meeting, selling or disposing of liquor at 6598.
Removal of landmark 6676.
Requisition, person suspected of bringing stolen goods into state, detained for 6649.
Rescue of prisoner 6336.

Resisting, delaying or obstructing public officer 4291, 6362.
Resisting or interfering with water officers 4704.
REVENUE AND TAXES—
Assessor, failing to assess as directed by state board 3809.
Assessor, misdemeanor in office 3681, 3684.
District attorney, failing to account 3676.
False affidavit as to 3755.
False oath or list of property 3630.
Mine owner, refusing access to books 3691, 3694.
Negligence relative to transient stock 3859.
Officers violating official duty 3751.
Personal property tax, attempt to avoid 3679.
Poll taxes, assessor failing to make return of 3726.
Proceeds of mines, false oath concerning 3690.
Poll tax receipt, issuing fraudulent 3414-3417.
Refusing information relative to poll tax 3720.
Refusing statement to assessor 3624.
Stock, evading or attempting to evade tax on 3856.
Stock, herding or grazing without certificate 3857, 3858.
Transient stock, revenue officers neglecting 3859.
Transfer to avoid taxes 3679.
Riot defined 6596.
Robbery defined 6427.
Robbery, assault with intent to commit 6413.
Property restored to owner 6650, 6651, 7448.
Rout defined 6596.
Rule of construction of act 6295.
Sabbath breaking 6608.
Safety appliances, failure to provide 6797-6799.
Safety cages in mines, failure to provide 6799.
Salary of officer, rebate or division for reward 6313-6316.
Salaried officers, neglect to pay over fees 1698.
Sale. *See Selling, post.*
Saloon, permitting minor to remain in 6842, 6843.
SCHOOL—
Books, overcharge for 3412.
Children, interference with 6599.
District, presenting fraudulent claim to 6715.
Disturbing of 3453.
Election law, violation of 3294, 3296.
False statement of age or attendance of pupil 3450.
Funds, auditor and treasurer failing to classify 3358.
Houses, injury to 3455, 3456, 6760, 6761,
Houses of prostitution located near 3457, 6510.
Interfering with pupils 3452.
Property of, injuring or defacing 3455.
Supply act, violation of 3472.
Truancy, encouraging 3449.
Truancy, parent failing to prevent 3445.
Sealed letters, messages or telegrams, opening unlawfully 6714.
Search warrant, maliciously procuring 6741.
Search warrant, officer exceeding authority or exercising unnecessary force in serving 6742.
Second degree murder 6386.
"Second-hand dealer" defined 6472.
Second-hand dealer, duties and penalties 6465-6472.
Secret or military orders or societies, badge or insignia of, unlawful wearing 2505-2507, 6715-6717.
Self-defense, what essential to establish 6394, 6395, 6402.
SELLING—
Adulterated foods, drugs or liquors 3486, 6816.
Goods containing forged or counterfeit stamps or labels 6690.
Horse meat, when unlawful 6524, 6525.
Liquor at religious or camp meeting 6598.
Liquors near prison or in capitol building 6504, 6505.
Liquor to drunkards or dipsomaniacs 6523, 6836, 6838.
Liquor to husband or father, when unlawful 6523.
Liquor to imbeciles 6506.
Liquor to Indians 6507-6509.
Liquor to minors 6506.
Lots before plat filed 959.
Or keeping lottery tickets 6496-6498.
Or purchasing carcass or hide of animal, when grand larceny 6640.
Or transferring services of person abducted or kidnaped 6420, 6421.
Tickets for entertainments without authority 6718.
Sending or delivering threatening letters 6437, 6438.
Setting spring gun 6567.
SHEEP—
Bringing into state without inspection 2300, 2301.
Herder, refusing information to inspector 2306.
Herding or grazing near town or village 2317, 2318.
Infected, exposing or permitting to run at large 2310.
Infected, failure to dip 2302.
Inspector permitting removal without examination 2304.
Owner failing to report infected to inspector 2305.
Permitting to run at large in towns or cities 2330.
Railroads transporting without health certificate 2309.
Removing from county to county without permit 2308.
Shearing within limits of town or city 6548.
Sheep inspection act, violation of 4602.
SHERIFF—
Failure to enforce itinerant peddler act 3895.
False certificate relative to horses shipped out of state 2394.
Illegal fees, charging of 1654.
Permitting escape 1657.
See Officer; Public Officer, supra.
Sidewalks, riding or driving on 6773.
Signals for vessels or railways, interference with or exhibiting false 6750.
"Signature" defined 6294 (7).
Signboards forbidding hunting, interference with 6768.

Signboards on highways, failure to erect, defacing or destroying 3028.
Slander of woman 6434-6436.
Slaughtering animals without having or examining hide containing marks or brands 6641.
Slaughter house, owner failing to keep book containing record of marks and brands 6641.
Slavery prohibited 246, 6847-6848.
Smelters or mills, hours of labor in 6555, 6556.
Smoking in prohibited places 6578.
Sodomy 6459.
Sodomy, assault with intent to commit 6413.
Soliciting jury duty 6326.
Songbirds, unlawful to kill or destroy eggs 6812.
Sound mind, who considered of 6269.
Spring gun, setting of 6567.
State board of examiners, failure to order examination of accounts 2858, 2859.
State board of examiners, presenting fraudulent claim to 6715.
State capitol building, liquors in prohibited 6505.
State capitol grounds, defacement or obstruction of 6774.
State controller drawing warrant for clerical work without appropriation 6661, 6662.
6662.
See Officers; Public Officers, supra.
State library, books, failure to return 3950.
State library, injury to property of 3950.
State liquor license, violation of act concerning 3784.
STATE MILITIA—
Arms, unlawful use of 4048.
Encampment, failure to attend 4038.
False list, making 4074.
Insulting officers or members 4083.
Obstructing 4082.
Property of, unlawful retention 4025, 4026, 4035, 4052.
State officer, employing or paying for clerical services or labor without appropriation 6661, 6662.
See Officer; Public Officer, supra.
State or county indebtedness, purchase of by officials 2825.
STATE POLICE—
Absence without leave 4286.
Falsely impersonating or wearing badge of 4292.
Molestation of in discharge of duty 4291, 6362.
Refusal to aid on command 4290.
State prison, selling liquor in vicinity of 6504.
See Escape; Prisoners, supra.
State treasurer, malfeasance or misfeasance in office 6660.
State treasurer, payment for clerical work without appropriation 6661.
See Officer; Public Officer, supra.
State veterinarian, violation of act concerning 4388.
Stationary engine, operating without license 3904.
Steamboat or boiler, reckless or negligent operation of causing death 6408.
Steam engine, or boiler, permitting excessive steam pressure on 6587.
STOCK—
Branding in same place as previous brand 2247.
Confinement on railroads over 36 hours 3572, 3585.
Driving diseased or infected animal on public highway 2266, 2268.
Driving or attempting to drive out of state to evade tax 3856.
Dying of contagious disease, failure to burn 2272, 2273.
Estrays, failure to give notice of 2274-2279.
Herding or grazing without revenue certificate 3857, 3858.
Marking by removing more than one-half of ear 2240.
Mismarking or misbranding not one's own 2242.
Permitting to run at large in towns or cities 2263, 2265.
Quarantine, violation of 2271.
Recording similar brand one already recorded 2248.
Stock subscription, signing fictitious name or names of other without authority or with understanding that terms of subscription are not to be complied with 6721.
Stolen goods, buying or receiving 6648.
Streams, pollution of 2047.
Street or highway, riding or driving in dangerous manner on 6589.
Substitution of child 6371.
Suicide 6379.
Suicide, aiding 6381-6383.
Suicide, attempt to commit 6380.
Subornation of perjury 6350, 6351.
Suit, instituting in name of another without consent 6372.
Sunday, noisy amusements or racing on 6608.
"Swear" defined 6353.
Swindling 6463, 6518.
Swine, permitting to run at large in towns or cities 2330.
Taking property from custody of officer 6337.
Tampering with or obstructing witness 6359.
TELEGRAPH—
Bribery of operator, officer or employee 4609.
Company's private mark or design, unlawful use of 4619.
Injury to or obstructing line 4610.
Officer or employee using information obtained 4605.
Operatives for railroads working over eight hours 3597.
Message, altering, destroying, divulging, delaying or opening 4603, 4606, 6712-6714.
Message, false, when deemed forgery 6664.
Message, failure to show time of transmission 6825.
Message, larceny of 4608.
Message, obtaining knowledge of contents unlawfully 6712, 6713.
Message, opening unlawfully 4607.
Message, sending out of order 4606.
Message, transmitting false or forged 4604.
"Third degree" unlawful 6807.
Telephone, damage to line 4610, 4632, 6752.
THREATS—
For purpose of blackmail 6739.
For purposes of extortion 6437, 6438.

Threats—continued.
For purpose of unlawful coercion 6740.
Or menaces, crime committed under 6268.
THREATENING—
Letters, sending or delivering 6437, 6438.
Public officer to intimidate 6364.
To publish libel 6433.
Timber, cutting unlawfully 2114-2116.
Timber, young trees, selling or offering 2118.
Time checks, discounting, when unlawful 6788-6790.
Tobacco, sale of to minors 3874, 6502, 6503.
Towns or city officer failing to enforce act relative to stock running at large 2265.
Towns or city officer contracting debt without funds 977.
Towns or city officer refusing information to examiner 983.
Trademark, counterfeiting of 4637.
Trademark, stamps, labels or designs, counterfeiting of 4619, 6437, 6689-6694.
Transacting business under assumed name, when unlawful 6728-6731.
Treason defined 248, 6308-6310.
Treason, levying war, what deemed 6309.
Treason, misprision of 6310.
Treasurer, state, county or city, misappropriating funds or securities or other malfeasance or misfeasance in office 6660.
See Officer; Public Officer, supra.
Trespass upon church or school property 6760, 6761.
Trespass, when unlawful 6765-6769.
Trial of indictment, conviction of lesser degree or attempt 6290.
Trial, place of, homicide 6393.
Two or more convictions, imprisonment on 6303, 7256.
Unborn quick child, killing 6403.
Underground mines, hours of labor 1941, 1942, 6554, 6556.
Union label, counterfeiting of 4637.
United States senator, paying or promising money or reward 1900.
"Unlawful assembly" defined 6595.
Unlawful assembly, destruction of property by 6612.
Unlawful dispossession 6806.
Unlawful certification of bank check or draft 647.
Unwholesome substance, depositing or keeping near highway or stream 6546.
Uttering, offering or disposing as true or having in possession with such intent, any forged writing or instrument 6667.
Uttering or passing fictitious check, bill or other paper 6665.
Vagrancy defined 6619.
Vagrants, employment of 6620-6623.
Vagrants, refusal to work 6622.
Vending without license 6808, 6810.
Vicious animal, allowing at large 6591.
Vicious dog, unlawful to keep 6441.
Voluntary manslaughter defined 6387-6389.
Voters, corrupting, intimidating or deceiving 6802, 6803.
See Elections, supra.
Warrants, purchasing or selling scrip or claims 2824, 2826.
WATER—
Claimant failing to make statement to state engineer within ninety days 4687.
Impure, furnishing for domestic use 6540.
Pollution of 6546, 6547.
Pollution of streams 4720.
Resisting or interfering with state engineer or assistants 4704.
Running on highway 3045, 3046, 6757, 6770, 6771.
Users of, failing to install headgate or weir 4709.
Waste, unlawful diversion of 4722.
Watercraft, injury or interference with 6756.
Water pipes, public utility, refusing to connect 6844-6846.
Wearing dangerous hatpin 6829, 6830.
Weights and measures, false, buying or selling by 4812, 6708, 6709.
Weights and measures act, obstructing sealer or deputy 4817.
Weights and measures act, sealer or deputy, neglect of duty 4819.
Weights and measures act, violation of 4812.
Wife or child, abandonment of 6446.
Wife or child, failure to support 6481-6483.
WITNESS—
Accepting bribe 6322.
Bribery charge, offender may be, proviso 6328.
Bribery of or offering to bribe 6321.
Dueling 6424.
Refusing to attend or testify before legislature or committee of 6334.
Tampering with or obstructing 6359.
See index, Criminal Practice.
WOMAN—
Attempting to produce miscarriage 6405.
Forcing to marry, divorce 6444.
Slander of 6434-6436.
Working domestic animals without consent 6744.
"Writing" defined 6294 (8).
Writing, instruments in, larceny of 6645.

CRIMINAL PRACTICE

Abortion, trial, evidence 7177.
Accomplice, corroboration of 7180.
Accusation, prosecution by 7000.
Acquittal, court may advise 7202.
Act, same provisions as former, construction 7525.
Act, superseded, not bar 7468.
Action, record of, what included in 7263.
Actual bias defined 7147.
Adjournment of court after submitting cause to jury, effect 7211, 7212.
AFFIDAVIT—
Entitlement 7414.
For change of venue 7116.
For new trial 7235.
For search warrant 7417.
Aggravation or mitigation of judgment 7254, 7255.
Animal, brand, evidence of ownership 7172.
APPEAL (From District to Supreme Court)—
Affirmance, execution 7305.
Affirmance without argument 7299.
Amendment of record 7296.

Appeal—continued.
Argument on 7299, 7300.
Bail on, who may admit to 7326, 7328.
Bail, pending when 7314, 7315.
Bill of exceptions 7283-7285.
By state, effect 7293.
Certificate of probable cause, stay of execution 7294.
Clerk to transmit record 7295.
Counsel, number may argue 7300.
Death sentence, suspension of 7270.
Defendant need not be present 7301.
Demurrer, order in 7286.
Designation of parties on 7288.
Determined at first term 7298.
Dismissal, grounds for 7296.
Disposition of 7303.
Errors, technical disregarded 7302, 7469.
Execution, stay of, when 7294.
From district court 7286.
From judgment 7286.
How taken 7291.
Intermediate order or decision reviewed 7289.
Irregularity, dismissal for, must be substantial 7296.
From judgment for costs, malicious prosecution 7262.
Judgment on, entry of 7306.
Judgment, technical errors, disregarded 7302, 7469.
New trial, order granting or denying 7286.
Notice of 7291, 7292.
On record 7283.
Parties, how designated 7288.
Power of court on 7303.
Precedence over civil appeals 7298.
Questions of law only 7287.
Record of action 7263.
Record, transmission of 7295.
Remittitur 7306, 7307.
Reversal, only after argument 7299.
Reversal, order of 7304.
Service of notice of 7291, 7292.
Stay of execution, when 7294.
Substantial errors only considered 7302, 7469.
Suspension of death sentence 7270.
Taken on questions of law alone 7287.
Technical errors, disregarded 7302, 7469.
Time of taking 7290.
Time of transmitting record 7295, 7297.
Transcripts, how prepared, rule iv, sec. 2, p. 1422.
Transmission of record 7295.
What may be considered on 7289.
When taken 7290.
Without bill of exceptions 7283.
Application for removal of action 7116.
Arson, investigation to determine if committed 7532, 7539.
Appeal (from justice court to district court) 7286.
See full index, Justice Court, post.
ARRAIGNMENT 7074-7089—
Answer to, how made 7089.
Answer to, time for 7088.
Bail, when increased on 7083.
Defendant committed, when 7084.
Demurrer 7089.
Failure to appear, bench warrant 7077.
Arraignment—continued.
For felony, defendant present 7075.
For misdemeanor, may appear by counsel 7075.
How made, copy delivered 7086.
Increased bail 7083.
Informed of right to counsel 7085.
Motion to set aside on 7089.
Name of defendant 7087.
Officer to present defendant 7076.
Plea 7089.
Right of counsel on 7085.
Time to answer 7088.
True name to give 7087.
ARREST—
After bail, when 7340.
Authorized by telegraph 4618, 6967.
By private person, duty 6964.
By private person, when 6954.
By sureties 7334.
By whom, and how made 6951-6967.
Cities, who may make in 800.
Custody of defendant 6934.
Defendant taken before magistrate without delay 6947.
Duty of officer making 6940, 6944-6950.
Duty on making 6964-6966.
Duty to aid, when 2833, 6361, 6606, 6956.
Escape or rescue from, recapture 6968, 6969.
Examination, preliminary, on 6970-6998.
See Preliminary Examination, post.
Force may be used 6960-6962, 6969.
How made 6952.
In other county, procedure, bail 6940.
Magistrate may orally order, when 6955.
Misdemeanor, proceedings on 6950.
Of convicted defendant on bench warrant 7250.
Offense not bailable, duty of officer 7322.
Officer making to receipt for property taken 7450.
Officer refusing to make on lawful command 2820, 2833, 4290, 6361, 6606, 6863, 6956.
On bench warrant right to bail 7321, 7322.
On order of recommitment 7342.
Person making may orally summon aid 2833, 6361, 6606, 6956.
Proceedings on, bail 6934, 6940, 6944, 6949, 6950.
Property taken, receipt for schedule 6651, 7450.
Resistance of or attempted flight, force 6960.
Restraint on, no more than necessary 6952.
Warrant of, to be shown, when 6959.
Weapons taken, delivery to magistrate 6963.
When may be made, day, night 6957.
Without warrant 6953, 6958, 6965, 6966.
ARREST OF JUDGMENT—
Bail, disposition of 7241.
By court of own motion 7239.
Defendant, order concerning 7241.
Defined 7238.
Effect of allowance 7240.
Grounds for 7238.
Motion for, grounds 7105.
Motion in 7238.
Not bar to further prosecution 7241.
Proceedings after allowance 7241.
Attempt, verdict may be for 7219.
Attorney appointed for defendant, compensation 7540, 7541.

Attorney-general, dismissal of criminal action, when 7400.
Attorney-general may take charge of prosecution 4137.
BAIL—
Action on forfeiture 7338.
After conviction 7314.
Answerable for reexamination 7093.
Arrest after, when 7340-7342.
Arrest on bench warrant, rights of defendant 7321.
Before conviction 7313.
Bond, form of 6941.
Cash deposit returned or forfeited 7335 7336.
Cash in lieu of 7330-7332, 7335.
Cases allowed in 236.
Chapter on 7308-7347.
Charge punishable by death 7311.
Clerk to pay forfeited bail money to treasurer 7339.
Consists of what 7309.
Defendant held to answer, who may grant 7316.
Defendant may surrender, bail exonerated 7333.
Defined 7308, 7309.
Deposit in lieu of 7330, 7332, 7335.
Discretion, when matter of 7310, 7314.
Duty of arresting officer, bench warrant 7321.
Exonerated, demurrer sustained 7102.
Exonerated on reversal, when 7304.
Exonerated upon surrender 7333.
Exonerated, notice to district attorney 7333.
Felony, minimum for 6989.
Forfeiture of 6940.
Forfeiture, action on 7338.
Forfeiture discharged 7337.
Forfeiture of, when 7336, 7337.
Form, held to answer 7317.
Form, on bench warrant 7324.
Form on recommitment 7346.
Insanity exonerates 7391.
Insufficient, grounds for arrest 7340.
Justification 7319, 7320, 7325, 7347.
Magistrate to certify, discharge 6943.
May surrender defendant 7333.
Money deposited for, refunded 7092.
Notice to district attorney 7312, 7327, 7333.
On appeal, conditions 7315, 7328.
On appeal, who may admit to 7326.
On arrest, forfeiture 6940.
On extradition 7438, 7439.
On recommitment 7344-7346.
Order for on warrant 6934.
Pending examination 6934.
Preliminary examination, minimum for felony 6989.
Qualifications, personal sureties 6942, 7318, 7325, 7347.
Recommitment after, when 7341-7344.
Sureties, examination, justification 6942, 7319, 7320, 7325, 7347.
Sureties, may arrest 7334.
Sureties, number of 7317.
Sureties, qualifications and justification 6942.
Surety company may furnish 695, 7329.
Who entitled to 7310-7315.
Bar of jeopardy 7113.
BENCH WARRANT—
Absent convicted defendant 7246-7250.
Bail, form of, on 7324.
Bail on 7313, 7321.
Convicted defendant, form of 7248.
For convicted defendant to several counties 7247.
How and where served 7249, 7250.
Offense not bailable, duty of officer 7322.
On presentment 7037.
BILL OF EXCEPTIONS—
Appeal without 7283.
Chapter on 7283-7285.
Contents of 7284.
How made part of record 7283.
Judge may settle after term 7284.
Preparation, filing and settlement 7283-7285.
Settlement 7283-7285.
Supreme court may settle, when 7285.
Time shortened or extended 7283.
What to contain 7284.
See Appeal, supra.
Board of pardons to determine period of imprisonment 7261.
Bond to keep peace, forfeiture and recovery 6874-6876.
Brand, evidence of ownership 7172.
Breach of peace before magistrate, security 6893.
Bribery, offender competent witness, proviso 6328.
Cash in lieu of bail 7330, 7332, 7335.
Certificate of probable cause, stay pending appeal 7294.
Change of venue 7115-7120.
Change of venue, costs in 7466, 7467.
Charge of court deemed excepted to 7230.
Charge, forms part of record 7230.
Charge to jury 7198.
Children under twelve years not to be committed to jail 742.
Civil officers, impeachment 6878-6893.
Civil officers, removal otherwise than by impeachment, procedure 6894-6907.
Clerk, certify costs change of venue 7467.
Clerk to make up record of action 7263.
Clerk to pay forfeited bail money to treasurer 7339.
Commission to take testimony, procedure 7365-7384.
Commitment, failure to appear for judgment 7343.
Commitment, for examination, form of 6975.
Commitment of defendant on conviction 7226.
Compelling attendance of witnesses 7348-7364.
Complaint, defined 6927.
Complaint or deposition, what to contain 6931.
Complaint for offense triable in other county, procedure 6948.
Complaint, magistrate to make examination 6930, 6931.
Compromise of misdemeanor 7411-7413.
Compromise, order, what to state 7412.
Conduct of jury 7204-7212.
Conspiracy, trial, evidence 7173.
Contempt, by witness 7361.
Contributory dependency and delinquency, suspension of sentence 758, 762.
Conviction, what based on 6858.
Coroners' inquests 7542-7560.
Corporate existence, proof of 7176.

CORPORATIONS—
Complaint against 7402.
Before justice of peace 7405.
Execution for fine 7410.
Indictment, summons on 7409.
Preliminary examination 7406, 7407.
Proceeding, against for misdemeanor 7405.
Summons, form and service 7402-7404.
COSTS—
Change of venue 7466, 7467.
Escape, prosecuting 6820.
How collected 7464.
Insanity inquiry 7393, 7394.
Not deducted from fines 7463.
Counsel, right to have in preliminary examination 6970.
Counterfeiting, trial expert testimony 7175.
Court of own motion may dismiss action 7399.
Court may advise acquittal 7203.
Court to decide law 7195, 7197.
Court may suspend sentence 7259.
Court may grant new trial of own motion 7237.
Crimes act construed 7525.
Crime against nature, trial, evidence 7171.
Criminal action defined 6851.
Criminal action, forgery, proof and witnesses in 6683, 6684.
Criminal action, how prosecuted 6852.
Criminal action, rights of defendant 6855.
Criminal action, time of commencing 6921-6926.
Death penalty, inflicted by hanging or shooting 7281.
Death sentence, suspension of 7270-7278.
Death warrant, form and contents 7268.
Decision on instructions, court to indorse 7200.
DEFENDANT—
Arrest on bench warrant, right to bail 7321.
Cannot be compelled to be witness 237, 7456.
Charged with felony may be searched 7434.
Committed on conviction 7226.
Custody on change of venue 7119.
Defined 6853.
Discharged on acquittal 7225.
Exonerates bail by surrender 7333.
Insane, commitment to asylum 7390.
May be committed pending trial though on bail 7202.
May elect method of execution 7281.
May except to law given by court 7197.
May have testimony taken by commission 7365-7384.
May testify in own behalf 7160.
Not compelled to testify 237, 6857, 7161.
Plea of 7095.
Presence at judgment 7245.
Presence of when verdict rendered 7214.
Presence or absence at trial 7123.
Presumed innocent 7163.
Refusing to plead 7114.
Rights of 6855-6858.
Right of counsel 6970-6972.
To show cause why judgment not pronounced 7251.
Unnecessary restraint 6857.
Witness against self 237, 6857, 7161.
Definition of words and terms 7457.
Degree of guilt, court to determine on plea of guilty 7244.
Degree of guilt, reasonable doubt as to, rule 6277, 7166.
Delinquent children not regarded as criminals 750.
Demurrer, appeal from order on 7286.
Demurrer to indictment 7095-7105.
See Indictment, post.
Deposition, defective entitlement 7414.
Deposition of witnesses, for defendant 7365-7384.
Dismissal of action, discharge on 7398.
Dismissal of action, on whose motion 7399.
Dismissal of prosecution, failure to proceed to trial 7396.
Dismissal of prosecution for failure to indict 7395.
Dismissal, when bar 7401.
Disobedience of subpena 7361, 7362, 7364.
Disposal of stolen property 6650, 6651, 7428, 7445-7450.
District attorney, action on forfeited bail 7338.
District attorney may dismiss criminal action, when 7400.
District attorney, removal 6907.
Duty of officer in charge of jury 7192, 7201.
Entitling affidavits 7414.
Errors, technical disregarded 7302, 7469.
Evidence admissible on plea of not guilty 7110.
Evidence, rules of, same as in civil case 7454.
Evidence, stenographic report of testimony 7456.
Examination, preliminary 6970-6998.
See Preliminary Examination, post.
EXCEPTIONS—
Defendant may take for what 7227.
State may take for what 7228.
What deemed excepted to by either party 7231.
What deemed excepted to by defendant 7229-7231.
EXECUTION—
Additional warrant for execution death sentence, when may issue 7279, 7280.
After affirmance of judgment on appeal 7280.
Against corporation 7410.
Certificate of probable cause, stays, pending appeal 7294.
Death penalty, how inflicted 7281.
Death penalty, infliction of, who may be present at 7281.
Death sentence, suspension of 7270-7278.
Death warrant, form and contents 7268.
Defendant found sane, warden to execute death sentence, when 7274.
Defendant insane, duty of warden 7275.
Defendant, insanity of 7271-7275.
Defendant may elect method of execution 7281.
Defendant pregnant, suspension of death sentence 7267-7278.
Delivery to warden 7267.
For fine 7265.
For fine and imprisonment 7266.
For imprisonment 7266.
Inquiry into sanity 7271-7275.
Judgment of death unexecuted, additional warrant for 7279.
Jury, inquiry into sanity by 7271.
Of death, statement transmitted to board of pardons 7269.

Execution—continued.
Of death under judgment 7268.
Of judgment, authority for 7264.
On affirmance of judgment 7305.
Return of officer 7267.
Return on execution, death penalty 7282.
Stay of pending appeal 7294.
Trial court to direct after affirmance 7307.
Exemption, not ground for challenge to juror 7149.
Exoneration of bail on surrender 7333.
EXTRADITION 7435-7444—
Arrest of fugitive 7437.
Bail of fugitive 7438, 7439.
Commitment of fugitive 7437, 7438.
Discharge, want of prosecution 7442.
District attorney, notice to and duty 7440, 7441.
District court to inquire into arrest 7443.
Expenses, county commissioners to allow 7444.
Magistrate may issue warrant of arrest 7436.
Magistrate, return of 7443.
Seal, no charge for 7435.
Secretary of state to affix seal without charge 7435.
Facts in mitigation or aggravation of judgment 7254.
False impersonation, trial evidence 7179.
False pretenses, trial evidence 7179.
Fees, recovered as costs 7465.
Felony, limitations 6922, 6924.
Fines, costs not deducted 3760, 7463.
Fine, imprisonment for nonpayment 7257.
Fine, paid into state treasury 7463.
Final adjournment of court, discharges jury 7212.
Forgery, trial, expert testimony 7175.
Forgery, witnesses and proof in 6663, 6684.
Form of bail, bond or recognizance 6941.
Form of indictment 7043, 7048.
Form of search warrant 7421.
Form of warrant of arrest 6933, 6936, 6948.
Formation of grand jury 4931, 4940, 7002.
Formation of trial jury 4930, 4937, 4940, 7124.
Former acquittal, what constitutes 7111, 7112.
Former jeopardy 7111, 7113.
Former jeopardy, order for discharge to become witness 7170.
Fugitives from justice 7435-7444.
Gambling, witnesses 6522.
Guilt, inference of, not drawn from failure to testify 7161.
GRAND JURY—
Action of juror not subject to question, exception 7033.
CHALLENGE—
Decision, entry 7007.
How made and tried 7006.
Only mode of objection 7010.
Panel or individual, effect of allowance 7008, 7009.
To individual juror, grounds 7005.
To panel, grounds 7004.
To panel or juror, who may make 7003.
Charge by court 7014.
Court to advise 7030.
Defendant, evidence for not bound to hear 7025.
Deliberations, where 7015.
Grand jury—continued.
Discharge of 7015.
District attorney to advise 7030.
Evidence for defendant, not bound to hear 7025.
Evidence receivable 7024.
Evidence, sufficient for indictment 7026.
Foreman, appointment 7011.
Foreman, oath of 7012.
Formation 4931, 4940, 7002.
INDICTMENT—
Defined 7022.
Evidence to warrant 7026.
How indorsed 7042.
Ignored, return 7043.
Twelve must concur 7042, 7043.
Jails, may enter 7029.
Juror having knowledge, duty 7027.
Juror, perjury by 7033.
Juror, when required to disclose testimony 7032.
Oath of 7012, 7013.
Presentment defined 7021.
Presentment, twelve must concur 7034.
Proceeding against corporation 7408.
Proceeding secret 6374, 7031, 7036.
Powers and duty 7020, 7028, 7030.
Records, may examine 7029.
Reexamination after discharge 7092, 7093.
Resubmission after demurrer 7101, 7103.
Special, how formed 7019.
Special, order for 7016, 7017.
Special, sheriff to summon 7017, 7018.
Who allowed before 7030.
Witness, oath to 7023.
Homicide, burden of proof 6399, 7174.
Husband or wife as witness against other 7452.
Impeachment not bar to indictment 6893.
Impeachment, officers liable to 6878.
Impeachment, procedure 6879-6892.
Implied bias defined 7147.
Incendiarism, investigation of 7532-7539.
Indefinite sentence 7260.
Indeterminate sentence 7260.
Indeterminate sentence, board of pardons to determine 7261.
Indian as witness liquor case 7530, 7531.
INDICTMENT—
Accessory, trial and conviction 7071, 7072.
Against several, one or more convicted or acquitted 7071.
Answer to 7092.
Arraignment on 7074-7089.
See Arraignment, supra.
Bail on 7313.
Capital or infamous crime prosecuted by 237.
Charge but one offense 7054.
Compounding offense 7073.
Concealing offense 7073.
Concurrence of twelve 7042.
Construction of words 7057.
Defect in form 7060.
Defective, arrest of judgment 7238.
Defendant's name, erroneous or fictitious 7053.
Defendant not in custody 7047.
Defined 7022.
Delinquent child, suspended, when 737.
DEMURRER TO 7095-7105—
Allowed, order resubmitting 7101.
Allowed when bar to other 7101.

Indictment, demurrer to—continued.
Disallowed, plea forthwith 7104.
Form of 7098.
Grounds for 7097.
Hearing of 7099.
Judgment on 7100.
Objections must be taken by, exception 7105.
Sustained, bail exonerated 7102.
Sustained, defendant discharged 7102.
When put in 7096.
Discharge from, when 7092.
District attorney must sign 7051.
District attorney to draw 1598.
Embezzlement 7068.
Error as to person injured immaterial 7056.
Facts alleged not constituting offense, resubmission 7188, 7189.
Facts, not constituting public offense, objection, how and when raised 7105.
Failure to find, dismissal 7395.
False pretenses, complaint or indictment for 7067.
Finding and presentment 7042, 7043.
For embezzlement 7068.
For false pretenses 7067.
For forgery 7065.
For larceny 7068.
For libel 7064.
For perjury 7066.
Form 7051.
Form and rules of pleading 7048-7073.
Found in wrong county, proceedings 7186, 7187.
Ignored, resubmission 7044.
Impeachment, not bar to 335, 6893.
Indorsed and signed, how 7042.
Judgment, how pleaded 7062.
Judicial notice, of what taken 7062, 7063.
Jurisdiction, question how and when raised 7105.
Larceny 7068.
Lewd or obscene publication 7069.
Libel 7064.
Motion to set aside 7090-7094.
Motion to set aside, when heard 7092.
Need not state presumptions or matter of judicial knowledge 7061.
Objections to, grounds of 7090.
Objections, waiver of 7091.
Of corporation 7408.
Order to set aside not bar to new 7094.
Perjury, indictment for 7066.
PLEA—
After demurrer 7104.
Defined 7095.
Form of 7107.
How put in 7107, 7108.
Kinds of 7106.
Of former acquittal 7111, 7113.
Of guilty by corporation 7108.
Of guilty, may be withdrawn 7108.
Of guilty, how put in 7108.
Of not guilty, entered on defendant's refusal to make 7114.
Of not guilty, evidence under 7110.
Of not guilty, what evidence admissible on 7110.
Of not guilty, what issue raised 7109.
Refusal to enter 7114.
Indictment, plea—continued.
When entered 7104.
When put in 7096.
Presentment and filing 7046.
Presumptions of law need not state 7061.
Principal and accessory defined 6275, 7071, 7072.
Private statute, how pleaded 7063.
Prosecution by 6999.
Reindictment after arrest of judgment 7241.
Setting aside, grounds for 7090.
Sufficient, when 7059.
Term "indictment" or "information" include what 6294.
Time of offense 7056.
Trial, proof showing higher offense, suspension, reindictment 7182, 7183.
Twelve to concur 7042.
Waiver of objections 7091.
What offenses prosecuted by 6854.
What to contain 7050, 7052.
When sufficient 7059, 7060.
When found 6925.
Words, how construed 7057.
Words of statute, not strictly followed 7058.
Informal verdict not to be recorded, when 7221.
Innocence presumed 6277, 7163.
Inquest, coroner's 7542-7560.
Insane defendant, commitment to asylum 7390.
Insane defendant, restored to sanity, proceedings 7392.
Insanity, conclusion of, commitment to asylum 7252.
Insanity, defense of, acquittal deemed judgment of 7217.
Insanity, ground of arrest of judgment 7252.
Insanity, inquiry into 7271-7275, 7385-7394.
Insanity, trial of, costs 7393, 7394.
Issue of fact, how tried 7122.
Issue of fact, when arises 7121.
Issue on plea not guilty 7109.
Issues, order of disposition 7126.
INSTRUCTIONS—
Court to indorse decision on 7200.
Deemed excepted to 7230.
Either party may request 7199.
Form part of record 7230.
Further given after jury retired 7207.
Jury may ask for further 7207.
Jury may take on retiring to deliberate 7206.
Interpreter, subpena and oath 7360.
Intervention to prevent offense 6862, 6863.
Jeopardy, once in, bar 7113.
JUDGMENT—
After affirmance, trial court direct execution 7307.
Affirmed, regardless of technical error 7302, 7469.
Aggravation or mitigation, circumstances showing, hearing before 7254, 7255.
Appeal from 7286.
Bail forfeited, defendant failing to appear 7246.
Bench warrant, defendant not appearing 7246-7250.
Cash bail, applied on 7332.
Certified copy furnished officer 7264.
Circumstances of aggravation or mitigation may be heard before 7254, 7255.

Judgment—continued.
Conviction based on 6858.
Court may suspend sentence 7259.
DEFENDANT—
Absent, arrest of 7250.
Appearance for 7251.
Asked if legal cause for not pronouncing 7251.
Failing to appear for 7246.
May elect method of execution 7281.
May show cause for not pronouncing 7251, 7252.
Presence of 7245.
Released, suspended sentence 7259.
Sterilization of, when 6293.
Failure to plea, after demurrer disallowed 7104.
For costs, malicious prosecution 7262.
For fine, costs not to be deducted 3760, 7463.
For fine, imprisonment until paid, rate of 7257.
For fine, lien of 7258.
Grounds for arrest of 7238, 7252.
How entered 7263.
Imprisonment, time of, pardon board to determine 7261.
Indeterminate sentence 7260.
Indeterminate sentence, pardon board to determine time of 7261.
Malicious prosecution, appeal from 7262.
Malicious prosecution, costs 7262.
Of death, statement transmitted to pardon board 7269.
Of death, suspension of 7270-7278.
Of impeachment 6888-6890.
On demurrer 7100.
On plea of guilty, court to determine degree 7244.
Presence of defendant 7245.
Record of, what to include 6273.
Removal from office 6905.
Rendition of 7253.
Reversed for material error only 7469.
Sentence, court may suspend 7259.
Sterilization of defendant 6293.
Terms, two or more offenses 7256.
Time for pronouncing 7242, 7243.
Time when pronounced 7242, 7243.
Two or more offenses 7256.
Joint defendants, verdict against one or more 7220.
JURISDICTION—
Abduction 6915.
Accessory 6918.
Bigamy 6916.
Burglary 6917.
Concerning animals ranging in two or more counties 6914.
Conviction or acquittal in other county 6920.
Conviction or acquittal in other state 6919.
Dueling 6910.
Embezzlement 6917.
Homicide 6393.
In state 6908, 6909.
Kidnaping 6915, 6421.
Larceny 6917.
Libel 6431.
Libel commenced without, concluded within state 6909.
Jurisdiction—continued.
OFFENSE COMMITTED—
On cars or vessel 6913.
On or near county boundary 6912.
Partly in two counties 6911.
Proceedings against minors transferred to juvenile courts 741.
Robbery 6917.
Sending letter 6307.
Want of, jury discharged pending trial 7184-7187.
Juror as witness 7190.
JURY—
Acquittal by, judgment for insanity 7217.
Adjournment of court during submission 7211, 7212.
Agreement of, return into court 7213.
Call of jury, part not appearing, retrial 7213.
Charge to 7198.
Disagreement 7224.
Deciding by lot, ground new trial 7234.
Degree of crime, to determine 7218.
Discharge after verdict 7224.
Discharged after deliberation, for what causes 7208.
Discharged after submission, when may be 7209-7212.
Discharged, sickness of juror 7208.
Discharged without verdict, retrial 7210.
Evidence received out of court, ground new trial 7234.
Final adjournment, discharges 7212.
Food and lodging, sheriff to provide 7205.
Form of verdict 7216.
How polled 7223.
Informal verdict not recorded, when 7221.
Informal verdict reconsidered 7221, 7222.
Informal verdict, when deemed acquittal 7222.
Instructions and papers, may take on retiring to deliberate 7206.
Instructions to 7198.
Judge of credibility 7451.
May be polled 7223.
May return for further instructions 7207.
Misconduct of, ground new trial 7234.
Misdirection of, ground new trial 7234.
Must be kept together after case submitted 7201.
Not bound to acquit on advice of court 7203.
Officer in charge, duties 7192, 7201.
Panel defined 7131.
Reconsideration of verdict 7221.
Return to court after agreement 7213.
Room for, county charge 7204.
Room to be provided for 7204.
Separating without leave, ground new trial 7234.
Sheriff to provide food and lodging 7205.
Sickness of juror after submission to 7208.
Special inquiry into sanity by 7271.
VERDICT—
Acquittal by reason of insanity, effect 7217.
Declaration of 7215.
Form of 7216.
Of conviction, must be specific 7222.
Presence of defendant 7214.
Read to 7224.

Jury—continued.
View by 7191.
When may separate 7192, 7193.
Where may deliberate on case 7201.
Juvenile court law 737-750.
Larceny of animal, trial, evidence 7172.
Law, court to decide 7195, 7197.
Lawful resistance 6859-6861.
Lieutenant-governor, impeachment, duty of senate 6892.
Libel, jury determine law and fact 238, 7196.
Limitations, criminal actions 6921-6926.
Limitation, offense committed before act effective 6926.
Lottery, conducting, or sale of tickets, trial, evidence 7178.
MAGISTRATE—
Breach of peace before, security for peace 6873.
Defined 6928, 6929, 7461.
Other may act, when 6940, 6945, 6947.
Powers on arrest 6940, 6945.
Who are 6929.
Malicious prosecution, judgment for costs 7262.
Mark, signature by 7457, 7458.
Maximum sentence, court to fix, when 7260.
Minimum sentence, court to fix, when 7260.
MISDEMEANOR. *See Justice's Court, post*—
Arrest for, duty of officer 6950.
Compromise of 7411-7413.
Limitation 6923, 6924.
Trial for, presence of defendant 7123.
Trial, jury, number or waiver 7122.
See Justice's Court, post.
Mistake in charge, resubmission 7181.
Money deposited for bail refunded 7092.
Motion for change of venue 7115-7120.
Motion for new trial 7232-7237.
Motion in arrest of judgment 7238.
Murder, no limitation 6921.
Murder, trial, burden of proof 7174.
NEW TRIAL—
Affidavit, when based on 7235.
Application for, when made 7233.
Court's own motion 7237.
Defined 7232.
Effect of granting 7232.
For material error only 7469.
Grounds for 7234.
Motion for 7233.
Not more than two, court's own motion 7237.
Number of, restriction 7237.
Order granting or refusing to appeal from 7286.
Procedure on 7232-7237.
Stay of proceedings until determined 7236.
Verdict, former cannot be referred to 7232.
When based on affidavit 7235.
Oath or affirmation 7453.
Officer in charge of jury, duty 7192, 7201.
Order for change of venue 7117.
Order of execution, after affirmance of judgment on appeal 7280.
Payment of witnesses, when 7357, 7358.
Peace, surety to keep, procedure 6864-6877.
Peace officer defined 6937, 7462.
Peace officer, duty on making arrest 6940, 6944-6950.
Peace officers, who are 6937.
Peremptory challenge defined 7143.
Peremptory challenge, how taken 7143.
Perjury before grand jury, evidence of juror 7032.
Perjury by grand juror 7033.
Plea of defendant 7095.
Plea, failure to make after demurrer disallowed, judgment 7104.
Plea to indictment 7106-7114.
Polling of jury 7223.
Pregnancy of defendant, death sentence suspended 7276-7278.
PRELIMINARY EXAMINATION—
Adjournment 6973, 6974.
After demurrer sustained 7101.
After discharge from indictment 7092.
Bail, minimum for felony 6989.
Bail on 7313, 7316.
Closed doors, when 6985.
Commitment of defendant, form of 6987-6992.
Commitment, how executed 6991.
Counsel, right to have 6970, 6972.
Defendant, informed of right to make statement 6978.
Defendant may become witness 6983.
Defendant, statement of, form and authentication 6983.
Defendant, statement, waiver of cannot use against 6979, 6983.
Discharge, form of order 6986.
Magistrate to inform defendant of rights 6970, 6978.
Magistrate, return of proceedings 6998.
Of corporation 7406, 7407.
Statement of defendant 6978-6982.
Stenographer may be employed, compensation 6977.
Testimony, filed with clerk of district court 6977.
Testimony, used on trial or habeas corpus 6977.
WITNESS—
Examination of 6977.
Exclusion during examination of defendant or witness 6984.
Security for appearance 6993-6997.
Subpena for 6976.
Without surety, conditionally examined 6997.
Who may attend 6985.
PRESENTMENT—
Arrest, proceedings on 7041.
Bench warrant on, form, issuance and execution 7037-7040.
Defined 7021.
Finding of, not to be disclosed 7031, 7036.
How found 7034.
How presented and filed 7035.
Presumption of innocence 7163.
Preventing offenses, means of 6862.
Prevention by intervention 6862, 6863.
Prior penal offenses not affected by act 7526.
Prisoner may be witness 7349, 7363.
Prisoner, order for 7459.
Prisoner, trial for other offense pending term 6818.
Proceedings against corporation 7402-7410.
Proceedings on arrest 7041.
Process, how executed 7460.
Property, stolen or embezzled, disposal of 6650, 6651, 7428, 7445-7450.

Prosecution by indictment or accusation 6999, 7001.
Prostitution, crimes concerning, trial, evidence 7178.
Public offenses, how prosecuted 6854.
Rape, trial, evidence 7171.
Rate of imprisonment for unpaid fine 7257.
Reasonable doubt, acquitted 7163.
Reasonable doubt defined 7164.
Recognizance, bail, form of 6941.
Recommitment after bail 7340-7344.
Reconsideration of verdict 7221.
Record, charge or instructions, part of 7230.
Record of action, what to include 7263.
Refusal to plead 7114.
Release of defendant on continuance 7397.
Remittitur from appellate court 7306, 7307.
Removal of action before trial 7115-7120.
Removal of action, costs 7466.
Removal of civil officers without impeachment 6894-6907.
Removal of officers, prosecution by accusation or indictment 7000, 7001.
Repeal, effect of 7526.
Retrial, jury discharged without verdict 7210.
Return of officer on execution 7267.
Riots, suppression 6862.
Same provisions in former act 7525.
Sanity inquisition 7275.
Sanity of defendant, inquiry into 7271-7275, 7385-7394.
Search of defendant 7434.
SEARCH WARRANT—
Affidavit of probable cause 7417.
Defined 7415.
Examination before issuing 7418, 7419.
Form of 7421.
Grounds, disputed hearing 7431.
Grounds for issuance 7416.
Inventory 7429, 7430.
Magistrate's duty 7433.
Magistrate to issue, when 7420.
Maliciously procuring, penalty 6741.
Officer, power of 7423, 7424.
Officer, exceeding authority, penalty 6741, 6742.
Probable cause must exist 247, 7417-7419.
Property restored, when 7432.
Property taken, disposal 7428.
Receipt for property 7427.
Return and inventory 7429.
Service of 7422-7425.
Service in daytime, exception 7425.
Time of service 7425-7426.
Using unnecessary in serving, penalty 6742.
Second prosecution 6856, 6919, 6920.
Secret offenses, limitation 6924.
Security to keep peace 6869-6870.
Seduction, trial, evidence 7177.
Sentence of death, suspension of 7270-7278.
Sentence, minimum or maximum, court to fix when 7260.
Sentence, second conviction, when to begin 6818.
Setting aside indictment 7090-7094.
Sheriff, summon special grand jury 7017-7019.
Sheriff to bring any prisoner on order 7459.
Signature by mark 7457, 7458.
Sodomy, trial, proof 7171.
Special grand jury 7016-7019.
State's witness 7168.
Stay of execution pending appeal 7294.
Stay of proceedings on motion for new trial 7236.
Stenographic report of testimony used, when 7455.
Stolen property, sale of, when 7449.
SUBPENA—
Books and papers 7354.
Clerk to issue blank to defendant 7352.
Defined 7348.
Disobedience of 7361, 7364.
For interpreter 7360.
Form of 7353, 7354.
Service and return 7355, 7356.
Who may issue 7349-7352.
Who may serve 7355.
Substantial rights only considered 7302, 7469.
Summons to corporation 7402-7409.
Superseding of act, not bar to crime committed 7468.
Surety to keep peace, procedure 6864-6877.
Suspended sentence 7259.
Technical errors, disregarded 7302, 7469.
Terms defined 7457.
Terms of imprisonment, two or more convictions 6303, 7256.
Testimony taken by commission 7365-7384.
Time of commencing actions 6921-6926.
TRIAL—
Abortion, testimony corroboration 7177.
Accomplice, testimony of, corroboration 7180.
Acquittal, court may advise 7202.
Animal, brand prima facie proof of ownership 7172.
Argument of counsel 7159, 7162.
Attempt, jury may convict for 6290, 7219.
By jury 7122.
Calendar and disposition of 7125, 7126.
Calendar, clerk to prepare 7125.
Calendar, how prepared 7125.
Calendar, issues on, order of disposal 7126.
Change of place of 7115-7120.
Charge, before argument, when 7159.
Charge to jury 7159, 7198.
Clerk to prepare calendar 7125.
Clerk to read indictment and state plea 7159.
Commitment of defendant pending 7202.
Conduct of jury 7204-7212.
Conspiracy, evidence, overt act 7173.
Continuance 7128.
Continuance from time to time 7397.
Continuance, release of defendant 7397.
Continuance of lesser degree or attempt 6290, 7219.
Corporate existence, proof of 7176.
Corroboration of accomplice 7180.
Counsel, argument of 7159.
Counterfeiting, expert testimony 7175.
Court may advise acquittal, province of jury 7203.
Court to decide law 7195, 7197.
Crime against nature, proof necessary 7171.
Decision on instructions, court to indorse 7200.
DEFENDANT—
Discharged to become witness, bar to further prosecution 7170.
Discharged to become witness for state 7168.
Discharged to be witness for codefendant 7169.

Trial, defendant—continued.
May be committed though on bail 7202.
May except to law given by court 7197.
May testify on own behalf 7160.
Time to prepare for 7127.
Dismissal, failure to proceed with 7396.
District attorney, opening statement 7159.
Evidence, brand of animal, prima facie proof of ownership 7172.
Failure to proceed with, dismissal 7396.
False impersonation, evidence 7179.
False pretenses, evidence sufficiency 7179.
For felony, defendant present 7123.
For misdemeanor, presence or absence of defendant 7123.
Forgery, expert testimony 7175.
Forgery, proof 7175.
Homicide, burden of proof 7174.
In defendant's absence, ground new trial 7234.
Indictment against several, one or more convicted or acquitted 7071.
Indictment not charging public offense, discharge or resubmission 7188.
Innocence, presumption of 7163.
INSTRUCTIONS—
Before argument, when 7159.
Either party may request 7199.
Inference of guilt not drawn from defendant failing to testify 7161.
Requested court to indorse decision on 7200.
To jury 7159, 7198.
Issue of fact 7121, 7122.
Joint defendants, discharge of one to become witness 7168, 7169.
Joint defendants, separate or joint trial 7167.
Jurisdiction in other county, proceedings 7186.
Jurisdiction, want of, jury discharged 7184, 7187.
JUROR AND JURY—
Challenge to Individual Juror—
Actual bias defined 7147.
Before juror sworn 7140, 7142.
Court to allow or disallow 7155.
Defendant informed of rights as to 7140.
Denial of, trial, witnesses 7152-7154.
For actual or implied bias, how taken 7150.
For cause, by defendant first 7156.
For cause, each party must exhaust 7156.
For cause, general 7146.
For cause, general or particular 7145.
For cause, order of taking 7157.
For cause, particular 7147, 7148.
For implied bias, grounds for 7148.
Exception to, denial of and trial of 7151.
Exemption not ground for 7149.
Grounds for, implied bias 7148.
Implied bias defined 7147.
Implied bias, grounds for 7148.
Joint defendants must join in 7130.
Kinds 7129, 7141.
May be oral 7150.
Number of peremptory 7144.
Opinion founded on rumor or public press 7150.
Trial, juror and jury—continued.
Order of taking, for cause 7157.
Order of taking, peremptory 7158.
Peremptory, defined 7143.
Peremptory, how taken 7143.
Peremptory, number allowed 7144.
Peremptory, order of taking 7158.
When to be taken 7140, 7142.
Challenge to Panel—
Amendment to 7136.
Bias of officer summoning 7138.
By joint defendants 7130.
Defined 7132.
Denial of, court to try question 7137.
Effect of allowing or disallowing 7138.
Exception to, court to try 7135.
Exception to, how taken 7135.
Exception, withdrawal of 7136.
For bias of officer summoning 7138.
Grounds for 7133, 7138.
Joint defendants, must join in 7130.
Kinds 7129, 7141.
When and how taken 7134.
Charge to 7159, 7198.
Conduct after submission to 7204, 7212.
Denial of challenge, court to try 7137, 7152, 7154.
Exemption, for what allowed 3356, 4016, 4612, 4932, 4941.
Exception to challenge, court to try 7135.
Exception to challenge, how taken 7135.
May or may not separate 7192, 7193.
Must be kept together after case submitted 7201.
Panel defined 7131.
Permitted to separate, admonished 7193.
Sickness of 7194.
To decide fact 7197.
Trial of challenge 7137, 7138.
Verdict (see Verdict, *post*) 7218-7226.
View by 7191.
Waived, when 7122.
Where may deliberate 7201.
Witness may be 7190.
Lesser degree, jury may convict for 6290, 7219.
Libel, jury determine law and fact 238, 7196.
Lottery conducting or sale of tickets, proof 7178.
Larceny, cattle, brand prima facie proof of ownership 7172.
Misdemeanor. *See Justice's Court, post.*
Mistake in charge, resubmission 7181.
Murder, burden of proof 7174.
New. *See New Trial, supra.*
Order of 7159.
Opening statement of counsel 7159.
Postponement, when and how ordered 7128.
Postponement, witnesses, deposition of 7128.
Presumption of innocence 7163.
Proof of corporate existence 7176.
Proof shows higher offense, suspension, reindictment 7182, 7183.
Prostitution, testimony corroboration 7178.
Public offense not stated, jury discharged 7184.
Question of sanity 7271, 7388.
Rape, proof necessary 7171.
Reasonable doubt, acquittal 7163.
Reasonable doubt, defined 7164.

Trial, juror and jury—continued.
Reasonable doubt, definition no other given 7165.
Reasonable doubt as to degree 7166.
Sanity, question of 7271, 7388.
Seduction, testimony corroboration 7177.
Separate or joint 7167.
Sickness of judge or juror 7194.
Sodomy, proof necessary 7171.
State's witness 7168.
Stayed pending, testimony by commission 7372.
Suspended pending indictment for higher offense 7182, 7183.
Suspended until sanity determined 7387.
Testimony, on preliminary examination, used in 6977.
View by jury, duty of officer 7191.
Unnecessary restraint 6857.
VENUE—
Change of, application for 7116.
Change of, authority of court 7120.
Change of, clerk to transmit record 7118.
Change of, custody of defendant 7119.
Change of, grounds for 7115.
Change of, order for 7117, 7118.
Charge of kidnaping 6421.
Prosecutions for libel 6431.
See Jurisdiction, supra.
VERDICT—
Against joint defendants 7220.
Any offense included in charge 7219.
Contrary to law or evidence, ground new trial 7234.
Conviction based on 6858.
Decided by lot, ground new trial 7234.
Degree of crime 7218.
Discharge of jury 7224.
Former cannot be referred to on new trial 7232.
Informal, when deemed acquittal 7222.
May be for an attempt 7219.
Of acquittal, defendant discharged 7225.
Of conviction, defendant committed 7226.
Read to jury 7224.
Recorded 7224.
When may be reconsidered 7221.
View by jury 7191.
WARRANT OF ARREST—
Directed to whom 6936, 6938.
From justice's court 7473.
Form 6933-6936, 6948.
Magistrate to issue, when 6930, 6932.
Magistrate may issue 6928.
Name of defendant unknown 6935.
New, when may issue 6940.
Officer serving return schedule of property taken from prisoner 6651.
Peace officer, schedule of property taken from person arrested, returned on warrant 6651.
Release on bail certified on 6943.
Where executed 6936, 6939.
What deemed excepted to 7229-7231.
Withdrawal plea of guilty 7108.
WITNESS—
Against self 237, 6857, 7161, 7451.
Attendance out of county, order for 7359.
Bond for appearance, forfeiture 7362.
Codefendant as 7451.
Commission to take testimony 7367.
Witness—continued.
Compelling attendance of 7348-7364.
Competency of 7451.
Credibility of for jury 7451.
Defendant as 7456.
Defendant may become 7160.
Defendant, refusal to be, not prejudicial 7456.
Deposition of 7365-7384.
Deposition of read by either party 7384.
Examination on commission 7365-7384.
Husband or wife against other 7452.
Indians may be in liquor cases 7530, 7531.
Interpreter 7360.
Juror may be 7190.
Oath or affirmation 7453.
Of defendant, when to testify 6983.
Prisoner as 7459.
Prisoner may be 7349, 7363.
Refusal to be sworn or testify 7361.
Rules same as civil case 7454.
Stenographic report of testimony, when may be used 7455.
Subpena for 7348-7364.
Testimony of on commission, procedure 7365-7384.
When may be paid 7357, 7358.
Words, defined 7457.

Justice's Court

Prosecutions for Misdemeanor

Acquittal, malicious prosecution, costs 7501, 7502.
Action, how commenced 7471.
Affidavits, entitlement 7522.
Arrest of judgment, grounds 7494, 7496.
APPEAL TO DISTRICT COURT—
Bail, pending 7515.
Complaint, dismissal on, grounds 7517.
Dismissal, grounds 7516.
Judgment and execution 7518.
Justice to transmit record 7514.
Notice of 7513.
Plea, anew 7518.
Record on 7514.
Right of 7286.
Stay of proceedings 7513.
Trial anew 7516.
Trial, procedure 7518.
When to be taken 7512.
Witnesses, bond of or testimony 7515.
Bail, generally 7308-7347, 7520.
Bail, pending postponement of judgment 7498.
Bail or deposit, forfeiture 7510.
Complaint, form and sufficiency 7471, 7472.
Complaint read to defendant 7475.
Constable, when may be deputed 7524.
Contempt 7519, 7521.
Costs, judgment for 7499.
Costs, malicious prosecution 7501, 7502.
Costs, not to be deducted from fine 3760, 7463.
Court to decide law 7487.
Defendant discharged, when 7481, 7505.
Defendant, failing to appear for judgment 7511.
Defendant, presence of 7482.
Demurrer, grounds of 7480.
Demurrer, sustained, new complaint 7481.
Docket 7474.
Evidence in public 7486.
Entitling affidavits 7522.
Execution of judgment, duty of officer 7507.

Fees, recovered as costs 7465.
Fine, how enforced 7503.
Fine, imprisonment in lieu of 7500.
Fine, paid to city treasurer 7508, 7509.
Forfeiture of bail or deposit 7510.
Grounds for arrest of judgment 7496.
Grounds for new trial 7495.
Gravity of offense, examination to determine 7477.
Higher offense, examination for 7477.
Imprisonment, how executed 7507.
JUDGMENT—
Acquittal or fine only, defendant discharged 7505.
Fine, how enforced 7503.
Fine, imprisonment in lieu of 7500.
Fine or imprisonment, costs 7499.
Fine, costs not to be deducted from 3760, 7463.
Imprisonment, how executed 7507.
Imprisonment until fine paid 7506.
Pronounced, when 7497, 7498.
Several defendants 7491.
When entered 7511.
Jurisdiction 323, 4851, 7470.
Jury trial 7483-7493. *See Trial, post.*
Malicious prosecution, costs 7501, 7502.
Motion for new trial or arrest of judgment 7494.
Name of defendant 7475.
New trial, grounds 7494, 7495.
Officer executing judgment, duty 7507.
Plea, how entered 7477.
Plea, kinds of 7475, 7476.
Preliminary examination 6970-6998.
Questions of law and fact, how decided 7487.
Retrial, jury discharged 7493.
Subpena, form 7519.
TRIAL—
Defendant discharged, when 7505.
Form of verdict 7490.
JURY—
Challenge, trial of 7486.
Deliberation of 7488.
Discharged, retrial 7493.
Formation of 7124.
Number, how summoned 7122, 7483.
Oath of 7485.
Oath of officer in charge 7488.
To decide fact 7487.
To sit together 7486.
Verdict, entry 7489.
Waiver of 7122.
When discharged 7492.
Oath of officer in charge of jury 7488.
Postponement for cause 7479.
Presence of defendant 7482.
Retrial, jury discharged 7493.
Several defendants, verdict, judgment 7491.
VERDICT—
Entry of 7489, 7504.
Form of 7490.
Several defendants 7491.
When to begin 7478.
Waiver of jury 7122.
Warrant of arrest, failure to appear for judgment 7511.
Warrant of arrest, form 7473.
Witnesses 7519.
Witnesses, competency 7523.

Criminal, anarchy, penalty 6613-6618.
Contempt, penalty 2834, 6368.
Literature, selling or giving, penalty 6461.
Negligence, when element, penalty 6271.
Process, service on government land 1949.
Criminal cases, amounting to felony, supreme court has appellate jurisdiction (Nev. Const. art. vi, sec. 4) 319.
District court has jurisdiction when not otherwise provided (Nev. Const. art. vi, sec. 6) 321.
Crop, growing, mortgaged, how 1080.
Cross-complaint, against codefendant in civil action 5052.
Cross-demands, when compensated as far as equal 5049.
Cross-interrogatories, for taking deposition out of state 5460.
Cross-references, to constitutional provisions relating to civil practice 4943, pp. 1432, 1433.
Crossings, to be made and kept in repair by party obtaining right of way under eminent domain 5626.
Cruelty, consent of parent adjudged guilty of or divorced for, when not necessary on adoption of child 5828.
Extreme, as affecting division of community property upon decree of divorce 2166.
Extreme is ground for divorce 5838.
To animals 794(70), 1378-1380, 6815.
To apprentice, master or mistress liable in damages 491.
Cruel punishment, not to be inflicted 235.
Culverts, on right of way obtained under eminent domain to be kept in repair 5626.
Cumulative voting, corporate elections 1223. See Corporations.
Curlew, closed season for 2089.
Currency, restrictions on paper, circulating as 343.
Custodian of state armory, adjutant-general is 3933.
Custodian suffering prisoner to escape, penalty 1657, 6341.
Custody, change of may order on habeas corpus 6251.
Of jury 5208, 5213. See Jury.
Of ballots 1795.
Customs of mining districts 4951.
Cutting timber unlawfully, penalty 2114-2116.

D

Damage, injury or destruction of property, penalty 6752-6754.
Damages. See Civil Practice.
Dams and aqueducts, injury to, penalty 6757.
Dams, eminent domain lies for purpose of building 5606.
Dangerous excavations, failure to fence, liability 3235-3237.
Dangerous exhibitions, penalty 6590.
Dangerous or vicious animal causing death, when manslaughter, penalty 6407,
Days, nonjudicial, what business allowed, falling on Sunday, Monday observed 4870.
When excluded in computation of time 5482.
Daytime, defined 6294(19).
Dead body, attachment or detention of 6476.
Burial of without certificate or permit, penalty 2962, 2972, 6549, 6550.
Burial or cremation of 6474.

Dead body—continued.
Burial permit, what to contain 2962.
City regulations 794(58).
Disinterment, permit for, commissioners may issue 6553.
Duties of undertaker 2960. See Public Health, Board of Embalmers.
Person accompanying, obstruction or detention of 6476.
Removal, commissioners may permit 6553.
Removal without authority 2972, 6475.
Stealing or receiving unlawfully 6475.
Unlawful dissection 6473.
Unlawful removal or interference with 6814.
"Dead timber" in mines, when must be removed 4213.
Deadly weapon, or instrument, setting of 6567.
Peace officer, use of by 6439.
Unlawful use or exhibition of 6439.
Deaf, dumb and blind, authority to receive in institution 1703.
California or Utah institutions, may be sent to 1702.
County commissioners to investigate and apply for 1703, 1704.
Education and support 1702-1704.
Expenses, state charge, when 1704.
Institutions for benefit of, legislature to foster 365.
Intelligent aid to 1704.
Petition by parent, relative, friend or guardian 1703.
Superintendent of public instruction, duties as to 1702-1704.
Who entitled to benefits of act 1704.
Death, action not to abate because of 5004. See Civil Practice.
By wrongful act, action for 4996, 4997, 5647, 5648.
By wrongful act, insurance not bar to recovery 5652.
By wrongful act, judgment exempt from debts 5648.
Certificate of 2958-2960, 2971, 2985.
Failure to record, penalty 2986.
False certificate of, penalty 2987.
Limitation of action for 4967.
Of workman, employer liable for, when 1915, 1925, 5650. See Employer and Employee.
Registration of, in cities 794(58).
Death certificate. See Public Health.
Altering of 2972.
Carrier shipping without 2972.
Certified copies issued by state board of health 2971.
Failure to record 2986.
Physician failing to issue or issuing false 2972, 2987, 6551.
Recorded, to be 2985.
Regulations regarding 2958.
Where no medical attendance 2959, 2960.
Death of minor child or ward, action for 4996, 4997, 5647, 5648.
Death of party to action, substitution, D. C. rule ix, p. 1423.
Death penalty. See Crimes and Punishment.
Inflicted by hanging or shooting 7281.
Suspension of 7270-7278.
Warrant for, form and contents 7268.
What crimes may be imposed for 6352, 6386, 6413, 6422, 6442, 6572, 6573, 6625, 6819.
Death warrant, form and contents 7268.
Debates and proceedings on adoption of constitution, publication of 410.
Debt. See Civil Practice, Estates of Deceased Persons.
Due another, surety may bring action to compel payment 5479.
Exemption of property for, legislature to provide 243.
Evidences of, when included in words "personal property" and "property" 5475.
Imprisonment for, forbidden 243.
Of counties or cities, state not to assume 351.
Of state, limitations on 350, 391.
Of territories, state to assume 391.
Payable in installments secured by mortgage or lien, how property may be sold to satisfy 5503.
Restriction of power of cities and towns to contract 345.
Debtor, fraudulently removing, conveying or concealing property with intent to defraud creditors, penalty 6701, 6702. See Civil Practice.
Privileges of 243.
Deceased persons, jurisdiction of, estates of 321, 4840, 4849. See Estates of Deceased Persons.
Decisions. See Civil Practice.
District judge may sign in any part of state, clerk to enter 4922.
Of supreme court, concurrence of majority of justices necessary (Nev. Const.) 317.
Of supreme court, not effective until opinions filed with clerk (Nev. Const.) 376.
Of supreme court, to be published 4481.
To be in accordance with common law, when 5474.
Declaration, false, when deemed perjury 5448.
Included in oath 5475.
Of independence 65-70.
Of intention for naturalization 2525.
Of rights, article on in state constitution 230-249.
Decree. See Civil Practice.
Deed. See Conveyances.
Conveying homestead may be authorized by court and recorded when wife insane 2146, 2147.
Derived from sale of real property for delinquent taxes conclusive evidence of title, possession recoverable in justice's court 3666.
Invalid, local or special law giving effect to, invalid (Nev. Const. art. iv, sec. 20) 278.
Lost or destroyed, validated 5639.
May be made by successor of officer making sale of real estate for delinquent taxes or under execution or order of sale 1662, 1663.
Of sheriff, executor, administrator, guardian, assignee, receiver, trustee or commissioner, when prima facie evidence of regularity of sale when record lost 5631.
Of sheriff under execution sale and subsequent redemption, who entitled 5301.
Or other writing fraudulently or maliciously injuring or destroying, penalty 6671.
Recorded in office of county recorder imparts notice 1093.

Deed—continued.
To include all property sold for taxes bid in by county treasurer 3669.
To lot in federal townsite, execution of after trial of adverse claim in district court 1984.
To lot in federal townsite, when to be made to guardian or trustee of minor or insane person 1986.
Under tax sale by treasurer not prima facie evidence of title in purchaser when record destroyed 5631.
Deed of trust lost and restored, limitation 5638.
Sale for taxes on 3787.
Taxes are lien 3786, 3788.
Deeds, commissioners of 1000-1004. See Commissioners of Deeds.
Deer, open season for, limit 2093, 2094.
Defacing or destroying legal proclamations or notices 6674.
Defacing or obliterating marks or brands, penalty 6640.
De facto officer, action for seizure of property, limitation 4967.
Defalcation of public officer, operates as disqualification for office 268.
Default. See Civil Practice.
Against additional parties brought in by the court 5008.
If made, to be entered in justice's court docket 5800.
If opposing party does not appear, moving party entitled to have motion decided in district court, D. C. rule xi, p. 1427.
In mandamus proceedings, judgment not to be entered without hearing 5698.
Judgment may be rendered against claimant in garnishment proceedings 5180.
Judgment may be taken by, in action for delinquent taxes 3665.
Judgment upon, how entered 5236.
Judgment upon in justice's court 5754, 5755.
May be set aside when taken through mistake or neglect 5084.
When plaintiff may apply for relief demanded in complaint 5236.
Defective articles of incorporation validated 1185. See Corporations.
Defective verdict, procedure 5219.
Defendant, civil. See Civil Practice.
Defendant, criminal. See Criminal Practice.
Defendant, insane, criminal action, inquiry as to sanity 7271-7275, 7385-7394.
Rights of in criminal action 6855, 6858. See Criminal Practice.
Defense. See Civil Action.
Deficiencies, in appropriations, board of examiners to authorize 4466-4467.
Tax to be levied to cover, when 349.
Definitions in civil practice act 5475.
Definitions in crimes act 6266, 6291, 6294.
Definitions in criminal practice act 7457.
Defrauding hotel, inn, restaurant, boarding or lodging-house 6726.
Degrees and diplomas conferred by university 4645.
Degree of guilt, court to determine on plea of guilty 7244.
Reasonable doubt, rule 6277, 7166.
Degrees of kindred, how computed 6119.
Delinquent child, defined 736.
Delinquent person, defined 728.
Delinquent tax sales 3865. See Civil Practice, Revenue.
Delinquent tax suit. See Civil Practice, Revenue.
Costs in, not chargeable against city or town 999.
Delinquent taxes, adjustment by treasurer of accounts with auditor 3862, 3863.
Demand. See Civil Action.
Against state, incurred when its liabilities exceed $300,000, void 350.
Exceeding $300 exclusive of interest, district court has jurisdiction 321.
Exceeding $300 exclusive of interest, not to be tried in justice's court 323.
Exceeding $300 exclusive of interest, supreme court has appellate jurisdiction 319.
Demurrer. See Civil Practice, Criminal Practice.
Civil action, district court, to answer 5053-5056.
Civil action, district court, to complaint 5040-5045.
Civil action, justice's court 5736, 5737, 5740, 5741, 5743.
To indictment 7095-7105.
Denial. See Civil Practice.
Dental examiners 4427-4444. See Board of Dental Examiners.
Dentistry, practicing without license, penalty 4427. See Board Dental Examiners.
Departments of government, functions to be separate 258.
Departure from state, with intention to defraud creditors, when defendant may be arrested in civil action in district court 5088; in justice's court 5744.
Dependent child, bond to secure support of 759, 760.
Defined 728.
Dependents, of injured employee, effect of compromise of claim under employers' liability act 1928.
"Depose," includes every written statement under oath or affirmation 5475.
Deposit. See Civil Practice.
Depositions, civil action, witnesses within state 5454-5457.
Witnesses without state 5458-5463. See Civil Practice.
Criminal action, for defendant 7365-7384, 7414.
Notary public may take 2750.
Deputy superintendents of public instruction 3245-3254. See Public Schools.
Descents and distribution 6116-6125, 6140, 6141.
Desert land laws 3150-3162. See Public Lands.
Desertion, of wife or child, penalty 6446.
Wilful for one year is ground for divorce 5838.
Destruction, alteration or concealing messages, papers or instruments, with intent to injure, penalty 6712.
Of building by explosive, penalty 6572, 6573.
Of property by unlawful assembly, penalty 6612.
Of public records, penalty 2817, 6344, 6345.
Detainer. See Civil Practice.
Forcible entry and, action for 5585-5605.

Detainer—continued.
Forcible entry and, action for, district court has jurisdiction 321.
Detectives. See State Detectives.
Detention home, establishment and maintenance of 734, 742.
Development of Carey act land 3088. See Public Lands.
Device for gambling, penalty for having or playing 6518, 6520.
Devise, executory, to be alleged in complaint in action for partition 5528.
Dice, playing with, when deemed gambling, penalty 6518.
Diligence, due must be shown in affidavit for continuance 5202.
In obtaining testimony must be shown to obtain postponement of trial in civil action in justice's court 5759.
Must be shown to obtain postponement of trial for nonreturn of deposition taken out of state 5462.
To be exercised in ascertaining residences of defendants in actions to determine adverse claims to real property 5523.
Diminution of record on appeal to supreme court, objections to transcript or papers, how noted and corrected, S. C. rule viii, p. 1423.
Diploma for practice of medicine, surgery, and obstetrics, applicant has right to appeal to courts from decision of board of medical examiners 2365.
Dipsomaniac, sale of liquor to 6523, 6836-6838.
Director, of corporation, district judge may act in relation to removal and election of 1179.
Of corporation, judgment of ouster 5568.
Of corporation liable in damages for making false report 1175.
Of corporation, when has right to be preferred in appointment of receiver 1195.
Directors, and officers of corporation, district judge has revisory power over election of, may order new election 1130.
And officers of corporation, district judge may act in relation to removal and election of 1179-1182.
Declaring dividend when railroad company insolvent liable for payment of debts 3568.
Liability of on dissolution of corporation in quo warranto 5578.
Limitations of action against for penalty or forfeiture 4984.
Disability or sickness of justice of the peace, other justice may be called to act 4926, 5811.
Disbarment of attorneys 511-524. See Attorneys.
Disbursing officer, if fee or salary of public officers garnished, may pay into court 5122.
Discharge from arrest in civil action 5114, 5122.
Discharging firearms, when unlawful, penalty 6569, 6570.
Disclosing transactions of grand jury, penalty 6374, 7031.
Discounting labor time checks, when unlawful, penalty 6788-6790.
Diseased animals, carcasses, disposition of 4381.
Diseased animals—continued.
Exposing 6530-6532.
Not to be sold, when 2988-2990.
Prohibited from entering state 2988-3003.
Quarantined, may be 2269-2271, 4380, 4588, 4591, 4595. See Live Stock, Public Health.
Diseased meats, poultry, game or fish, sale or exposure for sale, penalty 2988-3003, 6535.
Diseased sheep, permit to move 4598. See Sheep.
Diseases. See Public Health.
Diseases, spreading among bees 481.
Disfranchisement for dueling 250, 370, 371, 6423.
Disincorporation of cities organized under general act 873, 876.
Disincorporated towns, county commissioners, duties as to 967, 974.
Indebtedness, how paid 882, 883.
Disinterment or removal of dead body, commissioners to grant permit for 6553.
Dismissal, in district court of case ordered transferred from justice's court under section 779, new practice act, rule xxxviii, p. 1430.
Of action, attorney-general may order 7400.
Of action, for failure of nonresident or foreign corporation as plaintiff to give security for payment of costs 5301.
Of action, or nonsuit, in what cases granted and how entered 5237.
Of action, without prejudice in justice's court 5772.
Of appeal, for failure to furnish requisite papers 5356.
Of appeal, from justice's court to district court, D. C. rule xxxvii, p. 1430.
Of appeal, only for substantial error 5658.
Of appeal, to district court, may be ordered after notice 5794.
Of appeal, to supreme court for failure to file transcript, restoration, S. C. rule iii, p. 1421.
Disobedience to order, subpena or process punishable as contempt in justice's court 5795.
Disorderly conduct, city may specify what deemed 794(75).
When punishable as contempt in justice's court 5795.
Disorderly houses, hotels, and lodging-houses, when deemed, penalty 6484.
Disqualification of judges, grounds of 4865.
Dissection, when crime, penalty 6473.
Dissolution. See Partnership.
Of cooperative association, how effected 1258.
Of corporation, how effected, procedure 1195, 1240, 5670.
Of limited partnership, how effected 2908.
Distribution, of damages for death by wrongful act, how made 5648.
Of governmental powers 258.
Of statutes and documents 2932, 2936, 4257, 4335.
District attorney, absence, appointment of substitute, compensation 1597.
Leave of absence 1566-1568.
Account, penalty failure to make 1601.
To treasurer 1600.

District attorney—continued.
Action against assessor 3625, 3798.
Against assessor for land assessment 3840.
Against by county treasurer 3650.
Against corporation 1354.
Against county, papers delivered to 1503.
Against water user across highway 3024.
By or against state or county, to prosecute or defend 1598.
For unlawfully holding office 1814.
In forfeited bail 7338.
Advice and opinion to officers 1602, 1604.
Arrested person, property taken from, liability for 6651.
Assessor, neglect of, to notify auditor 3681.
To proceed against, when 3625, 3764, 3798.
At request of attorney-general to bring action for removal of county commissioners voting excess taxes 3828.
Attorney at law, must be 525.
Attorney-general, may instruct, to bring action to remove commissioners 3830, 3834.
Supervisory powers over 4137.
To prosecute for failure to enforce mining corporations' act 1340.
To report to 1608, 1609.
Auditor, receipts for money or property to be filed with 1599.
Bail, forfeited, action in 7338.
Notice to, of application for 7312, 7327, 7333.
Bank act, violations of, to prosecute 686.
Bank examiner, duty to aid 669, 686.
Bond 1594, 2786.
Additional for delinquent tax suit 3658.
Bonding companies, duties concerning 1244, 1248.
Books and records of revenue open to inspection 3752.
Bridges and culverts, duties concerning 3024.
Claims against county, to approve, when 1604.
Not to present or advocate 1520, 1605.
Commissioners, action to remove, to bring, when 3830, 3834.
May make deduction from salary, when 1597.
To attend sessions of 1519, 1520, 1602, 1604.
To report to property not assessed 3625.
County treasurer, action by or against, to bring, when 1600, 1601, 3650.
Criminal action, may dismiss, when 7400.
Delinquent list, proceeds of mines, suit on 3706-3709.
Delinquent taxes received, duty concerning 3674-3676.
Suit for 3655-3667, 3707.
Dental examiners, act concerning, to enforce 4441.
Deputy may appoint 2848.
District court may appoint temporary 1597.
Duty to attend meetings of commissioners 1519, 1520, 1602, 1604.
To bring suit against assessor for failure to make settlement 3704.
To prosecute persons refusing statements to assessor 3624.
To represent town 878-890.
Duties as to revenue, neglect of, penalty 3751, 3753.
District attorney—continued.
Duties concerning pure food and drug act 3504, 3505, 3509.
Election of 1593, 2765, 2773, 2781.
Expiration of term, refusal to surrender records 2819.
Extradition, notice to and duty of 7440, 7441.
Failure to attend court, salary deduction 1597.
Fee in tax suit 1603, 3677, 3709. See Revenue.
Fees of 1603, 3677.
Fee of, opium prosecutions 6493.
Governor to advise of result of criminal action 7030.
Houses of ill-fame, law to enforce 3459.
Indictments to draw and sign 1598, 7051.
Inspectors of hides, to report to 2285.
Leave of absence 1566-1568.
Liable on bond for collection taxes from mines 3706. See Revenue.
May be selected by public service commission to act as counsel 4544.
Malfeasance or misfeasance in office, penalty 1606.
Mining companies, statements of, to enforce 1340.
Mining taxes delinquent, action for 3707.
Nuisances, to abate 1562, 5504.
Notice to, application for or exoneration of bail 7312, 7327, 7333.
Oath 2786.
Office and office hours 375, 1564, 1565.
Office, forfeiture of, when 3676.
Office, unlawful holding, action to bring 1814.
Opening statement criminal trial 7159.
Optometry act to enforce 2896.
Partners of, prohibitions 1610, 1611.
Penalty, failure to pay tax money 3676.
Proceeding against assessor 3681.
Property taken from arrested person, liability for 6651.
Prosecutions to conduct 1595, 1596.
Public health act, duties relative to 2973.
Public prosecutor 1595, 1596.
Public service commission to prosecute under act 4538.
Pure food law, prosecutions 3505.
Receipts for money or property 1599.
Records or documents, altering or stealing 2817.
Removal from office, when 6907.
Removal of town or city officer 983.
Report to attorney-general, penalty for failure 1608, 1609.
Resignation or vacancy 2797-2799, 2801-2806, 2813.
Salary, deduction from for absence 1597.
School boards, to advise 3354.
School census, law to enforce 3371.
Sessions of commissioner, to attend 1519, 1604.
Settlements as to revenue 3754.
Sheep inspector, proceedings against 2344.
Subpena, may issue 7350, 7351.
Surety company, officers or stockholders of, to prosecute, when 1248.
Tax suit 3655-3667.
Taxes, failure to account for, penalty 3676.

District attorney—continued.
Temporary, district court may appoint, when 1597.
To account to treasurer, when 1600.
Toll roads, franchise, action to forfeit 3757, 3759.
To prosecute or defend action by or against county 1598.
Town government, duty as to 878-890.
Town or city, delinquent taxes 934.
Town or city tax, excessive, duty as to 976, 977, 981.
Town, unincorporated, delinquent taxes for improvement of streets, to bring action for 934.
Treasurer, action against, when 3650.
Treasurer, action by, when 1601.
Vacancy, how filled 1607, 2797, 2801, 2813.
Veterinarian, services, may direct 4397.
Weights and measures act, violations, to prosecute 4813.
District court. See District Judges, Civil Practice, Courts and Court Officers, Criminal Practice, Estates of Deceased Persons, Guardians.
Absence of judge, when causes forfeiture of office 332, 4868.
Accounts of administrators, executors or guardians, may require 4849.
Accounts, to receive in vacation 4850.
Accused may appear and defend in person and with counsel 237.
Acknowledgments, and affidavits, judge and clerk may take 4883.
Acquittal, may advise 7203.
Action, controversy submitted to without 5252-5254.
How commenced 5016-5034.
Limitations of 4946-4985. See Civil Practice.
May authorize by nonresident guardian 6200.
Not affected by vacancy or failure of term 4884.
One form of 329, 4943.
Railroads, affecting rates to have precedence 4540.
Special provisions converning certain 5501-5665. See Civil Practice.
Townsite lots, adverse proceedings 1984, 1985.
Adjournments 4842.
Adjournments, by clerk or sheriff 4872.
Administration, advance fee 2030.
Administrator, accounts 4849.
Adoption of children, minute entry of order 5832.
Adverse proceedings, townsite 1984.
Advise grand jury 7030.
Affidavits (civil practice) 5450-5453.
Alimony and divorce 5838-5845.
Always open 4906.
Appeal by applicant for medical certificate 2366.
Appeals from (civil) 5325-5361. See Civil Practice.
Appeals from (criminal) 7286-7307. See Criminal Practice.
Appeals from justice's court to (civil) 5788-5794. See Civil Practice.
District court—continued.
Appeals from justice's court to (criminal) 4848, 7286, 7512-7518. See Criminal Practice.
Appeals from municipal court to 837.
Appeals in railroad commission cases 4540, 4564.
Appeals, special court fee in 331.
Appellate jurisdiction 321, 4840.
Appraisers, appointment in vacation 4850.
Appraisers or arbitrators, may appoint 4849.
Arbitration 5255-5264. See Civil Practice.
Arrest and bail (civil) 5087-5123. See Civil Practice.
Arrest on civil process, elector exempt from on election day 253.
Arrest on civil process, members of legislature exempt 269.
Assistance, writs of, may issue 4843.
Attachment and garnishment 5147-5191. See Civil Practice.
Attachment, may issue on nonjudicial day 4870.
Attorneys appointed to defend accused, payment of 7540, 7541.
Attorneys, authority of 507.
Attorneys, judge not to act as, unless party 4866.
Auditor of county to draw warrant on court order 1583.
Award in arbitration of labor disputes, clerk to file 1930.
Bail (criminal) 7308-7347. See Criminal Practice.
Excessive not to be required 235.
Right of 236.
Bailiff for in certain counties, duties, powers, qualifications and compensation 4914-4920.
Bailiff may be appointed in certain counties 4914.
Bank, seized by examiner, action to recover 675.
Bonds, may approve in vacation 4850.
Bonds, of surety company, may accept 695-701.
Business at chambers 4843.
Calendar, calling, disposition of cases, D. C. rule ii, sec. 3, p. 1426.
Certiorari 5683-5693, 5711-5713.
May issue 321, 4840, 4843.
Chambers, business at 4843.
Functions at 4922.
Charge grand jury as to drunkenness in office 2862.
Charge to jury, restrictions as to fact and laws 327, 7014.
Charitable corporations, sale of property, may allow 1369.
Children under 18 charged with crime transferred to 741.
Cities, class, judicial notice of 772, 775.
Cities, disincorporation, levy of taxes 873, 875.
Cities, duties in incorporating 768-772.
Civil action, special court fee in 331.
Civil arrest, forbidden on election day 253.
Members of legislature exempt from 269.
Civil practice 4943-5713. See Civil Practice.
Claim and delivery 5114-5123.
Claims, may approve in vacation 4850.

District court—continued.
Clerk, fees of when not over 800 votes in county 1995.
List of trial jurors, to keep 4930.
May adjourn court, when 4872.
Of courts of record 290.
Receipt for fees, to give 2033.
To collect court fee, how applied 331.
To enter decisions, when 4922.
To keep register of actions 5480.
To procure and keep seal 4876-4878.
Warrants and process, to issue 6261.
Writs, to serve 6231.
Commissioners, may be suspended, when 3653.
Commencement of action or proceeding, fees 2030.
Compromise, offer of 5265.
Concurrent jurisdiction 323.
Condemnation of property for highway 3008.
Conflicting applications to purchase state land, certified to 3208.
Contempt 5394-5407. See Civil Practice.
Disobedience of summons issued for railroad commission 4532.
To apply to other coordinate judge for same order 4882.
To resist process 2833, 2834.
Contest for county or township office, attachment for witness 1809.
Contract of decedent, order for execution by executor 6147.
Contributory dependency and delinquency 728, 757-764.
Controversy, submitting without action 5252-5254.
Corporate elections, revisory power over 1130.
Corporate property, sale of, when 1197, 1198.
Corporations, criminal action against 7402-7410.
Directors, removal of and election of new 1180-1182.
Directors, revisory power over elections of 1130.
Disincorporation under act of 1865 1240.
Dissolution of 1195, 1240.
Election of directors, may require 1130, 1223.
Lost stock certificate, new to order, when 1165.
Mergers, awards, contest of 1147, 1148.
Receiver for 1194-1199.
Religious or charitable, sale of property, may allow 1369.
Removal of officers, proceedings 1180-1183.
Costs. See Civil Practice 5376-5393.
Counsel, right to appear by 237.
County auditor, to draw warrant on order of 1583.
County, how often must be held in 4922.
County-seat, terms held at 4841.
Court fee to be collected, how applied 331.
Court of justice 316, 4828.
Court of record 323, 4861.
Court room and necessities, may order furnished 4841, 4921.
Crimes and punishments. See Crimes.
District court—continued.
Criminal appeals 4848.
Criminal jurisdiction 321, 323, 4840, 4851.
Criminal practice 6851-7560. See Criminal Practice.
Criminal proceedings 4848.
Death, action for 5647, 5648.
Debt, imprisonment for forbidden 243.
Deceased persons, jurisdiction of estates 321, 4840, 4849.
Decision, exception to, how taken 4847.
Reduced to writing if required 4847.
Unreasonable delay 4886.
Where may be signed 4922.
Delay, unreasonable, act to prevent 4886.
Demurrer, overruling, penalty may be imposed by rule 4845.
Deposition (criminal) 7365-7384.
Deposition. See Civil Practice 5454-5473.
Deposition of prisoner, may order 5442.
Directors of corporations, proceedings to remove 1180-1182.
Disincorporation of cities 873, 876.
Disqualifications of judge 4865.
Disqualified judge, what business may transact 4865.
Dissolution of corporations 1195, 1240.
Districts, defined in constitution (obsolete) 320.
Established 4901, 4905.
Two or more in county, legislature may establish 322.
District attorney absent, appointment of substitute, compensation 1597.
District attorney, temporary, may appoint 1597.
District judge, any may hold court 4844, 4922.
Divorce and alimony 5838-5845.
Divorce, trial private, when 4863.
Drunkenness in office, grand jury to charge concerning 2861.
Due process of law, guarantee of 237.
Duties of sheriff during sessions of, D. C. rule xxxix, p. 1431.
Election day, civil arrest forbidden on 253.
Eminent domain 5606-5629.
English language used 4885.
Equity and law in same action 329, 4943.
Equity, jurisdiction of 321.
Established 316.
Estates of deceased persons. See Estates of Deceased Persons 5857-6148.
Of deceased persons, jurisdiction 4849.
Of deceased persons, minors and insane, jurisdiction over 321.
Of deceased persons, minors and insane, may direct in vacation 4850.
Of deceased persons, minors and incompetents, jurisdiction of 4840, 4849.
Of deceased persons, orders, power to enforce 5867.
Of deceased persons, power of district court over 4849, 4850.
Evidence, depositions and witnesses 5408, 5473. See Civil Practice.
Evidence, judge may state 4846.
Exceptions, how taken 5315-5318.
To decision, how taken 4847.
Excessive bail or fines, not to be exacted 235.

District court—continued.
Execution (civil) 5280-5314. See Civil Practice.
Executive functions forbidden 258.
Executors, accounts may require 4849.
Exemptions from executive, guarantee of 243.
Extradition, inquiry into arrest 7443.
Fact, matters of, judge not to charge on 327, 4846.
Federal jurisdiction over certain property 1949-1952.
Fees of 2030.
Fees, to give receipt for 2033.
Filing and serving papers 5367-5375.
Final appellate jurisdiction from justice's courts 321.
Fines, excessive not to be imposed 235.
Forcible entry and detainer 5585-5605.
Forcible entry and detainer, jurisdiction 321, 4840.
Foreclosure of mortgages 5501-5503.
Foreigners entitled to same rights as natives 245.
Forfeiture of office for absence of judge 332, 4868.
Form of action 329.
Fuel, lights and stationery, may order 4841.
Functions, at chambers 4922.
Grand jury. See Grand Jury.
Charge as to drunkenness in office 2862.
Charge to 7014, 7030.
May indict 4848.
To indict for capital or infamous crime 237.
Guardians. See Guardians.
Guardians, accounts may require 4849.
Habeas corpus. See Habeas Corpus 6226-6265.
Habeas corpus, may issue 321, 4840, 4843, 6226-6265.
Supreme court may make returnable before 319, 4834.
Suspended, when 234.
Held at county-seat 4841, 4871.
Held, how often, in each county 4922.
Highway, condemnation for, appeal to from award of damages 3008.
Imprisonment for debt prohibited 243.
Indictment for capital or infamous crimes 237.
Inferior courts, final appeal from 4840.
Injunction 5136,5146. See Civil Practice.
May issue 321, 4840, 4843.
Insane and incompetents, jurisdiction of person and estate 4840, 4849.
Insane persons, estates of, jurisdiction 321.
Instructions may be given on nonjudicial day 4870.
Inventories, to receive in vacation 4850.
Jeopardy, twice in, forbidden 237.
Judge, and clerk may take acknowledgments 4883.
Election of 4901.
May hold in any district 4844, 4922.
Not to charge on matters of fact 327, 4846.
Not to have partner in practice 4867.
Not to interfere with orders of other judge 4881, 4882.
Not to practice as attorney 4866.
Not to receive fees or perquisites 325.
District court, judge—continued.
Orders made out of court, power to enforce 4864.
When disqualified 4865.
Judgment, civil 5236-5251, 5266-5279. See Civil Practice.
How rendered and entered 4922.
In civil cases, when may be entered 4842.
Power to enforce 4864.
Judicial days 4869.
Judicial department, coordinate 258.
Judicial power, vested in what courts 316.
Jurisdiction, and powers 321, 4840, 4849.
In contest of county or township office, may require documentary evidence by mandamus 1806.
In quo warranto 5663.
On disincorporation of city 872, 873.
On transfer of case from justice's court 5721.
Jury. See Jury.
Civil case, three-fourths may agree 232.
May be discharged on nonjudicial day 4870.
May be waived 232.
Trial 5204-5225. See Civil Practice, Jury.
Trial guaranteed 232.
Justice courts, appeals from 321, 5788-5794. See Civil Practice.
Appeal from, criminal 7286, 7512-7518. See Criminal Practice.
Appeal from in criminal cases 4848.
Entry in docket of abstract of judgment of 5781.
Final appeals from 4840.
Transfer of cases from 5721.
Juvenile court law 728-756, 764.
Jurisdiction, district courts 729.
Juvenile department 730, 757.
Land, conflicting applications to purchase 3208.
Landlord and tenant 321, 323.
Language, what and how used 4885.
Lands, state, contests for 3208.
Law and equity in same action 329.
Law, judge may declare 327, 4846, 7195, 7197.
Legislative functions forbidden 258.
Letters, testamentary, of administration or guardianship, may issue 4849.
Life estate, termination of 5584.
Limitations of actions 4946-4985. See Civil Practice.
Lost records, restoration of 5630-5646.
Magistrate, powers of on nonjudicial day 4870.
Mandamus 5694-5707, 5711-5713.
May issue 321, 4840, 4843.
Matters of fact, judge not to charge 327, 4846.
Marriage, may license ministers of gospel to solemnize 2340.
Married woman, authorized to act as sole trader 2191.
Mechanics' liens, jurisdiction (Nev. Const.) 321, 323.
Ministerial officers, conduct to control 4864.
Minors, estates of, jurisdiction over 321.
Jurisdiction of person and estate 4840, 4849.
Mortgages, foreclosure 5501-5503.
Motions and orders 5362-5366. See Civil Practice.

District court—continued.
Names of persons, may change, procedure 5837.
Naturalization of aliens 2516.
New trials in 5319-5324. See Civil Practice.
Nonjudicial days, designated, certain business may be transacted on 4870.
Notices 5367-5375. See Civil Practice.
Notices to adverse claimants, townsite lots 1984.
Nuisance, action for 5504-5513. See Civil Practice.
Officers, proceedings to remove 2851-2854.
Official reporter 4908-4913.
Duties 4908.
Excused, when may be 4910.
Examination as to qualifications 4909.
Fees, how paid 4913.
Judge to appoint 4908.
Oath of office 4911.
Qualifications, test of 4909.
Removable at pleasure 4908, 4910.
Temporary appointment 4910.
Transcript prima facie evidence 4912.
One form of action 329.
Open always 4906.
Order, by one judge not to be changed or affected by another 4881, 4882.
Entry of in term or vacation 4842.
Power to preserve and enforce 4864.
Refused or granted conditionally, application for same order only to higher judge 4881.
What may make 4849.
Original jurisdiction 321, 4840.
Panel of trial jurors, how drawn and summoned 4930.
Papers, filing and serving 5367-5375.
Partition of property or estate may order 4849.
Partition, proceedings in 5527-5583. See Civil Practice.
Partner in practice, judge not to have 4867.
Payment of attorneys appointed for defense 7540, 7541.
Penalty for demurrer, rule may impose 4845.
Perpetuating testimony 5464-5473.
Personal injuries, action for 5649-5652.
Petition for changing name of person 5835.
Place of holding, changed when 4873, 4874.
Pleadings 5035-5086. See Civil Practice.
Powers, estates to enforce 5867.
Powers in vacation 4842, 4850.
Power of county, to enforce process 2835.
Power to enforce orders, judgment and process 4864.
Primary election, order contestee in contest for nomination to appear 1764.
Private property taken for public use, compensation 237.
Probate practice and procedure 5857-6144. See Estates of Deceased Persons.
Process, clerk to issue 6261.
Process, power to enforce 2833-2835, 4864.
Resistance of, contempt 2833, 2834.
Style of (Nev. Const.) 328.
Proceedings for removal of officers 2851-2854.
Proceedings, public, exception 4862, 4863.
Proceedings to remove directors of corporations 1180-1182.
District court—continued.
Prohibition 5708-5713.
May issue 4840.
Prosecutions conducted in name of state 328.
Protestant Episcopal Church, order for sale of real estate 1431.
Public administrator to report to 1618, 1620.
Public offenses, may inquire into 4848.
Public service commission, judgment in action to review order of 4540(c).
Public service commission, to issue subpenas for attendance before 4532.
Punishments, cruel or unusual, forbidden 235.
Quiet title, action for 5514-5526. See Civil Practice.
Quo warranto 5656-5682.
May issue 321, 4840, 4843.
Railroad commission may apply to for summons, 4532; procedure 4540.
Receivers 5193.
Receivers for corporations 1194-1199.
Records, restoration of lost 5630-5646.
Reference and referees 5230-5235.
Referee, power to enforce order before 4864.
Registration, may compel by mandamus 1710, 1712.
Register of actions, clerk to keep 5480.
Religious or charitable corporations, sale of property, may allow 1369.
Removal 6907.
Removal of officers, proceedings for 2851-2854.
Resistance of process, contempt 2833, 2834.
Revenue officers, removal or suspension 3753.
Room and necessities, may direct sheriff to provide 4841, 4921.
Rules, additional undertaking on attachment, xx, p. 1428.
Affidavit and order of arrest, return of, xxxiii, p. 1430.
Affidavit on motion for continuance, xii, p. 1427.
Amendment of judgment or order, notice of to be given, xlv, p. 1431.
Amendment to pleadings and documents, how made, ix, p. 1427.
Amendment to pleadings, how made, xvii, p. 1428.
Answer, amendment to, how made, xvii, p. 1428.
Appeal from justice's court, dismissal, when, xxxvii, xxxviii, p. 1430.
Appeal from justice's court, papers to be filed, costs paid, xxxviii, p. 1430.
Appeal, stay of execution, supersedeas, effect, xxii, p. 1429.
Application to one judge, other judge precluded, xlii, p. 1431.
Argument of attorney when a witness for client, xiii, p. 1428.
Arrest, return of by sheriff, xxxiii, p. 1430.
Attachment, additional undertaking, dissolution, xx, p. 1428.
Attorney, as guardian ad litem, xxx, p. 1430.
As witness, restrictions as to argument, xiii, p. 1428.
Not to be surety, xiv, p. 1428.

District court, rules—continued.
Stipulations of, requisites, xxvii, p. 1429.
To furnish clerk with forms of orders, judgments and decrees, xxxii, p. 1430.
Briefs, motions or issues of law may be submitted on, vii, p. 1426.
Calendar, called, business, how disposed of, iv, p. 1426.
Called, parties to be ready, iv, p. 1426.
Clerk to prepare, how, ii, secs. 1-3, p. 1425.
Number and kinds, ii, p. 1425.
Clerk, counsel to furnish with forms of orders, judgments and decrees, xxxii, p. 1430.
To give notice of holding court, iii, p. 1426.
To prepare calendars, ii, secs. 1-3, p. 1425.
Commission to take testimony, xv, p. 1428.
Complaint, amendments to, how made, xvii, p. 1428.
Continuance, motion for, requirements, xii, p. 1427.
Copies, for service, requisites, ix, p. 1427.
Correction of judgment or order, notice of, xlv, p. 1431.
Cost bill, service of, xxxiv, p. 1430.
Costs, motion to retax, time, xxxiv, p. 1430.
Court, hour of opening, i, p. 1425.
Decision on motion or issue of law, notice of time when begins to run, vii, p. 1426.
Demurrer, provisions concerning, viii, secs. 1-3, p. 1427.
Deposition, filing and publication, xvi, p. 1428.
How to be taken, xv, p. 1428.
Districts having more than one judge to divide business, i, sec. 2, p. 1426; xli, p. 1431.
Dissolution of attachment, insufficient bond, xx, p. 1428.
Documentary evidence, original, not to be withdrawn, xix, p. 1428.
Documents or pleadings for files, form, paper and amendments to, ix, p. 1427.
Duties of judge as to business of other judge, i, sec. 2, p. 1426; xli, xlii, p. 1431.
Duties of sheriff, xxxix, p. 1431.
Excuse of juror, how made, xxviii, p. 1429.
Execution, stay of on appeal, xxii, p. 1429.
Execution, stay of on motion for new trial, xxvi, p. 1429.
Evidence, original documentary not to be withdrawn from files, xix, p. 1428.
Foreclosure of mortgage, reference, xxiii, p. 1429.
Form of orders, judgments and decrees, furnished clerk, xxxii, p. 1430.
Guardians ad litem, xxix-xxxi, p. 1430.
Hearing, judge first entering on to control, xli, p. 1431.
Hearing on motions, xi, p. 1427.
District court, rules—continued.
Hour of opening court, i, p. 1425.
Instructions, settlement of, xl, p. 1431.
Interrogatories for deposition, how settled, xv, p. 1428.
Judge, application to one precludes action by other, when, xlii, p. 1431.
First entering on trial or hearing to control, xli, p. 1431.
To fix law day, ii, sec. 4, p. 1426.
Other than one having charge of cause, precluded from acting, exception, xliii, p. 1431.
Judgments, orders and decrees, form of furnished clerk, xxxii, p. 1430.
Juror, how excused, xxviii, p. 1429.
Justice's court, dismissal of appeal from, xxxvii-xxxviii, p. 1430.
Law day, judge to fix business on, ii, sec. 4; v, p. 1426.
Issue of, stipulation to hear any time, or place, vii, p. 1426.
Liens, of mechanics, xxxv, p. 1430.
Manner of making motions, xi, p. 1427.
Mechanics' liens, xxv, p. 1430.
Modification of judgment on order, notice of, xlv, p. 1430.
Mortgage, foreclosure of, reference, xxiii, p. 1429.
Motion, decided, renewed, when, xi, p. 1427.
For continuance, requirements, xii, p. 1427.
For new trial, stay of execution on, xxvi, p. 1429.
Hearing on, manner of making, xi, p. 1427.
Notice of, when required, x, p. 1427.
Placed on calendar, when, vi, p. 1426.
Stipulation, to hear any time or place, vii, p. 1426.
To retax costs, time, xxxiv, p. 1430.
To strike out, xviii, p. 1428.
When disposed of, vi, p. 1426.
New trial, time extended for motion or statement, effect, xxiv, p. 1429.
Notice, of amendment, correction, modification or vacation of judgment or order to be given, xlv, p. 1431.
Of decision on demurrer, viii, sec. 2, p. 1427.
Of decision on motion or issue of law, vii, p. 1426.
Of decision, when not required, vii, p. 1426.
Of holding court, iii, p. 1426.
Of motions, when required, x, p. 1427.
Of order extending time, xxxvi, p. 1430.
Of report of referee, xxi, p. 1428.
Order, of daily business, iv. p. 1426.
Of extending time, notice of, xxxvi, p. 1430.
Or rule, application for to one judge precludes action by another, when, xlii, p. 1431.
Original documentary evidence not to be withdrawn, xix, p. 1428.
Papers, withdrawal of, xix, p. 1428.
Parties, stipulations, requisites, xxvii, p. 1429.

District court, rules—continued.
Pleadings, amendments to, how made, xvii, p. 1428.
Pleadings and documents, amendments to, how made, ix, p. 1427.
Points and authorities on demurrer, when may be demanded, viii, sec. 3, p. 1427.
Records, withdrawal of, xix, p. 1428.
Referee, in foreclosure suit, xxiii, p. 1429.
Notice of, report to give, xxi, p. 1428.
Settlement of statement, xxv, p. 1429.
Trial by, duty, xxi, p. 1428.
Reference and referee, xx, p. 1428.
Renewal of motion once decided, when, xi, p. 1427.
Reply, amendment to, how made, xvii, p. 1428.
Report of referee, notice of to be given, xxi, p. 1428.
Rules, special for districts having more than one judge, i, sec. 2, p. 1426; xli, xliii, p. 1431.
Saturday, law day, v, p. 1426.
Settlement of instructions, xl, p. 1431.
Sheriff, duties of, xxxix, p. 1431.
Sheriff to file return of arrest, when, xxxiii, p. 1430.
State land register, causes certified to court by, xliv, p. 1431.
Statement on motion for new trial, settlement by referee, xxv, p. 1429.
Stay of execution on motion for new trial, xxvi, p. 1429.
Stay of proceedings on appeal, xxii, p. 1429.
Stipulations to be in writing or entered in minutes, xxvii, p. 1429.
Strike, motion to, xviii, p. 1428.
Supersedeas, xxii, xxvi, p. 1429.
Surety, attorney not to be, xiv, p. 1428.
Time, extensions of, new trial, effect, xxiv, p. 1429.
Notice of order extending, xxxvi, p. 1430.
Trial or hearing, judge first entering on to control, xli, p. 1431.
Trial, setting of, iv, p. 1426.
Two judges in district, disposal of business, i, sec. 2, p. 1426; xli, xliii, p. 1431.
Undertaking on attachment, additional, when required, xx, p. 1428.
Vacating judgments or orders, notice of to be given, xlv, p. 1431.
Withdrawal of papers, xix, p. 1428.
Witness, attorney as, restrictions of argument, xiii, p. 1428.
Writ, application for to one judge, conclusive, when, xliii, p. 1431.
Rules, may make restrictions on 4845.
Sale of corporate property 1197, 1198.
Seal, how affixed 4880, 5481.
Seal, to have 4875-4880.
Seal, to what papers affixed 4879.
Search warrants 7415-7434. See Criminal Practice.
Search warrants, probable cause to exist 247.
Second judicial district, number of judges, powers, rules, may make 4903.
District court—continued.
Sheriff, may adjourn court, when 4872.
May direct to provide room and necessities 4841, 4921.
To attend, orders to obey and enforce 1648.
To summon venire 4930.
Sickness of judge or juror pending trial 7194.
State, actions against 5653-5655.
Prosecutions conducted in name of 328.
Style of process 328.
Submitting controversy without action 5252-5254.
Subpena issued by railroad commission, may enforce 4561.
Surety company bond, may accept 695-701.
Suspend, administrators, executors or guardians during vacation 4850.
Terms 4842, 4906.
When and where held 332.
Testimony, judge may state 327.
Perpetuating 5464-5473.
Title papers, may require production 4849.
Treason, constitutional provisions concerning 248.
Trespass, action for 5504-5513. See Civil Practice.
Trial, by jury guaranteed 232.
Civil 5195-5229. See Civil Practice.
Criminal 7159-7226. See Criminal Practice.
Jury. See Jury.
Jury, panel, drawing and summons of 4930.
Unlawful detainer, jurisdiction of 321.
Vacancy in office of judge not to affect action 4884.
Vacation, powers in 4842, 4850.
Venire of trial jurors, open to inspection 4930.
Verdict may be received on nonjudicial day 4870.
Waste, action for 5504-5513. See Civil Practice.
Where held 4841, 4871.
Wife insane, appeal from order authorizing sale of homestead 2148.
Wife insane, conveyance of homestead 2146, 2147.
Wills 6202-6225. See Wills.
Power to probate 4849. See Civil Practice 5419-5449.
Witnesses, criminal 7348-7384, 7451-7456. See Criminal Practice.
Witnesses, may compel attendance 4849.
Witness against self, not compelled in criminal case 237.
Witness not to be unreasonably detained 235.
Writs, what may issue 321, 4840, 4843, 6228.
Writs and warrants, clerk to issue 6261.
District judge. See District Court, Civil Practice, Criminal Practice, Estates of Deceased Persons, Grand Jury, Jury.
Absence, forfeiture of office, when 332, 4868.
Leave of, forbidden 332.
Of, when vacates office 332.
Accounts of officers to order submitted to grand jury 2857.

District judge—continued.
Acknowledgments and affidavits, may take 4883.
Adoption of children, proceedings 5829.
Affidavit before salary paid 4886.
Affidavit, may take for examination of books of assayer 2484.
Appointment or election to other office, when void 326.
Arms, militia, application for to approve 4042.
Assistance, writs of, may issue at chambers 4843.
Attorney, must be 525.
Bond, county recorders, to approve 1628.
Bond of notary public, to approve 2745.
Box for names of jurors, to approve 5204.
Business in his district, to control 4922.
Canvass certain election returns 1513.
Canvass votes of legislators and commissioners 1513.
Certiorari, may issue 321, 5684.
Certiorari, writs may issue or determine at chambers 4843.
Chamber business transacted in any part of state 4922.
Chamber, functions at 4922.
Charge to grand jury 4924, 4925, 7014.
Charge to jury, restrictions as to fact and law 327.
Children under 14, employment of to be approved by 6824.
Chosen, how 2778.
Claim against estate, may file 5966.
Commissioners, election of, to canvass 1513.
Suspension pending charges 3753.
To provide office for 2941.
Commissions, form of 2793.
Compensation, court fee applied to 331.
How and when paid 330.
Control business in his district 4922.
Corporations, directors of, revisory power over elections of 1130, 1179, 1182.
Dissolution of on application 1240.
Court in any county, may hold 4922.
Court in other district, may hold 4844, 4922.
To control in own district 4922.
Decision, may be required to reduce to writing 4847.
Decision, signed any part of state 4922.
To be rendered before end of term 5489.
Disqualified, probate, procedure 5940, 5941.
Duel, failure to prevent 2823.
Duplicate certificate of oath filed in office of secretary of state 2795.
Duties, certain, may perform after expiration of term 1988.
Duty to see business of his district properly performed 4922.
Election of 2765, 2773, 2778, 4901.
Election contest, arrest of person receiving fees 1815.
Election, contest of, triable in adjoining district court 1813.
Election contest, time for hearing to be fixed by 1808.
Election returns, certain, to canvass 1513.
Election to other office, when void 326.
Eligibility 371, 2766.
Eligibility to other office 326.

District judge—continued.
Equal, coextensive and concurrent jurisdiction 4922.
Estates, disqualified to act in, duty 5940, 5941.
Estates, mortgaging of, order authorizing 6140.
Expenses, traveling 4907.
Facts, not to charge jury in respect to (Nev. Const.) 327, 4846.
Federal townsites, may enter as trustee 1961, 1982, 1991.
Fee act, duty of to give in charge to grand jury 2022.
Fees and perquisites, forbidden to receive 325.
Fees, officers' unpaid, order for execution 2027.
Functions of, at chambers 4922.
Governor may direct to hold court in other district, when 4844.
Governor to fill vacancy 2812.
Grand jury, accounts of officers to order submitted to 2857.
Grand jury, selection, order concerning 4931.
Grand juries, to instruct on certain subjects 2022, 4924, 4925, 7014.
Guardianship, may grant special letters in vacation 4850.
Guideboards, law on, to give to grand juries 4925.
Habeas corpus, may issue 321, 4840, 6228.
Habeas corpus, refusal of writ, penalty 6262.
Hearing, entry upon, other judge not to act except on written request, D. C. rule, p. 1431.
Impeachment, liable to 335.
Insane, commitment of 2200, 2204, 2211.
Jurisdiction, equal, coextensive and concurrent 4922, 5604.
Jury box, to approve 5204.
Justices of the peace, to decide when two claim office 5807.
Leave of absence to, forbidden 332.
Legislature, election of members to canvass 1513.
Mandamus, may issue (Nev. Const.) 321, 5695.
Mandamus, may issue and determine at chambers 4843.
May settle bill of exceptions (criminal) after term 7284.
Military force to command, when 2839-2841.
Minutes and records unsigned by predecessor, may sign 4923.
New trial, motion for at chambers 4843.
Notary public, bond of to approve 2745.
Number of, legislature may increase 320.
Oath of 370, 2786, 2787, 2891.
Oath, duplicate certificate of filed in office of secretary of state 2795.
Offices to be provided for 4921.
Offices, forfeiture for absence 332, 4868.
Offices vacated by absence 332.
Officers, duties of certain, to give in charge to grand jury 4924, 4925, 7014.
Order, designating commissioner to draw trial jury 4930.
Order for panel of trial jurors 4930.

District judge—continued.
Other district may hold court in 4844.
Personal property, taxes, delinquent, citation for discovery of 3679.
Powers after expiration of term 1988, 5489-5491.
Powers in vacation 4850.
Powers to hold court in any county 4922.
Predecessor, minutes and records left unsigned by, may sign 4923.
Primary election, correction of error, order for 1763.
Probation officer, to appoint 733.
Public administrator to report to 1618, 1620.
Qualification 525, 2766.
Quo warranto, issue or determine at chambers 4843.
May issue 321.
Removal from office by legislature 336.
Resignations made to governor 2798.
Revenue to be set apart for salaries 330.
Salary, amount of, how paid 4902.
Salary, court fee applied to 331.
How paid 1508, 4887.
May be changed 401.
Not increased or decreased during term, paid from county treasury 330.
Not to be paid until affidavit filed 4886.
Several may hold court in one county at one time 4922.
Sheriff, may order to provide office 4921.
Sickness of 7194.
Successor in office, rights not to be abridged 5491.
Term, expiration of, powers after 1988.
Ineligible to any other office during 326.
Term in other district, may hold 4844.
Term of office 329, 2778.
Testimony for perpetuation, publication of notice 5466.
Testimony, may state 327.
Townsites, federal, may enter as trustee 1961.
Traveling expenses 4907.
Unsigned minutes and records of predecessor, may sign 4923.
Vacancy, how filled 2812.
Vacancy in office, governor may fill, term 301, 2812.
Occasioned, how 2799, 2802.
Vacancy in office to be filled by governor 406.
Vacation of court, powers during 4850.
Vacation of office by absence 332.
Veterinarian, services may require 4379.
Writs, what may issue 321, 4840, 4843, 6228.
District mining recorders, certificate proof of labor to record 2046. See Mines and Mining.
Violating recorder's act, penalty 1638.
District of Columbia, when included in word "state" and words "United States" 5475.
District superintendent of schools 3245-3254. See Public Schools.
Districts, judicial, legislature may provide for and number of judges, change not to take effect except in case of vacancy or expiration of term (Nev. Const. art. vi, sec. 2) 320.
Disturbing, assembly or meeting 6607.
Church or school 3455, 3456, 6760, 6761.
Legislature 6333.
On street or highway 6589.
Religious meeting 6478, 6597.
The peace 6589, 6592, 6593.
Ditch companies, rates may be regulated by the legislature (Nev. Const. art. iv, sec. 20) 278.
Ditches, eminent domain may be exercised for 5606.
Dividends, directors of insolvent railroad company paying liable for debts 3568.
Of corporation, by whom declared, how, when 1167. See Corporations.
Divorce. See Civil Practice.
Alimony, grounds and procedure 5838-5845.
Business, advertising for, penalty 6462.
Community property, division in case of 2166.
Conviction of crime for forcing woman to marry operates as 6444.
Custody of children may be changed pending or after action 5840.
Disposition of property, what considerations determine, effect of decree on matters not specifically mentioned, preliminary restraining orders 5841.
Disposition of property rights, rule when wife obtains decree on ground of imprisonment or adultery of husband, alimony pendente lite, procedure, orders 5843.
Either party entitled to jury to try issue of fact 5845.
How community property divided on granting decree 2166.
How obtained, grounds for, verified complaint, venue 5838.
In proceedings for, court may direct trial of fact to be private 4863.
Local or special laws for granting are invalid (Nev. Const., art. iv, sec. 20) 278.
Marriage, when void without decree of 2354.
Nonresident defendant to be notified, order, publication, service, summons, compulsory process may issue 5839.
Order for completely dissolves marriage contract and may change name of female 5844.
Order regarding children may be enforced by attachment, commitment or requiring security 5840.
Schedule of sections relating to 5838.
Testimony, pleadings, orders, depositions and practice same as in actions at law 5842.
Docket, and papers in case of death or removal of justice of the peace to be delivered to county clerk or other justice 5804.
And papers must be delivered by justice of the peace to successor 5803.
Certified transcript of on change of place of trial in justice's court 5719.
Conviction of contempt in justice's court to be entered 5799.
Entry in judgment docket of district court of abstract of judgment in justice's court 5780.

Docket—continued.
Entry of judgment of supreme court to be made 5360.
Execution or other process may be issued by justice of the peace upon docket of predecessor 5805.
For judgment liens, how kept and what to contain 5275.
In justice's court, alphabetical index to be kept 5802.
Certified copy to be transmitted on appeal to district court 5791.
Copy of to be used on appeal in district court 5789.
Criminal action 7474.
Entry to be made of date of trial or hearing and mailing notice 5733.
In civil action, entry of waiver of jury 5766.
What entries to be made 5800.
Judgment for deficiency may be entered after sale on foreclosure and become lien on real estate 5501.
Of judgment, costs to be included 5278.
Of judgment, to include entry of interest and costs 5388.
To be open for inspection without charge 5276.
Transcript of to be certified by justice's court on transfer of case to district court for trial 5721.
Document, bringing of may be required by witness 5431.
Production of may be required by arbitrators on voluntary submission of dispute between employer and employee 1932.
Public of this state or the United States other than judicial in custody of public officer or certified or verified copy may be read in evidence 5409.
Documentary evidence may be required by mandamus in contest for county or township office 1806.
Dog fights, city may prohibit 794(75).
Dog, malicious poisoning of, penalty 6775.
Stealing, penalty 6647.
Tax on, city may impose 794(11)
Vicious, unlawful to keep, penalty 6441.
Domestic animals, working without consent, penalty 6744.
Domestic corporations consolidated how, when 1245, 1246. See Corporations.
Domestic relations, divorce 5838-5845. See Divorce.
Guardian and ward 6149-6201. See Guardians.
Husband and wife 2155-2189. See Husband and Wife.
Marriage 2338, et seq.
Doors of public buildings to swing outward 6581.
Double compartment shaft, when required in mines 4216.
Douglas County, creation, boundaries, seat 390, 1442, 1450.
Dower or courtesy, no estate by 2161.
Drainage, eminent domain may be exercised for 5606.
Draughtsman in land office 4398.
Drawing checks or instrument without deposit or credit, penalty 6672.
Drawing jury, misconduct of officer, penalty 6325.
Drawing or exhibiting deadly weapon unlawfully, penalty 6439.
Driving diseased or infected animal on public highway, penalty 2266, 2268.
Drugs, adulteration of 4511.
Adulterated, defined 3492.
Defined 3490.
Omitting or wrong label 6542, 6543.
Standard of purity defined 3491.
To produce miscarriage, sale of 6448, 6449.
Druggists. See Board of Pharmacy.
Drunkards, habitual, consent of parents adjudged guilty of being, when not required on adoption of child 5828.
Sale of liquor to 6523, 6836-6838.
Drunkenness 6523.
As mitigation of crime 6282.
Habitual, gross, when ground for divorce 5838.
In office, penalty 2861-2863.
Ducks, wild, closed season for, what 2089.
Due process of law, guaranteed 175, 185, 237.
Duel, constable, district judge, justice of the peace, justice of supreme court, sheriff or other officers, duty to prevent, failure, penalty 2823.
Forbidden 250, 370, 371, 2823, 6422-6426.
Jurisdiction for prosecution for 6910.
Officers, oath to take, fighting makes ineligible 370, 371, 2891.
Seconding, penalty for 6426.
Dues, from corporation may be secured, but corporators not individually liable for debts (Nev. Const. art. viii, sec. 3) 340.
Dumb. See Deaf, Dumb and Blind 1702-1704.
Duplicate notice, of location of mine in office of county recorder receivable in evidence same as original 2473.
Duress, obtaining property or advantage by, penalty 6821.
"Dwelling house" defined 6294(17).
Dynamite. See Explosives.
Dynamite machine, making or having, penalty 6571.

E

Eagle, American, killing unlawful 6811.
Earnings of judgment debtor, exempt from execution, when 5288.
Earnings of wife and minor children separate property, when 2168.
Of wife not liable for debts of husband, when 2167.
Easement, when may be taken under eminent domain 5607.
Editors and publishers, liability of for publications 6618.
Editors' libraries and certain property of exempt from execution 5288.
Education. See Public Schools 3239-3478, University, Normal Schools.
Amendment proposed to constitution, art. xi, sec. 3, passed at legislative sessions 1909, 1911, subject to ratification by the people at general election 1912, provides for the investment of school moneys in bonds of any county in the state 355.
Certain females eligible as superintendent and trustee of schools 371.

Education—continued.
Education, proceeds from land granted state by act of Congress of July 2, 1862, for college for benefit of agriculture, mechanic arts and military tactics to be invested by board of regents of university in separate fund to be irreducible 360.
Educational districts 3264. See Public Schools 3239-3478.
Estates that escheat to the state, fines collected under penal laws and property bequeathed to state pledged to educational purposes, and the interest thereon to be proportional among counties as legislature may provide (as amended 1889) 355.
Lands granted by United States to state and proceeds dedicated to educational purposes 355.
Sectarian instruction not to be imparted in any school or university under the constitution 361.
Special tax to be provided by legislature (as amended 1889) 358.
Eight-hour-day laws, assessment work on mining claims 2430.
Cement mills 6559, 6560.
Mills for ore reduction 6555, 6556.
Open-pit or open-cut mines 6557, 6558.
Plaster mills 6559, 6560.
Public works, unskilled labor on 3481, 3482, 6778.
Railroads, telegraph and telephone operators, block signals 3597, 3598.
Smelters 6555, 6556.
Surface men of underground mines 1941, 1942.
Telegraph or telephone operator on railroad using block signals 3597-3599.
Underground mines 6554, 6556.
Ejectment, jurisdiction of action for 321-4840. See Civil Practice, Forcible Entry and Detainer under Civil Practice, 5585-5605, 6743.

ELECTIONS

ABSTRACT OF VOTES—
Copy of supplied secretary of state, when, by whom 1797, 1799, 1801, 1881.
Made, how, when, by whom 1796, 1800.
Military service, made how, when, by whom 1887.
Transmitted to secretary of state, how, when, by whom 1797, 1801.
ACTS PROHIBITED AND PUNISHED—
Applying for ballot wrong precinct 1862.
Attempting to vote when not authorized, 1827.
Betting on 1788.
Bribery and intimidation 1829, 2414, 6319, 6802 (Const. 285).
Buying votes 1829.
Certificates nomination destroyed, false, fraudulent 1859.
Changing ballot after same has been deposited 1826.
Corrupting or intimidating electors 6802.
Corrupt practices at elections 6803.
County commissioners, failure transmit votes 1797.
Acts prohibited—continued.
County clerk, failure certify amendments 1842.
County clerk, failure transmit abstract votes 1801.
Destruction ballot 1860.
Destruction election supplies 1826, 1860.
Disclosing design or watermark on paper 1859.
Disclosing secrecy ballot 1828.
Disobeying order justices supreme court or district judges, contempt, when 1763.
Elector refusing to be sworn 1825.
Election laws, violation of by any person 1862.
Election officer, neglect of duty 1861.
False oath before registry agent 1719.
Fraudulent action officers 1824.
Fraudulent attempt to vote 1827.
Fraudulent voting 1826.
Illegal acts 1826.
Illegal registering 1718.
Inspectors election, failure notify board unwillingness to serve 1772.
Interfering with election officers to prevent lawful action 1826.
Liquor, selling of, on election day 1830.
Making false certificate nomination 1859.
Marking ballot or stub for identification 1859.
Marking ballot unlawfully 1862, 1864.
Misconduct in signing or filing referendum or other petition, misdemeanor, when 6670.
Neglect of officer to file papers 1765.
Neglect officers perform election duties 1861.
Oath, false regarding ballot 1859.
Offering legislative or election bribes 6319, 6802, 6803.
Offering to appoint officer 1829.
Offering to procure appointment of officer 1829.
Officer election attempting influence vote 2814.
Officer election attempting obtain information ballot 1828.
Officer tampering with nomination papers 1765.
Penal provisions general election applicable primary election 1765.
Prompting challenged voter 1731.
Registration, illegal 1718.
Registry agent, violation election laws, felony 1719.
Removal ballots from election place before closing polls 1862.
Reward to be offered for arrest violators election laws 1831.
Secretary of state, failure certify amendments 1842.
Selling liquor on election day 1830.
Soliciting elector to show ballot 1862.
Supplies, destruction of 1860.
Tampering with ballots or election material 1826.
To withdraw from referendum or other petition for compensation 6670.
Unlawful holding of office 1815.
Violation election laws, reward for 1831.
Violation primary law, punished same as other violations 1765.
Violation school election law 3294-3296.
Voting fraudulently 1826.
Voting more than once 1826.

ADJUTANT-GENERAL, ex officio lieutenant-governor, 4249-4250 (Const. 310)—
Certify list military service voters to secretary of state 1887.
Age qualification of candidates various offices 2766.
Age qualifications electors (Const.) 250.
Alien not to be naturalized thirty days before election 2519.
Appointed officers, who 2765.
Arrest, civil, forbidden on election day, when 253.
ASSEMBLY—
Composed, how 4111.
Convened, how 4112, 4113.
Members of elected 2765 (Const. 261).
Officers and attaches, whom 4115.
Sole power of impeachment (Const.) 334-337.
Speaker of, receive certificates nomination U. S. senator receiving highest vote 1758.
When convened 4113 (Const. 260).
ASSEMBLYMEN 2765 (Const. 260-261)—
Apportioned, how 4111.
Compensation, expenses limited (Const.) 291.
Election contest, conducted how 1818.
Eligibility (Const.) 263.
Nomination papers, contain what 1740.
Vacancy in, filled by special election, how, when 2797.
When elected 2779.
ATTORNEY-GENERAL 4128-4134 (Const. 312)—
Duty prepare necessary election forms 1766.
BALLOTS—
Applying for at wrong precinct, misdemeanor 1862.
Canvass, conducted, how 1755, 1791, 1792, 1796.
Canvass, by county commissioners 1757-1796.
Canvass, by district judges 1513.
Canvass, by justices supreme court 1797 (Const. 297).
Canvass by mayor, city and town elections 801.
Canvass, rejected, by inspectors election 1863.
Changing same after deposited, felony 1826.
Checked how, when voted, by whom 1754, 1890.
Contain, what 1844.
Cost, maximum allowed for printing 1840.
Counted, how, and preserved 1795.
Counting, tallied how 1794.
County clerks supply election precincts 1846.
County clerk to have printed 1840. See secs. 1843, 1847, 1855, 1897.
County commissioners to canvass 1757.
County high school, contain what 3414.
Custody, who to have when counted 1795.
Defaced or spoiled, disposed of, how 1752.
Destruction of 1860.
Different for voters out of town 1868.
Disclosing design or watermark on paper 1859.
Distributed, how 1748.
Districts, canvass how 1800.
Error in, ordered corrected, how, by whom 1763, 1847.
Error, technical, when not considered 1753.
Excess of poll list, disposed of, how 1793.
Expenses for and supplies, 1744, 1802, 1833.
False oath, making of, felony 1859.
Ballots—continued.
Filed on string, by whom, when, where forwarded 1795.
Folded and disposed of, how 1754.
Folded containing two ballots voted, marked how, and rejected 1792.
Form, color and size 1779.
Form, general election 1779.
Furnished by county 1744, 1833.
Furnished by secretary of state 1893.
Furnished to voters, how 1744-1849.
Inspection, subject to, by whom, when 1795.
Inspectors election, canvass rejected 1863.
Inspectors election, custody of 1877.
Irregular, thrown out, when 1858.
Kept how long after being cast, by whom, how, where 1795.
Kept in sealed packages, when 1876.
Legality of, determined how 1787.
Made, how 1844.
Marking for identification, felony 1858, 1859, 1864.
Marks, nullify, when 1753, 1858.
Military, official 1890, 1893.
Names rejected, when 1785, 1792.
New, obtained, how when spoiled 1854.
Not deposited, when 1856.
Not to be exhibited, 1784.
Number of, supplied per registered voter by county clerk 1846.
Number of, bound, how 1845.
Officer election attempting to obtain information of 1828.
Official, contain what 1868.
Official, primary, contain what 1747.
Official, primary, form of 1747.
Prepared before casting, how 1852.
Primary provided, how 1747, 1748.
Printed, where 1747, 1840.
Printing or furnishing imitation ballot paper, felony 1859.
Quality and character of 1747.
Recount ordered, when and by whom 1513, 1796.
Regulations as to voting 1754, 1852.
Rejected, canvassed how 1863.
Rejected, reason for indorsed thereon 1864.
Rejected, transmitted where 1863.
Removal from polls before closing, misdemeanor 1862.
Sample, distributed how, when 1748.
Sample, instructions to voter 1857.
Sample, primary, form of 1747.
Sample, primary, printed, how, contain what 1748.
Sample, posted where, when 1857.
Sample, voter entitled to 1857.
Sample, voter entitled to, primary 1748.
School election, form of 3291.
Sealed and transmitted by registered mail 1874.
Secretary of state furnish county clerks 1843, 1893.
Soliciting elector to show, misdemeanor 1862.
Spoiled, treated how 1752, 1854.
Subject to inspection, when 1795.
Supply, furnish and have printed 1893.
Taken from ballot-box, how, when, by whom 1792.
Time allowed to cast 1853.
Time canvass, when to begin and end 1791.

Ballots—continued.
Town candidates for town voters only 1869.
Transmitted by mail, when 1874-1877.
U. S. senator, contain what, designated how 1897.
Voted, how 1747, 1754, 1852.
Voter, physically disabled, mark, how 1855, 3295.
Voter, number of entitled 1752, 1854.
When error or omission in, corrected how 1763, 1847.
Written and printed names for same office, which to be rejected 1786.
BALLOT-BOX—
After election, where to be kept, by whom 1795.
Care of 1778, 1782, 1795.
Custody of 1783, 1795, 1877.
Form of 1778.
Furnished by county commissioners 1777.
Inspectors receive, how, when 1788.
Betting on, misdemeanor 1788.
BOARD OF CANVASSERS. *See Canvass of Votes*—
City and town elections, who 1513.
County commissioners, to act when 1513.
County elections, who 1513.
District judge 1513.
Duties of 1513.
Duties of, concerning military vote 1892.
Justices of supreme court, when to meet 1797 (Const. 297).
Members of 1513.
State election, who 1892 (Const. 297).
BOARD COUNTY COMMISSIONERS 1501-1534 (Const. 284)—
See County Commissioners.
BOARD OF ELECTION. *See Election Officers*—
Appointed, how 1773-1857.
Compensation, by whom paid 1750-1796.
Duties of 801, 1857, 3298.
BOARD OF EXAMINERS—
Order amendments published 1878.
Bonds, official 805, 2868-2879.
Books for, prepared 1706, expense 1744, furnished, how 1726, signature elector, when challenged must sign 1731, transfer contain names electors transferred 1730.
BOOTHS—
Character of 1850.
County commissioners to provide 1850.
Number of, determined, how 1850.
Persons occupying, number of 1853.
Time occupying 1853.
Bribery or intimidation 1829, 2814, 6802, 6803, 6319 (Const. 285).
By the people to be by ballot (Const.) 254.
By the legislature to be viva voce (Const.) 254.
CANDIDATES. *See Nomination; Nomination Papers; Conventions*—
City and town, elected, how 801.
Convention, members of 1760.
County clerk to publish list of 1745, 1746.
County, nomination papers, contain what 1740.
County, nomination papers, filed where, when 1740-1741.
Duty secretary of state certify names to county clerks 1745.
Elected, how 801, 1758.
Candidates—continued.
Error or omissions on ballot, may have corrected, how, when 1763, 1847.
Fees, filing nomination papers 1742.
For delegates to national convention 1760.
Independent, nominated otherwise than by convention 1737, 1836.
Independent, not prohibited being voted for at general election 1740.
Legislative, declaration of as to U. S. senator 1740.
List of, published 1746.
Names placed on official ballot, when 1758.
Nominated, county, convene formulate county platforms, how, when, where 1759.
Nominated, convene, formulate state platforms, how, when, where 1760.
Nominated, how 1737.
Nominated, when 1738, 1758.
Proxies, members of convention can be represented by 1760.
State, nomination papers, filed when, where 1740, 1741.
Statements, form of 1740.
To receive official nomination certificates from whom, when 1758.
U. S. senator, nominated, how 1737, 1896.
Canvass state officers (Const.) 297. *See Canvass of Votes.*
CANVASS OF VOTES—
By county commissioners 1513, 1757-1796.
By district judges 1513.
By inspectors of election 1863.
By judges of election 1756.
By justices supreme court 1797 (Const. 297).
By mayor and council 801.
Cities and town officers, by whom, when 801.
Compiled by whom 1757, 1796.
Conducted, how 1756.
Constitutional amendments 1881.
District judge to canvass legislative candidates and county commissioners 1513.
District officers, how 1892 (Const. 297).
Legislative candidates, how, by whom, when 1513.
Made how 1756, 1796, 1891.
Manner of canvass 1513, 1792, 1796.
Military 1891.
Military service 1887, 1893.
Military, transmitted, how 1891.
Official, U. S. senator, transmitted, how 1898.
Presidential electors 1797.
Public 1791.
Rejected, on separate sheets 1863.
Returns, compiled by whom 1757.
Reviewed by whom 1796.
State officers, how 1892 (Const. 297).
Soldiers and sailors 1887, 1891.
Tally lists, kept, how 1756.
Time state returns canvassed (Const.) 297.
Transmitted secretary of state 1797, 1893.
When all ballots counted, military service, sealed, transmitted, how, opened when, by whom 1891.
When to be begun 1791.
CENTRAL COMMITTEES—
Chosen, how 1759, 1760.
County, organized, when, where 1759.
County, vacancy in, filled, how 1759.
Proxies, qualifications of 1760.
State, organized when, where 1760.

Central committee—continued.
State, vacancy, filled, how 1759.
Vacancies on ticket, filled, when, by whom 1761, 1839.
CERTIFICATES—
Election 1513, 1796, 1797, 2794.
Election, county committeemen 1758.
Election, city officers, issued how, by whom 801.
Election, issued how 1513, 2793.
Election, issued to whom 1810.
Election, issued officers elected, when, by whom 1796, 1797, 2794.
Election, state officers, members legislature, county precinct officers, issued by whom 1513, 2794.
Electors, choice precincts on certificates or affidavit 1714.
Filed with county clerks for county and district offices 1837.
Filed with secretary of state, state offices 1837.
Form of, military service 1890.
Identification, for election day 1731.
Naturalization produced when 1711.
Nomination, county and district offices filed with county clerk 1837.
Nomination, false or fraudulent 1859.
Nomination, published, when 1841.
Nomination, form of 1740, 1758.
Nomination, issued how, when, by whom 1758.
Nomination, issued and transmitted 1758.
Nomination filed with secretary of state 1791.
Nomination U. S. senator, transmitted to speaker assembly 1758.
Returns, military service 1890.
CERTIFICATES ELECTION—
Certificate not to be withheld on account of technical defect, when 1798.
City officers, issued how, by whom 801.
Congressman 2794.
County clerks 1796.
County clerks issue when ordered by county commissioners 1513, 1796.
County committeemen 1758.
County officers 1513, 1796.
District judges 2794.
Governor certify election U. S. senator to president senate 1905.
Governor issue state officers, when 1797,2794.
Governor issue after canvass by justices of supreme court 1797.
Issued after election contest 1810.
Issued by county clerks to whom, how, when 1513, 1796.
Issued by county commissioners, how, to whom 1796, 2794.
Issued persons receiving highest number of votes 1797.
Issued members legislature 2794.
Issued when counties united in one senatorial, representative or judicial district 1800.
Limitations of actions in election contests 4972-4973.
Members of legislature 1513, 1796.
Papers to be served, how, when 1811, 1815-1820.
President senate certify election U. S. senator to governor 1913.
Certificates election—continued.
School trustees, issued to whom 3299.
Speaker assembly certify election U. S. senator to governor 1913.
State officers 1797, 2794.
Township officers 801, 1796.
U. S. senator 1913.
Withheld on account of defect or informality, when 1798.
CERTIFICATES NOMINATION—
Candidates, county, filed where, with whom 1837.
Candidates, state, filed with whom 1837.
Certified, how, when, by whom 1835.
Chairman convention to sign 1835.
Destroyed, felony, when 1859.
Fees for filing, nomination papers various candidates 1742.
Filed, when and where 1839.
Filed with county clerk, when 1839.
Filed with secretary of state 1839.
Issued, how 1758.
Issued to whom 1758.
Making false or fraudulent, felony 1859.
Oath chairman convention, attached to 1835.
Oath secretary convention, attached to 1835.
Otherwise than by convention, made how 1836.
Restrictions in making 1838.
Secretary of convention to sign 1835.
Transmitted, how 1758.
U. S. senator, filed, when 1897.
CERTIFICATES RETURNS—
City and town elections, kept where, by whom 801.
Military service, form of 1890.
Certificates of transfer of vote, how secured, by whom issued 1714.
CHAIRMAN POLITICAL PARTY—
Receive result election returns 1757.
Selected, how 1760.
CHALLENGE—
General election, made to voter, how 1790.
Oath administered challenged voter at polls 1790.
Oath administered challenged voter school election 3296.
Polls 1717, 1790.
Primary election, made to voter, how 1752.
Prompting challenged voter, penalty 1731.
Registration, made how 1712.
School election, made to voter, how 3296.
Voter, qualify how, after being challenged 1731.
CHECK LISTS—
Furnished by registry agent 1717.
Vote cast, checked when, by whom 1754.
Voter, name must appear thereon 1717.
CITIES AND TOWNS 801-805—
Bond and oath 805.
Canvass of votes, by whom, when 801.
Contest, conducted how, where 801.
Oath, taken when 805.
Special election, city and town, conducted, how, held, when 801.
Civil process suspended on election day (Const.) 253.
CLERKS ELECTION—
Appointed, how, by whom 1773, 1849.
Charge of ballots election day 1849.
Compensation of 1796, 1802.

Clerks election—continued.
Duty regarding spoiled or canceled ballots 1854.
Inspectors election administer oath, when 1775.
Prying into secrecy of ballot 1828.
Service, form of 1773.
Trying to control vote 2814, 2815.
CLERK SUPREME COURT 2776 (Const. 380)—
Elected, by whom 2773.
Commission of office, person elected entitled to 2796.
COMPENSATION—
Members of legislature (Const.) 291.
Officers, city 814.
Officers, county 1501-1701.
Officers, general election 1796.
Officers, primary election 1750.
Officers, school election 3283.
County board education, elected, how, who 3418.
County central and executive committees, selected, how 1760.
County high school, established, how 3413-3415.
Constitution of Nevada 226-427.
Constitution of United States 86-190.
Constitution, state, amended, how (Const.) 383, 384.
CONSTITUTIONAL AMENDMENTS—
Canvassed, how 1881.
How submitted to voters, by whom, when 1842.
Proposed, when 1878.
Published, how long 1842, 1878, 1879.
Secretary of state to certify 1842.
Submitted to voters 1878-1881.
CONTEMPT—
Disobeying mandate justices supreme court or district judges, to correct errors or omissions 1763.
CONTEST. *See Election Contest.*
CONVENTION—
County candidates, formulate platform, convene where 1759.
Defined 1834.
Delegates selected for national convention, how 1737, 1760, 1834. See note under Primary Elections.
Joint convention both houses legislature (Const.) 292.
Legislature in joint convention, proceedings 1908-1914.
National, delegates to, elected, how, where 1737, 1760, 1834. See note under Primary Elections.
State candidates, formulate platform, convene, where 1760.
County and township officers, special laws affecting election of, prohibited (Const.) 278.
COUNTY CLERKS (Const. 290) 1613, 1614.
Candidates' fees, disposed of, how 1743.
Certificates nomination to file 1837, 1839.
Certify registry list to secretary of state 1735.
Constitutional amendments, copies of, mailed voters 1879.
Custody of ballots 1795.
Custody of ballots, not to have when a candidate 1795.
Data insert in official ballots 1868.
County clerks—continued.
Disposal of fees received from candidates 1743.
Duties concerning election contests 1805, 1811, 1818, 1820.
Duty concerning placing names of candidates on official ballots 1868.
Duty concerning publication constitutional amendments 1842, 1868, 1879.
Duty file certificates nomination county officers 1837.
Duty forward notices to registry agents 1770.
Duty issue certificates of election legislative candidates and county commissioners, when 1513.
Duty keep record rejected ballots, returns and results election 1763.
Duty print ballots 1840.
Duty publish list of candidates to be voted for how, when 1745, 1746.
Duty publish questions submitted by referendum petition 1884.
Duty transmit complete list registered voters to secretary of state 1735, 3981.
Duty transmit election contest papers to legislature, when 1820.
Duty transmit papers secretary of state election contest, when 1820.
Elected, when 2781.
Error, duty to correct in ballots, how, when 1847.
Failure comply with provisions regarding certification of amendments 1842.
Fees of candidates, disposed of, how 1743.
Fees, election contest case secured, how 1811.
Fees, for filing nomination papers 1742.
File list registered voters sent by registry agent 3981.
Furnish adjutant-general list registered voters, how, when 3981.
Furnish election officers election laws 1832.
Furnish poll books and supplies 1769.
Furnish registration lists to inspectors 1713.
Issue certificates of election 1513, 1796.
Mail to voters copies newspapers containing proposed amendments 1879.
Manner of election, by whom 2773.
Notices of election (special and general) to give, how 1770.
Prepare abstract votes, furnish copy to secretary of state 1797, 1799, 1881.
Prepare statement result primary, forward to secretary of state 1757.
Primary nomination papers to be filed with 1741.
Provide ballots for primary 1747, 1748.
Provide election officers with ballots 1848.
Provide election precincts with ballots 1846.
Provide printed ballots 1843, 1846, 1848, 1868.
Publish list candidates and offices to be filled, primary election 1739.
Publish candidates, primary 1745, 1746.
Publish list nominations 1841.
Publish notice primary election 1739.
Registry lists filed with by registry agents 1734, 1735, 3981.
Record, must keep result returns transmitted by inspectors election 1863.
Sample ballots, cause to be printed how, when 1857.

County clerks—continued.
Supervise printing of ballots 1840.
Supply number ballots per registered voter 1846.
Transmit abstract votes to whom 1801.
Transmit to city treasurer fees received from candidates 1743.
COUNTY COMMISSIONERS 1501-1534 (Const. 284)—
Appoint deputy sheriffs to preserve order 1789.
Appoint inspectors election, when 1768.
Appoint registry agent, when 1705, 1721, 1725.
Appointed by governor, when 2805.
Canvass election returns, when 1513, 1757, 1800.
Canvass votes, how, when, where 1796.
Certificates of election, cause to be issued, how, when 1800.
Constitutional officers (Const.) 284.
Declare county offices vacant 2802.
Duty to establish election precincts 1768, 1508.
Errors or omissions on ballots ordered corrected, how, when 1847.
Failure transmit abstract votes secretary of state 1797, 1847.
Make temporary appointment officers, when 2805.
New election to order, when 1796, 2797.
Notice election, form of 1770.
Notice election, must order given, when 1770.
Power to appoint registry agents 1705.
Proclaim and publish constitutional amendments, how, when 1880.
Provide booths for voting, character of 1850.
Provide election stationery 1706.
Recount on account tie vote ordered, when 1796. *See Recount.*
Supply ballot-box 1777.
Supply official register and stationery 1726.
Tie vote, county officers, to determine 1796.
Tie vote, members assembly and senate, determined, how 1796.
Vacancy in, filled how, when 1501, 2805.
COUNTY COMMITTEEMEN—
Executive and county committees, chosen how 1709.
Issue certificate of election 1758.
County government 1501-1529 (Const, 284).
County officers, elected by whom 2773. *See County Government.*
County officers, manner of election 1531-1534.
Cumulative voting, when allowed election directors 1124.
Delegates. *See Convention, post.*
DEPUTY SHERIFFS—
Appointed to preserve order, how, when 1789.
Directors of corporation elected, how 1130. *See Corporations.*
DISTRICT ATTORNEY 1593-1607—
Duty bring action unlawfully holding office 1814, 1815.
Duty when defendant arrested for usurping office 1815.
Elected, by whom 2773.
Elected, when 1593, 2781.
Vacancy, filled, how 1607.
DISTRICT COURTS—
Judicial districts established 4901.
District courts—continued.
Jurisdiction certain contests 1806.
Power make order election directors of corporations, how, when 1130.
Time of holding (Const.) 322.
DISTRICT JUDGE 2778, 4901 (Const. 320-326).
Authority correct official ballot 1763.
Canvass votes, legislative candidates and county commissioners 1513.
Elected, by whom 2773.
Elected, when 2778.
Ineligible to other office during term (Const.) 326.
Offices contested, when 1813.
Order arrest usurper office 1815.
Order contestants proceed with contest, when 1764.
District returns, made how 1800.
Disqualified from holding office, who (Const.) 268.
ELECTION—
Assemblymen, elected, when 2779.
Board, receive original official register 1729.
By ballot (Const.) 254.
City and town officers, conducted how 801, 1866.
County high schools 3413-3415.
County officers, elected, when, by whom 2781.
Defined 1736.
Directors of corporations, how, when elected 1117, 1121, 1123, 1129.
Distinguished from primary 1736.
District judges, elected, when 2778.
General 1767-1832.
General, city, county, township, primary, terms construed 1736.
General, form of notice 1770.
General, held when 1767 (Const. 373).
Irrigation district bond issue, election, how conducted 4786.
Irrigation officers of irrigation district, how elected 4786. *See Water* 4672-4791.
Legislators, vote viva voce (Const.) 254.
New, when may be held 1796, 1848.
November, defined 1736.
Officers, appointed, when, by whom 1750, 1768, 1773.
Officers, compensation of 1750, 1796.
Officers, precinct, elected, by whom 2773.
Officers, presence required polling places 1755.
Polls, opened and closed, when 1749.
Presidential 1736.
Primary 1736-1766.
Primary, date of 1738.
Primary, defined 1736.
Primary, when not held for certain officers 1737.
Primary, other than in September, held, when 1738.
Returns, form of, aggregate 1794.
Returns, transmitted board county commissioners 1713.
September primary, defined 1736.
State officers, elected by whom 2773, 2774.
State senators, elected, where 2780.
Stationery, provided by county commissioners 1706.
School trustees 3278-3313.

Election—continued.
Supplies and ballots provided, how 1726, 1744.
Township officers, elected, by whom 2723.
Elector, qualifications 1724, 2764; territorial act 196 (Const. 250). *See Voter.* Presidential, qualifications (U. S. Const.) 141.
Electoral year defined 1710.
ELECTION CONTEST—
Brought, when 1894.
Candidates for nomination at primary, when 1764.
Causes of 1803.
Certificates of election issued after contest, to whom 1810.
City officers, conducted, how, when, where 801.
Clerks' fees 1811.
Complaint, contains what, form of 1805.
Conduct of, members legislature 1818.
County and township officers 1803, *et seq.*
County clerk transmit all papers members legislature 1820.
Courts having jurisdiction various offices 1806.
Damages recoverable usurpation office 1816.
Depositions, contestants may take, how and when 1822.
Defendant may be arrested, how, when 1815.
Dismissal for want of form prohibited 1807.
District attorney bring contest against unlawful holder office 1814, 1815.
District court, jurisdiction of 1806.
District judge, how and when heard 1813.
Fees, county clerk 1811.
Fees, sheriff 1811.
Fees, witnesses 1811.
Grounds for 1805.
Incumbent's title tried, how 1814.
Judgment, certificate election 1810.
Jurisdiction courts 1806.
Justices peace issue attachments, assess fines against witnesses 1819.
Justices peace issue subpenas, when 1819.
Justices peace take depositions, members legislature 1818.
Justices supreme court order contestants to proceed with contest, when 1764.
Limitation time, begins to run, when 1894, 1895.
Mandamus by district court remedy to compel documentary proof, when 1806.
Members legislature, conducted, how 1818.
Members legislature, duty secretary of state 1821.
Misconduct of inspectors election, effect of 1804.
Nomination, proceeded with, how 1764.
Notice of 1808.
Office, when declared vacant 1812.
Person unlawfully holding office arrested, when 1815.
Presiding officer in legislative branches to give notice of depositions and papers in election contest for member of legislature 1821.
Primary election candidate may contest nomination, when 1764.
Proceeded with, how 1764.
Quo warranto 5656-5682.
Secretary of state, duty deliver papers, how, when, to whom 1821.
Election contest—continued.
Several persons claiming office, determined, how 1817.
State officers, who may bring, how 1823, *et seq.*
State senator, conducted, how 1818.
Statement of, not to be dismissed for want of sufficiency, when 1807.
Subpenas issued by justices of peace, when 1819.
Subpenas witnesses, procured, how 1809.
Testimony in writing 1820.
Time and place of hearing, fixed, how 1808.
Time for filing 1805.
Time for contest or recount commences to run 1894, 1895.
Who may contest 1803.
Witnesses, subpenaed how 1809.
Election returns. *See Returns.*
Electoral year defined 1710.
ERRORS. *See Ballots*—
Corrected, how, when 1763, 1847.
EXCESS BALLOTS—
Excess of poll list, disposed of, how 1793.
Federal office holder disqualified to hold office, when (Const.) 267, 305.
Expenses 1802, 1744, 1833.
FEES (*See also Compensation*) 1994-2004, 2046—
Clerks, election contest 1811.
County clerks filing nomination papers 1742.
Filing nomination papers, various state, district, county, federal candidates 1742.
Received from candidates, disposed of, how 1743.
Secretary of state, duty concerning fees received from state candidates 1743.
Secretary of state, filing nomination papers 1742.
State treasurer, duty concerning fees received from state candidates 1743.
Witnesses, election contest 1811.
Felonies. See Acts Prohibited and Punished, under title Elections.
Form of ballot, general election 1779.
Form of ballot, primary election 1747.
Form of ballot, school election 3291.
Form of ballot, special election 801, 805.
Form of nomination certificate 1740.
Form of notice, general election 1770.
Form of notice, primary election 1739.
Form of notice, school election 3291.
Form of notice, special election caused by tie vote 1796, 1797.
Form of notice, election presidential electors 2769.
Fraudulent acts. See Acts Prohibited and Punished, under title Elections.
Fraudulent interference with, what, punished how, See Acts Prohibited and Punished, under title Elections.
GENERAL ELECTION 1767-1832. *See Elections; Primary Election; Voters*—
Date of 1767 (Const. 373).
Laws applicable primary election offenses 1765.
Laws govern primary election 1751.
Notice, form of 1770, 1880.
Registration 1707-1712. *See Registration.*
Registration for primaries sufficient for general election 1733.

GOVERNOR 2765, 2773, 2774 (Const. 295)—
Appoint county commissioners, when 1501, 2805.
Call special session legislature, how, when (Const.) 260.
Certify election U. S. senator to president U. S. senate 1905.
Convene joint convention, when 1911.
Elected, by whom 2773.
Eligible to office (Const.) 296.
Federal officer disqualified office of governor (Const.) 305.
Fill vacancy member Congress, how (U. S. Const.) 91.
Fill vacancy member legislature, how 2797.
Fill vacancy state office 2808, 2812 (Const. 301, 406).
Issue writ of election, when 2797 (U. S. Const. 91).
Offer reward, arrest and conviction violators election laws 1831.
Order new election, when 1848.
To grant certificate election and commissions officers elected 1797.
Transmit certificate election U. S. senator 1913.
Vacancy occurring in board county commissioners, filled, when 1501, 2805.
Vacancy occurring in office U. S. senator, to fill, how 1903, 1904 (U. S. Const. 94).
Vacancies, constitutional authority to fill, how, when (Const.) 301, 406.
High schools established, how 3413, 3415.
HOURS OF ELECTION—
Designated, city 801.
Designated, general 1776.
Designated, primary 1749.
Designated, school 3284.
Identification certificate for election day 1731.
Identification may be required of voter, when 1717.
Identification oath to take when refused right to vote on transfer 1730.
Identification statement required when 1727.
Illegal acts 1826. See Acts Prohibited and Punished, under Elections.
Illegal registering 1718.
Illegal voting 1826.
Impeachment from office (Const.) 334, 335, 336.
INDEPENDENT CANDIDATES—
Not prohibited being voted for at general election 1740.
Nominated otherwise than by convention, how, procedure 1836. *See also sec. 1737.*
Index books, registry agent to furnish 1713.
Initiative and referendum, procedure (Const.) 412, 413. *See Referendum.*
INSPECTORS OF ELECTION—
Administer oaths 1775.
Appoint clerks of election 1773.
Appointed, how, when 1768.
Ballot-boxes, receive, how, when 1778.
Canvass rejected ballots separate sheets 1863.
Clerks of election take oath under 1775.
Compensation of, per diem 1796, 1802.
Compensation mailing returns 1875.
Custody ballot-box, when 1877.
Duty compare poll list 1787.
Duty notify governor call new election, when 1848.
Inspectors of election—continued.
Duty seal and transmit ballots by registered mail 1874.
File cast ballots on string, how, when 1795.
Make and file returns, how, when 1795.
Misconduct of, cause for contest, when 1795.
Notify county commissioners unwillingness to serve 1772.
Oath taken, form of 1774.
Penalty failure to notify county commissioners unwillingness to serve 1772.
Post bulletins result ballots cast candidates and questions submitted 1873.
Post result of returns, how, when 1863.
Prying into secrecy of ballot, felony, when 1828.
Receive special register 1713.
Rejected ballots, how to mark 1864.
Retain identification statements of electors 1728.
Require identification certificate, when 1717.
Transmit election returns and other data to clerk board county commissioners 1713, 1795.
Transmit rejected ballots county commissioners 1863.
Transmit result candidates and questions submitted to county commissioners 1863.
Transmit strung ballots cast, tally lists, poll books, clerk of board of canvassers, when 1735.
Trying to control vote 2814, 2815.
Inspector of mines, office created, elected, how 2773, 4198-4239.
INSTRUCTIONS TO VOTERS—
Contain what 1747.
Given to voters, when 1752.
Sample ballots 1857.
Irregular ballots thrown out, when 1858.
Irrigation bonds election, how held, and election of irrigation district officers, 4786. *See Water* 4672-4791.
JOINT CONVENTION, both houses legislature (Const. 292)—
Adjourn, when majority not present 1910.
Causes for adjournment 1910.
Certificate of election, issued by whom 1913.
Convened how, by whom 1911.
Election U. S. senator, who to convene, when 1911.
Governor to convene, when 1911.
Held, how 1909.
Legislature elect U. S. senator, how (Const.) 292.
Majority necessary to elect 1909.
Presiding officer 1912.
Proceed to elect U. S. senator, when 1908.
Temporary appointment U. S. senator, how, transmitted 1914.
Voting viva voce 1909.
JUDGES ELECTION—
Duty to canvass votes 1756.
JUSTICES OF PEACE 2782-4852 (Const. 297)—
Duty certify and transmit all papers election contest, members legislature, to county clerk 1820.
Duty take depositions witnesses in election contest between members legislature 1818.

Justices of peace—continued.
Empowered to issue subpenas for witnesses election contest, when 1819.
Ex officio registry agent 1705.
Issue attachments, assess fines, election contest 1819.
Number of, determined by legislature (Const.) 323.
JUSTICES SUPREME COURT 2275-4830 (Const. 318)—
Attorney at law, must be 525.
Authority correct error official ballot 1763.
Canvass state votes, when 1797 (Const. 297).
Chief justice, presence necessary opening returns military vote 1791.
Chosen how, when 2775, 4830 (Const. 318).
Ineligible to other office during terms (Const.) 326.
Jurisdiction to hear certain contests 1806.
Order contestants proceed with contest, when 1764.
Order error corrected in ballot, when 1763.
Vacancy, filled how 4831 (Const. 406).
Legal residence defined 3609. *See secs. 3610-3616; Const. 250, 251.*
Legislature amend constitution, how, when 383, 384.
Legislature, determine number justices of peace (Const.) 323.
Legislature elect in case of tie vote 1797.
Legislature elect U. S. senator, joint convention (Const.) 292.
Legislature to make provision for election U. S. senators and representative in Congress 100.
Legislature to make provisions for preserving purity of elections and manner of holding 255.
Legislature to make provision for registration of voters (Const.) 255.
Legislature special session, called, how, when, by whom (Const.) 260.
Lieutenant-governor 2765, 2773-2774 (Const. 310).
List, registry, forwarded secretary of state, when 1735.
List, registry, printed when, paid for, how 1720.
List, tally, canvass kept, how 1756, 1795.
List, voters, printed 1720.
List, voters, school election 3287.
Liquor, disposed of on election day, punishment 1830.
Mandamus, compel registration 1710, 1712.
Manner of voting 1753, 1780, 1852.
Mayor and city officers, elected how, when 801, 805.
Messenger getting returns, compensation 1799.
Military service, vote cast how, canvassed, counted, when 1887-1893.
Mileage, messenger getting returns 1802.
Misdemeanors. See Acts Prohibited and Punished, under title Elections.
Mode of voting 1752, 1852.
Names, rejected, when 1785.
National convention, delegates selected, how, when, where 1737, 1760. See note under Primary Elections.
Naturalized citizen 1711.
Naturalization certificate 1711.
Naturalized, alien cannot be 30 days before election 2519.
Naturalization procedure 2506-2544.
New constitution, legislature recommend vote upon (Const.) 384.
New election, on tie vote, ordered when, by whom 1796.
NEWSPAPERS—
Publish proposed amendments 1879, 1842, *See Notices.*
Publish candidates city offices, primary election 1748.
Publish list candidates to be voted for primary election, when, where 1745-1746, 1748.
Publish nomination of candidates, various offices, when, how long 1841.
Publish registration of voters, when, how long 1708.
NOMINATION—
Candidates, for most all offices, see secs. 1737-1740, 1834-1836.
Certified, how 1835.
City candidates, papers filed where 1741.
Congressman, papers filed where 1741.
Contested at primary, proceeded with, how 1764.
Contested, proceeded with, how 1764.
County candidates, papers filed, where 1741.
District candidates, filed where 1741.
List of, published by whom, when 1891.
Made, how 1834.
Otherwise than by convention, made how 1836.
Papers, failure of officers to file, punishment 1765.
Papers, fees for filing 1742.
Papers, form of 1740.
Papers, U. S. senator, filed where 1741.
Published, when, where 1841.
Restrictions in making nominations 1838.
Statements, candidates, contain what 1740.
State officers, papers filed, where 1741.
State senator and assemblyman, papers contain what 1740.
U. S. senator, how 1896.
Vacancies in, filled how 1761, 1839.
Nominees. *See Nomination; Candidates; Nomination Papers.*
NOMINATION PAPERS—
Candidates, city, filed where 1741.
Candidates, county, filed where 1741.
Candidates, district, filed where 1741.
Candidates' statements, contain what 1740.
Congressman, filed where 1741.
Failure officer to file, punishment 1765.
Fees for filing 1742.
Filed when, where 1740, 1741.
Form of 1740.
Making false 1859.
State officers, filed where 1741.
State senators and assemblymen, contain what 1740.
U. S. senator, filed where 1741.
NOTICE, ELECTION—
Form of 1770.
Officers, generally 2769.
Posted, how 1771.
Presidential electors, given how 2769.
Notice expiration time registration, published, when 1708.
Notice new election, given how, when 1796.

Notice primary election, published when, where 1746.
Notice registration voters, published when 1708.
OATH—
Administered by clerks of election 1775.
Administered by registry agent, authority for power 1705.
Administered challenged voter, form of 1790.
Administered challenged voter, school election 3296.
Administered voter, nature of 1709.
City and town officers 805.
Chairman convention attach certificate nomination 1835.
Defined 6353.
Deputy required take same as principal 2792.
Elector desiring transfer 1714.
Elector must take when challenged touching identity 1780.
Elector, required of, when 1710.
Elector, testing right to register 1710.
False, deemed felony, when 1859.
False, punishment therefor 1719.
False, regarding ballot 1859.
Form of official 2891 (Const. 370).
Form of, subscribed by registry agent 1715.
Identification, take when refused right to vote on transfer 1730.
Indorsed on election commissions 2791.
Inspectors and clerks, form of 1774.
Inspectors election to administer 1775.
Naturalized citizen, character of 1711.
Officers elected, taken where 2788-2790.
Official, governor, taken when, before whom 2789.
Perjury, when false before registry agent 1719.
Refusal to take, misdemeanor 1825.
Registry agent, subscribe, form of 1715.
Secretary convention attach to certificate of nomination 1835.
Taken by officers election 2786.
Transferred voter, taken how 1730.
Voter physically disabled must take to secure assistance 1855.
Voter required to answer questions under, when 1780.
Offering appointment by candidate, felony 1829.
OFFICE—
Females, eligible to hold, which (Const.) 371.
Who eligible to hold (Const.) 371.
Who not eligible to hold (Const.) 267, 268.
State, vacancy filled, how (Const.) 406.
To be kept at seat of government (Const.) 380, 2774, 4128.
OFFICERS. *See County Officers; State Officers*—
Age to be eligible to different offices 2766.
Bonds required, filed when, where 2786.
Compensation, primary election 1750.
County, elected by who 2773.
Election, fraudulently attempting to obtain information ballot 1828.
Election, interfering with ballot 1826.
Election, general, who appoint, how, when 1750, 1768, 1773.
Election, primary, presence required at polling places 1755.
Election, primary, who 1750.
Females entitled to be certain officers (Const.) 371.
Officers—continued.
Impeachment of 334, 335, 336.
Must keep office at capital, who (Const. 380), 2774, 4128.
Precinct, elected by whom 2773.
Reside at capital, who 2774, 4128, 4249.
Residence (Const. 380) 2774, 4128, 4249.
Resignation allowable 2797.
Resignation, made how, to whom 2798.
State, elected, by whom 2773.
State, election contested 1823, et seq.
State, nomination papers, contain what 1740.
State, prepare forms primary election 1766.
State, qualify when (Const.) 402.
State, who must keep office seat of government (Const.) 380.
Township, elected by whom 2773.
Qualifications of, generally 2766-2847.
Official bonds 805, 2868-2879.
OFFICIAL REGISTER—
Certified copy of, deposited with clerk board of canvassers 1795.
Contain, what 1706, 1713.
Copied, how, when, by whom 1713.
Copies of delivered to inspectors election 1713.
Copies of placed at polling places 1729.
Data to contain 1726.
Electors' names must appear therein 1780.
Electors' names not on register, not entitled to vote 1717.
Number of, required to be printed 1726.
Original delivered to election board 1729.
Registry agent must furnish copies to officers primary election 1751.
Size of 1726.
Supplied by whom 1726.
Transfer of vote from, secured how 1714.
Voter, name not on, when entitled to vote 1714.
Voter not entitled to vote if name not on 1717.
Penal provisions general election laws applicable to primary election 1765. See Acts Prohibited and Punished, under title Elections.
Physical disability voter, warrants assistance, when 1859, 3295.
PLATFORMS—
County, how, when, where formulated 1759.
State, how, when, where formulated 1760.
Police, state, prohibited from participating in politics 4281.
POLITICAL PARTY—
Candidates, voted for, how 1753.
Chairman, selected how 1759, 1760.
Chairman to receive result election returns 1757.
Poll books, kept how, where, by whom 1795.
POLL LIST—
Compared by inspectors election 1787.
Secretary of state supply commanding officer 1893.
POLLS—
Adjournment of, taken how 1776.
Books for, care of 1782.
Books furnished and distributed 1769.
Closed, when 1872.
Military vote, how, where conducted 1889.
Opened continuously between what hours 1755.
Opened and closed, how, when 1776.

PRECINCTS—
Established or altered, how, when, where 1768, 1865.
Not to have more than 480 voters 1768, 1865.
Officers, elected by whom 2773.
Presidential electors 2767-2771 (U. S. Const. 141-143).
President senate act as governor, when 2808; elected, when 2809.
Presiding officer of legislature to give notice of receipt of depositions and papers in election contest for member of legislature 1821.
Presumption of abandonment of residence 3614. See secs. 3609-3616. *See Residence.*
PRIMARY ELECTION 1736-1766. *See Elections; Candidates; Officers.*
[NOTE—For primary election of delegates to convention to elect delegates to national conventions, see Stats. 1883, p. 28; Cutting's Compiled Laws, secs. 1678-1692; continued in force by Revised Laws 1737.]
Ballots for primary, provided how 1747, 1748. *See Ballots.*
Canvass of returns made when, where, by whom 1757.
Compensation, officers, primary election, same as officers general election 1750.
Defined 1736.
Fees for filing nomination papers with county clerk 1742.
Fees for filing nomination papers with secretary of state 1742.
General election laws to govern 1765.
Held, when 1738.
Notice of, issued by county clerks 1739.
Notice of, published how and when 1745, 1770, 1880.
Officers to be same as provided for general election 1750.
Qualifications for registration 1751.
Registration at primary sufficient for general election 1733. See secs. 1710 and 1715 under title Registration.
Sample ballots, distributed by whom, how 1748.
September primary election defined 1736.
Supplies, furnished how 1706, 1726, 1744.
Tie vote, determined how 1762.
Time to register 1751.
Vacancies occurring after, filled how 1761.
QUALIFICATIONS—
Of candidates for member of Congress (U. S. Const.) 89.
Of officers generally, 2765-2847.
Of voters (Const. 250-251) 1724.
Of U. S. Senator (U. S. Const.) 95.
Questions raised by referendum printed on ballot 1885.
Quo warranto, action, proceedings 5656-5682.
RECOUNT—
Candidates defeated by ten votes or less can demand, how 1513.
Candidate, when may and must demand 1513, 1796, 1895,
County commissioners to order, when 1513, 1796.
Tie vote, entitled legislative, district and township candidates to, when 1796.
REFERENDUM (Const. 412-413)—
Allowed, number of petitions to circulate 1883.
Referendum—continued.
Carried, how and when 1886.
Initiative, procedure (Const.) 412, 413.
Law regulating 1882-1886.
Misconduct in signing or filing petition, misdemeanor, when 6670.
Perfected, how 1882.
Petition, contain what 1882.
Petition, verified 1883.
Put to voters 1885.
Questions raised by, printed on ballots 1885.
Required 1883.
Verified, oath 1883.
Votes necessary 1886.
Withdrawal of name from petition for reward, misdemeanor 667.
REGISTRATION 1705-1735. See secs. 1866, 1867 (Const. 255). *See Registry Agent*—
Challenges to voter registering, made how 1712.
Directions as to registration 1707.
Electors, deemed registered, when 1710.
Electors required (Const.) 255.
General election laws govern, 1751. See secs. 1710, 1714, 1733.
Illegal, punishment for 1718.
Legislature required to make provision registration of voters (Const.) 255.
List of registered voters furnished inspectors, when, by whom 1713.
Military services not required (Const.) 252.
Mandamus to compel 1710.
Naturalized citizen, questions propounded 1711.
Notice of expiration of time, published 1708.
Oath required, when 1710.
Objection, made, when 1712.
Primary, sufficient for general election 1733.
Qualifications necessary to vote 1706.
Qualifications to vote 1780.
Required (Const.) 255.
School trustees, qualifications, oath 3286.
Transfer, right to registration 1751.
REGISTRY AGENT. *See also Registration*—
Act, one may, for another 4926.
Advertise notice expiration time to register 1708.
Appoint deputy 1705.
Appointed by county commissioners certain cases 1705, 1721, 1725.
Chairman board county commissioners make appointment, when 1721.
Compensation 1705, 1716, 1734, 3981.
Compensation withheld until complete list registered voters sent to county clerk 1734, 3981.
County clerks furnish election notices to 1770.
County commissioners furnish stationery 1706.
Death of, successor appointed, how, when, by whom 1721.
Designate residence voters on official register 1867.
Directions as to registration 1707.
Duties of 1708, 1727.
Duty county commissioners make appointment 1705, 1721, 1725.
Duty regarding posting notices of election 1771.

Registry agent—continued.
Duty file with county clerks lists of registered voters 1734, 3981.
Duty to register voters, how, when 1707, 1709, 1710, 1727, 1866.
Duty to transfer voters, when, how 1714.
Expenses, paid how 1705, 1716, 1734, 3981.
Failure to qualify 1723.
False swearing before, deemed perjury 1719.
Form of election notices furnished registry agents 1770.
Furnish election officers, copy register 1751.
Furnish inspectors election check lists 1717, 1713.
Furnished official registers by county commissioners 1706.
Give voter certificate of transfer, when 1714.
Justices of peace ex officio 1705.
Oath, form of 1715.
Oath, form of administered to voter applying to be registered 1709.
Official register, books, stationery provided to, how 1706.
Penalty refusal perform duties 1712.
One may act for another 4926.
Post general election notices, how, when 1771.
Post notices registration certain cases 1708.
Power to administer oath 1705.
Prepare, print, publish registered names 1712.
Procure signatures electors 1727.
Publish notice expiration time to register 1708.
Punished, violation election duties 1719.
Qualifications of appointee 1722.
Questions propounded to voter 1710.
Report to county clerk persons subject to military duty 3981.
Resignation of, successor appointed, how when, by whom 1721.
Send county clerks complete list registered voters 3981.
Transfer given to voter applying, when, how 1714.
Transmit electors' identification statements to inspectors election 1728.
Voter to take oath before registry agent, form of 1709.
Who are ex officio 1705.
Removal of officer, vacancy filled, how 2801 (Const. 334-337). *See Vacancy.*
REPRESENTATIVE IN CONGRESS 2772, 2773 (U. S. Const. 88, 89, 100)—
Qualifications (U. S. Const.) 89.
Vacancy in office, filled, how (U. S. Const.) 91.
RESIDENCE 3609-3616 (Const. 250, 252). *See Officers—*
Actual, deemed to constitute 3609-3616.
Defined for registration purposes 1714, 1867.
Defined, for purpose of voting (Const.) 250-252.
Determined, fixed how 3610. See sec. 3609.
Elector, defined 1710.
Family abode, effect on 3615.
Legal, defined 3609 (Const. 250-252).
Lost, when 3613.
Necessary for naturalization 2517.
Officers to reside at seat of government, who (Const. 380) 2774, 4128, 4249.
Presumption abandonment of, when raised 3614.
Residence—continued.
Removal from one county or precinct to another 3612.
Removal from state with intent to remain, lost 3613.
Soldiers and sailors, for voting purposes, where (Const.) 252.
Transfer by elector, when 1714.
When not deemed gained or lost 3611 (Const. 251).
RESIGNATION—
From office, made how 2797-2798.
Filed, where 2795.
Vacancy in office made by resignation, filled how, see Vacancy.
RETURNS. *See Canvass of Votes; Board of Canvassers—*
Canvass of, compiled by whom 1513, 1757, 1797, 1892 (Const. 297).
County, commissioners to canvass for legislative, county and township officers 1513, 1757.
County offices canvassed, when 1513, 1797.
Defect or informality in, effect on certificate of election 1798.
Delayed, supplied, how 1799.
District judge canvass for legislative officers and county commissioners 1513.
Election returns, what to consist of, kept how, by whom, when 1795.
Messenger may be sent for 1799.
Military service 1889, 1891.
Military service, certificate of, form of 1890.
Where finally deposited after election 1795.
REWARD—
Offered by governor violation election laws 1831.
Road supervisor, election pertaining to 3037-3044.
SAILORS AND SOLDIERS—
Ballot to be official 1890.
Board of officers to count votes 1890.
Certificate, form of 1890.
Conducted, how 1889.
Duties board of canvassers 1893.
May vote (Const.) 252.
Registration, not required (Const.) 252.
Residence for voting purposes, where (Const.) 252.
Returns, canvassed how 1891.
Secretary of state furnish necessary ballots 1893.
Vote, when, where, and cast how, and canvassed 1887-1893.
SAMPLE BALLOT—
Distributed, how, when 1748.
Instructions to voters 1857.
Posted, where, when 1857.
Primary, form of 1747.
Primary, printed, contain what 1748.
Voter entitled to 1748, 1857.
SCHOOL TRUSTEES 3278-3313—
Ballots, contain what, number of 3291.
Board of election, duties of 3298.
Board of election, issue certificates, when 3299.
Candidates file names with county clerks 3297.
Certificates of election, to whom issued 3299.
Election officers, appointed, how 3283.
Hours of election 3284.

School trustees—continued.
Illegal voting punished, how 3296.
Instructions as to voting 3293.
List voters delivered inspectors 3289.
List voters 3287.
Misdemeanor, what constitutes 3294.
Notice of election posted, how, where 3284.
Number of, determined, how 3282.
Preparation list voters, compensation 3288.
Qualifications for voting 3285.
Registration regulations, oath 3286.
Take office, when 3300.
Time for holding election of 3281.
Vacancies, filled by whom 3302.
Vacancies, filled, how 3301.
Vote at school election, how 3292.
Voter, challenged, how 3296.
Voter physically disabled, allowed assistance when 3295.
Voting shall be by ballot 3290.
SECRETARY OF STATE 4251-4261—
Canvass and compile returns, for whom 1757.
Canvass state returns with justices supreme court 1797.
Certify military election returns board of county commissioners 1891.
Certify names nominees to county clerks 1840.
Compile election returns 1757.
Conduct, corrupt, illegal or fraudulent, punished how 2815.
Countersign certificate election U. S. senator 1906.
Duty certify list electors commanding officer, military, when 1888.
Duty certify questions county clerks, how, when 1842.
Duty certify questions raised by referendum 1884.
Duty certify and submit constitutional amendments 1842.
Duty to certify to proper officer, fact of removal any officer for any cause 2801.
Duty certify to various district attorneys failures or omissions county commissioners or other officers in relation to election 2816.
Duty concerning delayed returns 1799.
Duty deliver presiding officer legislative branch papers election contest 1821.
Duty file certificates nomination state officers 1837.
Duty furnish official ballots and supplies military service 1893.
Duty provide county clerks with ballot paper 1843.
Duty to issue election laws in pamphlet form 1832.
Duty to forward election laws pamphlet form to whom 1832.
Duty to furnish official ballot paper 1747, 1893.
Duty to issue official certificates nomination 1758.
Duty to supply check and poll lists, etc., commander 1893.
Elected, by whom 2773.
Fees for filing nomination papers 1742.
Fees from candidates, disposed of how 1743.
File list registered voters in office 1735.
Secretary of state—continued.
Nomination certificates to issue, when, to whom, how 1758.
Open military returns presence chief justice, when, where 1891.
Penalty failure certify constitutional amendments 1842.
Prepare election forms 1766.
Prepare, have printed and furnish ballots, when 1893.
Prepare roll-call assembly and convene 4112-4113.
Receive abstract votes from county commissioners 1797.
Residence and office at Carson City 2744.
Supply, prepare and have ballots printed, military service 1893.
Tie vote, determined how, when 1762.
Transmit certificates nomination U. S. senator to speaker assembly and president senate, when 1758.
Transmit list candidates filing nomination papers to county clerks 1745.
Transmit official canvass U. S. senator to legislature, how, when 1898.
Transmit statement election returns to chairman political party 1758.
Transmit to county clerks list candidates to be nominated primary election 1739.
September primary. See Primary Election.
SHERIFF 1643-1660—
Advertise for another election, when 1796.
Deputies, duties election day 1789.
Signature book defined, contain what 1731.
Soldiers and sailors. See Sailors and Soldiers.
SPECIAL ELECTIONS 2797-2801—
City and town, held when, how 801.
Fill vacancy assemblyman 2797.
Fill vacancy county office 1796.
Fill vacancy member of Congress (U. S. Const.) 91.
Special session legislature, called how, by whom, when (Const.) 260.
Spoiled ballots 1854. See Ballots.
State central and executive committees, selected, how 1760.
STATE OFFICERS 2765, 2773-2774 (Const. 312). *See Officers*—
Contest 1823, *et seq.*
Elected, by whom 2773.
Impeached, how (Const.) 334-336.
Who may contest election 1823, *et seq.*
State police not to participate in politics 4281.
STATE SENATE—
Composed how, 4111 (Const. 263).
Convened, how 4112, 4113 (Const. 260).
Members election 2765 (Const. 261).
Officers and attaches, whom 4115.
President 2808, 2809.
Senators, nomination papers, contain what 1740.
STATE TREASURER 4360-4369—
Duties concerning fees received from secretary state, election 1743.
Elected, by whom 2773.
SUBPENAS—
Justices peace issue, election contest, when 1819.
Superintendent of public instruction 2777 (Const. 353).

SUPPLIES. *See County Clerks; Secretary of State; County Commissioners; Primary Election*—
Ballots and election material provided at public expense, when 1744, 1769.
Destruction election, penalty 1826, 1860.
Election, furnished how 1706.
Election, furnished by county clerks 1713, 1747, 1748, 1769, 1846, 1848, 1857.
Election, furnished by secretary of state 1743, 1893.
Election, furnished by county commissioners 1706, 1726, 1777, 1850, 1865.
Official register election, furnished by county commissioners 1726.
TALLY LIST—
Canvass, kept how 1756.
Where deposited, after election, with whom 1795.
Terms, state officers 2774.
Terms, county officers 1501.
Terms office, city and county 802, 804.
Terms member of Congress (U. S. Const.) 88.
Terms office, U. S. senator (U. S. Const.) 93.
TIE VOTE—
City officers 801.
County commissioners to determine 1796.
County and township, determined by whom 1796.
District officers, determined how, by whom 1796.
Legislature, joint convention, decide, when 1797.
Members assembly, determined, how, when, by whom 1796.
New election ordered when 1796 (U. S. Const. 91).
Primary election, determined how, when 1762.
Recount on account of, ordered when 1796.
State officers, determined how, by whom 1797.
State senator, determined how, by whom 1796.
Time and place, contest, fixed how 1808, 1894.
Time canvass of votes to begin and end 1791.
Time holding election school trustees 3281.
Time holding general election 1767 (Const. 373).
Time holding primary election 1738.
Time holding election representative in Congress and U. S. senator (U. S. Const.) 100.
Time opening and closing polls 1776, 1872.
Time recount for tie vote 1796, 1797.
Town elections conducted as general, how, when 1870.
Township officers, elected by whom 2773.
Transfer vote, when allowed, how, who entitled to transfer 1714.
United States district attorney member board of canvassers (Const.) 419.
UNITED STATES SENATOR 1890-1914 (Const. 292; U. S. Const. 95, 100)—
Appointment, temporary, made how and transmitted 1914 (U. S. Const. 94).
Candidates for legislature make statements regard to 1740.
Declaration candidates legislature thereto 1740.
Election by legislature, when, where 1907.
Election of 1896-1900 (Const. 292).
Election of by legislature held, when 1902 (Const. 292; U. S. Const. 93).
Election of, certified how, by whom 1905.
United States senator—continued.
Election, viva voce (Const.) 254.
Elected, when 1901 (U. S. Const. 100).
Governor must certify election to president U. S. senate 1905.
Governor to fill vacancy in, how, when (U. S. (Const.) 94.
Law governing election of 1896-1900.
Legislative candidates to make statements 1740.
Majority, joint convention, to elect 1909 (Const. 292).
Manner of election 1907-1914.
Mode of election 1902.
Nominated, how 1737.
Nomination certificate to be filed with secretary of state 1791.
No reward allowed to aid in election 1900.
Person elected receive certificate election from governor 1913.
Relative election 1901-1906 (Const. 292).
Qualifications (U. S. Const.) 95.
Statutes U. S. relative election 1901-1906.
Time, place, manner election (U. S. Const.) 100.
Vacancy filled, how, by whom (U. S. Const.) 94.
Vacancy occurring before legislature, filled, how 1903.
Vacancy occurring by death, resignation or otherwise, filled, how (U. S. Const. 94) 1914.
Vacancy occurring during legislature, filled, how 1904.
Votes necessary joint convention to elect 1909.
Voting for in legislature viva voce 1909.
VACANCY—
Assemblyman, filled by special election, how, when 2797.
Board county commissioners filled by governor, when 1501, 2805.
City officers filled, how 785.
Congress, member of (U. S. Const.) 91.
County commissioners declare county officers, when 2802.
County nominees 1839.
County offices declared vacant by county commissioners, when 2802.
County officers, filled, how 1759, 2797, 2813.
County ticket, filled, how 1759, 1839.
Governor has constitutional authority to fill, when (Const.) 301, 405.
Governor to fill vacancies generally, when, how 1501, 2803, 2805, 2808, 2812.
Occasioned, how 2799, 2874.
School trustees, filled how, by whom 3301, 3302.
State office, filled, how (Const.) 301, 406.
State office, declared by governor 2802.
State ticket, filled, how 1761.
State and judicial, filled by governor 2812 (Const. 301, 406).
State senators, filled by special election, how, when 2797.
State and county nominees 1839.
Supplied, generally, how 2803.
Temporary appointment, U. S. senator, when vacancy in office, made how (U. S. Const. 94) 1914.
U. S. senators positions, vacancies filled how 1903, 1904 (U. S. Const. 94).

VOTE. *See Canvass of Votes; Returns; Tie Vote; Recount; Voter—*
Adjutant-general certify list military service to secretary of state 1887.
Canvass of, public 1791.
Canvassed, presidential electors, how, when, by whom 1797.
Cast, how 1852.
Clerks and inspectors election trying to control 2814, 2815.
Constitutional amendments, canvassed, how 1881.
Counted, how 1513, 1858.
Military service, cast how and counted 1887, 1893.
Military service, certified how 1890.
Plurality at election constitute choice (Const.) 382.
Presidential electors, cast how, for president and vice-president, U. S., when (U. S. Const. 142, 143) 2771.
Recount of vote, how, when, by whom 1513, 1796, 1895.
Soldiers and sailors, canvassed how 1887.
Tie, county commissioners, determined 1796.
Tie, county and township officers, determined, how, by whom 1796.
Tie, legislature decide state officers, when 1797.
Tie, members assembly, determined, how, by whom 1796.
Tie, primary election, determined, how, when, by whom 1762.
Tie, state officers, determined, how, where, by whom 1797.
Tie, state senator, determined, how, by whom 1796.
VOTER. *See Acts Prohibited and Punished, under title Elections; Vote—*
Age required to be eligible different offices 2766.
Age required to be eligible to vote (Const.) 250, 251, 411.
Arrest, not subject to on election day, when (Const.) 253.
Attempting to vote when not authorized 1827.
Ballot, new, given when 1752, 1854.
Challenge at polls 1717, 1790.
Challenged, how qualified 1731.
Challenge, made how, to registering 1712.
Challenged, must sign signature book 1731.
Challenged, penalty for prompting 1731.
Challenged, at primary election, how 1752.
Change residence, how to secure transfer 1714.
Choice voting different precinct 1714.
City and town election, qualifications for 801.
Corrupting or intimidating 6802.
Disqualified from holding office (Const.) 268.
Duties required to have vote transferred 1714, 1730.
Eligibility to hold office 2765, 2766, 2847 (Const. 371, 411; U. S. Const. 89, 95).
Employed moving trains, stages, regulations, how to vote 1714.
Entitled assistance by reason disability, when 1855, 3295.
Entitled to new ballot, when 1752, 1854.
Entitled to sample ballot, when 1857.
Voter—continued.
Entitled to vote when vote transferred, if challenged, how 1730.
Furnished ballots, when 1744, 1748, 1849, 1857.
How shall vote 1851-1852.
Identification may be required before voting, when, by whom 1717.
Legislature required to make provision registration voters (Const.) 255.
Majority of, control on referendum 1886.
Military service, law pertaining to 1887-1893.
Military service, vote taken how 1887-1893.
Name must appear on official register 1717.
Names, printed when 1720.
Names, printing of, how paid for 1720.
Not entitled to vote, when 1716.
Not subject to arrest election day (Const.) 253.
Oath of, when challenged at polls 1712, 1790.
Oath of, when challenged at school election 3296.
Oath of, when applying to be registered 1709, 1710.
Oath required desiring transfer 1714.
Objection to registration, how made and tried 1712.
Officer election attempting to influence 2814.
Penalty for prompting challenged voter 1731.
Percentage necessary for referendum petition 1882.
Physically disabled, allowed assistance 1855, 3295.
Privileged to transfer, when 1714, 1751.
Presidential electors, qualifications of (U. S. Const.) 141.
Printed names of 1720.
Qualifications for city and town election 801.
Qualifications for presidential elector (U. S. Const.) 141.
Qualifications for school trustee election 3285.
Qualified, when 1724 (Const. 250, 251).
Regulations to follow, when voting 1852.
Registered names, posted and distributed 1712.
Registered in and out of town 1866.
Registered, primary election, entitled vote general 1733.
Registered, when 1710, 1711.
Registry agent secure name of, when registering 1727.
Residence, actual, determined how 3610. See sec. 3609.
Residence, defined, registration purposes 1714.
Residence, designated official register 1867.
Residence, for purpose of voting defined (Const.) 250-252.
Residence, given registry agent 1867.
Residence, legal 3609. See secs. 3610-3616; Const. 250-252.
Residence lost, how, intent 3613.
Residence, presumption of abandonment, when raised 3614.
Residence, removal from one county or precinct, effect on residence 3612.
Residence, when not deemed gained or lost 3611.
Sample ballot, entitled to, number, when 1857.

Voter—continued.
Sample primary ballot, entitled to, number, when 1748.
School trustee election, when qualified to vote 3285.
Signing name to wrong data for referendum or other petition, misdemeanor 6670.
Soldiers and sailors (Const.) 252.
Soliciting to show ballot, misdemeanor 1862.
Time allowed to cast ballot 1853.
Transfer book contain names of electors transferred 1730.
Transfer residence, when 1714.
Transfer registration, how 1714.
Volunteers, manner of taking 1889.
Vote, how 1752, 1753, 1851, 1852.
Withdrawing name from referendum petition for pay, misdemeanor 6670.
When may vote if name not on register 1717.
Who entitled to hold office 2765, 2766-2847 (Const. 371, 411; U. S. Const. 89, 95).
Who entitled to vote (Const. 250, 251, 411) 1724.
Who was entitled to vote on constitution (Const.) 257.
VOTING—
Manner of 1752, 1753, 1780, 1852.
Mode of 1752, 1753, 1851.
Regulations as to 1852.
VOTING PLACES—
Number of, determined how, by whom 1865.
Provided, how, where 1850, 1865.
Requisite number of therefor 1865.
What officers to be appointed 2765.
What officers to be elected 2765.
Who eligible to hold office (Const. 371, 411; U. S. Const. 89, 95) 2765-2847.
Who not eligible to hold office (Const.) 267, 268.
Who eligible to vote (Const. 250, 251, 411) 1724.
Writ of quo warranto, proceedings under 5656-5682.
Writs of election issued by governor, when 2797 (U. S. Const. 91).

Election day, civil arrest forbidden on 253.
Elector. See Voter in index "Elections" (Const.) 250, 251, 253, 255, 285, 371, 383, 384, 412, 413, 1724.
Electric light, heat and power, franchises for 1261-1264, 2129, 2139.
When eminent domain may be used for 2138, 5606.
Wilful and malicious injury to property 6752.
Electric wires, public utility refusing to connect, penalty 6844-6846.
Eleemosynary purposes, perpetuities allowed for only 372.
Eligibility to office, justices of supreme court and district judge ineligible to any state office other than judicial during term of office for which elected 326.
No person holding lucrative office under government of the United States eligible to civil office of profit except certain postmasters and commissioners of deeds 267.
Elisors, appointment and powers 5495-5498, 6234. See Civil Practice.
Elko County, creation, boundaries and seat 1458, 1459, 1464.
Road inspector, compensation 3036.
Embalmers, state board of 4445-4454. See Board of Embalmers.
Embalming, practicing without license, penalty 4451.
Embassador of United States, affidavit, may take in foreign country 5452.
May certify to judicial record of foreign country 5411.
Embezzlement, bailee defined 6653.
By bailee 6653.
By bank official 648.
By officer, public money, disqualification for office 268, 6556-6660.
Chapter concerning 6653-6662.
Cities may regulate, under fifty dollars 794(75).
Contractor failing to pay for labor or material 6655.
Defined 6653.
Evidence of 6653, 6654.
Indictment for 7068.
Jurisdiction of offense 6917.
Of bank funds 648, 6648.
Property restored to owner 6650, 6651, 7428, 7445-7450.
Public funds, conviction of, disqualifies from holding public office 268.
Public money by officer 6656-6660.
Emblems or insignia, illegal use in wearing of 2503-2505, 6715-6717.
Embracery, penalty for 6323.
Emergency loan and tax levy for by commissioners 3831, 3832.
Eminent domain, chapter concerning in civil practice act 5606-5629. See Civil Practice.
Compensation for property taken, guaranteed 175, 237, 344.
Franchises, may exercise 2138.
Highways, exercised for 3052.
Irrigation projects, may exercise 4770.
Mining claims on land in private ownership 2458-2462.
Property shall not be taken for public use without compensation, when 237.
Railroad corporations, powers of 3535-3550, 3574.
Right of way not to be appropriated to corporation until compensation is made or secured 344.

EMPLOYER AND EMPLOYEE

Act for collection hospital fees 1944.
Act making misdemeanor collect hospital fees certain cases 1903-1945.
Act prohibit false advertising or deception procuring employees to work 1936-1938.
Act prohibiting issuance nonnegotiable acknowledgments indebtedness payment for wages 1939, 1940.
Act provide arbitration differences employers and employees 1929-1935.
Act specifying working on surface underground mines not labor more than eight-hour day 1941, 1942; other eight-hour day, in underground mines 6554; in smelters, quartz mills, reduction plants 6555; in plaster and cement mills 6559.

Agent for employment, false representation or fraud by, penalty 6785.
Agent or employee, violation of duty, penalty 6786.
Agreements arbitration acknowledged before whom 1933.
Agreements arbitration filed, recorded, when, where 1933.
Appeal from award taken to supreme court within what time 1931.
Appeal, losing party, may, when 1923.
Arbitration board decide dispute, how, when 1922.
Arbitration board, selected how 1922.
Arbitration commission, appointed by governor, when 1929.
Arbitration, governor to act, when 1929.
Arbitration proceedings, conducted how 1922.
Arbitration, same subject, cannot be again considered 1930.
Arbitrators, authority compel production books, contracts, other documents 1932.
Arbitrators, compensation, provided how 1935.
Arbitrators compel witnesses testify, produce books, etc., how, when 1932.
Arbitrators, decision 1931.
Arbitrators issue subpenas, compel attendance witnesses 1932.
Arbitrators, power administer oaths, sign subpenas 1932.
Assignment when claim becomes legal 1927.
Assumption risk or hazardous employment by employee no defense, when 1915.
Attorney fees allowed prevailing party arbitration proceedings, when 1923.
Attorney fees taxed as costs losing party, when 1938.
Award binding on employees, when 1933.
Award continue in force between parties, how long 1930.
Award majority board of arbitrators binding, when 1930.
Award proceedings before arbitration board, certified how 1930.
Board arbitration settle disputed injuries workman, when 1921.
Board arbitration chosen, how 1930.
Board arbitration meet, when 1930.
Checks and orders must be negotiable 1939.
Chinese not to be employed on public work 3101, 3483-3485.
Choice remedies exercised solely by workman 1925.
Claim against employer assignable, when 1927.
Claim compensation for accident presented, when 1918.
Claim compensation preferred debt 1926.
Claims may be compromised 1928.
Clerk district court file award and proceedings before arbitration board, when 1930.
Collection hospital fees unlawful, when 1943.
Compensation, allowed for injury or death of workman, when 1915.
Compensation, arbitrators, provided, how 1935.
Compensation, determined how, in case of death 1919.
Compensation, determined how in temporary or permanent injury 1920.
Compensation, due injured workman, paid how, to whom 1919.
Compensation, recovered death of workman, paid how, to whom 1919.
Compensation recovered, preferred debt 1926.
Contractor failing to pay, when deemed embezzlement 6655.
Compromised, claims may be, when 1928.
Contributory negligence not a cause of defense, when 1915.
Contributory negligence, not presumed, when 1915.
Copy award sent to governor, when 1933.
Costs allowed prevailing party arbitration proceedings, when 1923.
Costs suit, reasonable attorney fees allowed prevailing party, when 1923.
Court compel attendance witnesses, production evidence, how, when 1923.
Day's labor, eight hours to constitute, when 1941, 1942, 2430, 3481, 3482, 3597, 3598, 6555-6559. See Eight-Hour Day Laws.
Death, workman, employer liable for, when 1915.
Decision arbitrators 1931.
Decision arbitrators set aside, how, when 1931.
Decision, supreme court, final, when 1931.
Demanding money of, when unlawful 6783-6786.
Dependents defined 1916.
Dispute of injuries workman, determined how 1921.
Eight hours, day's work, plaster, cement mills 6559.
Eight hours, day's work, smelters, quartz mills, reduction plants 6555.
Employee dissatisfied award must notify employer intention to quit 1930.
Employee given choice of remedies recover compensation or damages injury or death, when 1925.
Employee not compelled proceed under this act 1925.
Employee not deemed guilty contributory negligence, when 1915.
Employee not entitled to compensation injuries, when 1915.
Employee submit physical examination, when 1921.
Employer cannot discharge employee during pendency arbitration 1934.
Employer defined 1916.
Employer dissatisfied with award must give notice intention discharge employee, when 1930.
Employer engaged hazardous improvements defined 1917.
Employer given notice of accident, when 1918.
Employer liable injury or death workman, when 1915.
Employer privileged reduce number employees, when 1934.
Employer responsible contractor or subcontractor, when 1924.
Employer responsible to employee, when 3510.
Employers' liability act 1915-1928.
Employment agent, fraud or false representation by 6785.
Employment, obtaining by false letter or certificate, penalty 6787.
Employment, preventing unlawfully 6779.
Endangering life by refusal to labor, penalty 6588.

Failure arbitration court proceedings, when 1923.
Failure give notice accident no bar to recovery 1918.
False letter or certificate to obtain employment 6787.
Governor appoint arbitration commission, when 1929.
Hazardous callings enumerated 1917.
Hospital fees, collection unlawful, when 1943.
Injury workman, employer liable, when 1916.
Issuing nonnegotiable instrument for wages, penalty 1939.
Judgment court conclusive on all parties, when 1923.
Judgment entered when award filed, how 1931.
Labor conditions misrepresented unlawful, when 1936.
Laborer cannot be compelled by injunction or other legal process work against consent 1930.
Legal day's work for surface employees, what 1941.
Liability for damages parties violating arbitration proceedings, what 1934.
Life, endangering by refusal to labor, penalty 6588.
Limitation compensation injured workman entitled to 1920.
Limitation for presentation claim compensation for accident 1918.
Liquor house, wages of miners not to be paid in 4230.
Majority board of arbitrators competent to make award 1930.
Mongolians, not to be employed on public works 3101, 3483-3485.
Miners, solitary employment, regulations 4232.
Money, demanding by, when unlawful 6783-6786.
Nonnegotiable instrument, issuing for wages, penalty 1939.
Notice, failure to give, no bar to recovery 1918.
Notice of accident, contain what, addressed to whom 1918.
Notice of accident given employer, when 1918.
Notice of accident served upon employer, how, when 1918.
Notice of employees to quit service given employer, when 1934.
Notice of intention to discharge employees given by employer, when 1934.
Notice to employees given by employer intention to dismiss, how, when 1930.
Notice served upon an employer when a corporation, how 1918.
Notice in writing of intention to quit work given employer, when 1930.
Notice in writing served on arbitrators to convene, when 1933.
Obligation of parties during pendency of arbitration 1934.
Partially injured workman, compensation to receive, what 1920.
Penalty issuing negotiable instruments subject to discount 1940.
Penalty misrepresenting labor conditions, what 1937.
Penalty violation act providing for collection of hospital fees 1945.
Penalty violation eight-hour law, defined 1942; 6555; 6559.
Physical examination, employee must submit to, before whom, when 1921.
Plaster-cement mills, eight hours day's work 6559.
Preferred debt claim for compensation recovered 1926.
Prevailing party entitled to costs and reasonable attorney fees, when 1923.
Preventing employment, penalty 6769.
Principal liable to pay compensation entitled indemnify himself, when 1924.
Proceedings and testimony arbitrators filed, where 1930.
Prompt notice of accident given employer 1918.
Public printing, union label on 4309.
Quartz mills, smelters, eight hours day's work 6555.
Record award transmitted supreme court on appeal, when 1931.
Reduction plants, smelters, quartz mills, eight hours day's work 6555.
Refusal to labor, endangering life by, penalty 6588.
Regulations, contracts, or rules employer not allowed as defense, when 1915.
Right of action of workman against employer, defined 1938.
Right of appeal allowed losing party 1923.
Saloons, wages of miners not to be paid in 4230.
Smelters, quartz mills, eight hours day's work 6555.
Solitary employment in mines, regulations 4232.
Surface employees work only eight hours a day, when 1941.
Terms defined 1916.
Total disability injured workman, compensation to receive, what 1920.
Underground mines, eight hours day's work 6554.
Union label on public printing 4309.
Unlawful to misrepresent labor conditions, when 1936.
Wages, issuing nonnegotiable instrument for, penalty 1939.
Wages of miners, not to be paid in liquor house 4230.
Want of ordinary or reasonable care fellow servant not a defense, when 1915.
Weekly payments compensation disabled workman commence when, paid how 1920.
Weekly payments increased or diminished, how 1923.
Workman defined 1916.
Workman entitled damages for misrepresentation labor conditions 1938.
Workman injured entitled recover compensation from contractor instead of employer, when 1920.

Employers' liability act 1915-1928. See Employer and Employee.
Employment agent, fraud or misrepresentation by, penalty 6785.
Enabling act, of Congress for Nevada 209-220.
Enacting clause of statutes, how made 281.

Encampment of militia 4036-4038. See State Militia.
Enclosure of public lands unlawful 3173.
End lines of mining claims to be parallel 2378. See Mines and Mining.
Endangering life by refusal to labor 6588.
Endangering vessels, train or car by false signal or interference with signals 6750.
Endowment life insurance companies 1310-1324, 1327-1329. See Corporations.
Engine liable to cause fire, operation of, penalty 6580.
Engineer on duty at all times in mines, when 4233.
Engineer, stationary, licensed, how 3899.
Engineer, who cannot read, employment of, when unlawful 6582.
English language, juror must have knowledge of 4929.
Used in courts 4885.
Enlarged homesteads (federal) 3139-3145. See Public Lands 3063-3226.
Enrolled militia, who constitute 3966. See State Militia.
"Enter," word includes what 6294(21).
Entry, forcible, defined 5586. See Civil Practice.
Entry, forcible, district court has jurisdiction 321.
Enumeration of inhabitants of state, under direction of legislature, with census taken under direction of Congress to serve as basis of representation in legislature 381.
Enumeration of rights, not to impair others retained by the people 249.
Episcopal Church, Protestant, incorporated 1425-1433.
Equalization, board of, duties 3638, 3693, 3793, 3797, 3839, 3844. See Revenue, County Commissioners.
Equity. See Civil Practice.
Jurisdiction of district courts in (Const.) 321.
Jurisdiction of supreme court in (Const.) 319.
Justice of the peace, no jurisdiction in (Const.) 321.
May be administered in same action with law (Const.) 329.
Error, writ of, S. C. Rules xviii-xxii, pp. 1424, 1425.
Errors (civil action), technical disregarded 5066. See Civil Practice.
Errors (criminal action), technical, disregarded 7302, 7469.
Escape of prisoner. See State Prisons and Jails.
Causing death in attempt, penalty 6819.
Concealing, penalty 6343.
Costs, prosecutions for 6820.
From prison or jail 6339.
Insane convict 2209.
Paroled prisoner, when deemed 7631.
Permitting, penalty 1657.
Reward for 2831.
Soliciting or receiving bribe to permit or assist 6342.
Escape of defendant arrested in civil action, sheriff liable as bail 5110.
Escheats, animals impounded, proceeds of sale of 2331.
Escheats—continued.
Attorney-general, duties and relation to 1625, 6130-6136.
Contest of 6132.
County treasurer to pay state treasurer 1625.
Estates that escheat to state pledged for educational purposes 355.
Informer of to have percentage 6136.
Procedure in 6131-6136.
Proceeds of unclaimed property sold by jeweler 523.
Public administrator, funds in hands of 1619.
Recovery back from state 1625, 6134.
School fund to receive benefit from 355, 1619, 6116.
When occurs 6116, 6130.
Esmeralda County, creation, boundaries and seat 390, 1441, 1450, 1451, 1452, 1460, 1461.
Estate for life, proceedings on termination of 5584.
Estate for life or years, how set off in action for partition 5548.
Estates and rights, subject to condemnation under eminent domain 5607.

ESTATES OF DECEASED PERSONS

Absent heirs, attorney for 5872, 6047.
ACCOUNT—
After authority ceases 6051.
Allowance or confirmation of 6063.
By administrator or executor on resignation 5937.
By administrator, when letters revoked on discovery of will 5935.
Claims paid, how charged in 6039.
Contest of 6045, 6047.
Court may receive, in vacation 4850.
Court may require 4849.
Failure to make, revocation of letters 6051, 6061.
Failure to render, how enforced 6043.
Final, failure to render 6061.
Final, petition for distribution may accompany 6072.
Final, when deemed 6056.
Final, when to render 6060, 6072.
First, when rendered, contents 6041.
Full, when required 6042.
Hearing of 6045, 6049.
Notice of hearing 6044, 6049.
Settlement conclusive 6048.
Special administrator to render 5931.
Vouchers produced 6046.
What chargeable in 6035.
Act liberally construed 6126.
Action for death by wrongful act 4997.
Action pending, claim to be filed for 5972.
Actions for conversion, trespass and waste 6023, 6024.
Actions, limitations, effect on 4977, 4978.
Actions, parties to 4987.
ADMINISTRATOR. *See also Executor or Administrator.*
Acts before revocation of letters valid 5938.
New, appointed, when 5915.
New, powers of 5936.
Special, when appointed 5926-5932.
With will annexed, powers 5890.

Advance court fee in 2030.
Advance distribution or payment of legacies 6064-6071.
ADVANCEMENT—
Considered, how 6120-6124.
Determination of 6089, 6120-6124.
Gift or grant, when deemed 6122.
Affidavit to claim 5965.
Agent for absent distributee 6090, 6094.
APPEALS—
From what may be taken 6089, 6112.
None from appointment of special administrator 5928.
Power of appellate court on 6113.
Procedure in 6112.
To supreme court 6112-6115.
Undertaking on 6114.
Appraisement, before sale 5997.
Appraisement, how made 5943, 5944, 5949.
Appraisers, oath and duties 5943-5949.
Appraisers, compensation of 5943.
Assessment of property of, how 3629.
ATTORNEYS IN—
Appointed for parties in interest, on sale of real property 5990.
Compensation of 6126.
For absent or minor heirs 5872.
For creditors 5990.
For minors, heirs or devisees, appointment of 6047.
For minors or interested parties, duties 6110.
Powers of 6126.
BOND OF EXECUTOR OR ADMINISTRATOR—
Additional required 5911, 5917, 5919.
Additional security, who may apply for 5917, 5918.
Additional sureties required 5914-5922.
Approval 5911.
Court of own motion may require additional surety 5922.
Form of 5911.
In force until penalty exhausted 5912.
May be required though will exempts 5916.
Penalty excess of $2,000, sureties 5913.
Release of sureties 2881, 5923-5924.
Sureties, additional required, procedure 5914-5922.
Sureties, doubtful, reexamination 5914.
Sureties, justification of 5913.
Sureties released, how 5923-5924.
Sureties, when several may qualify 5913.
Surety company may furnish 695.
Certified copies force of originals 5910.
Children, homestead may retain 5956.
Citation to executors 5869.
Citation to heirs 5868.
Citation, service and proof of 6101, 6102, 6104-6107.
Civil practice act applicable 6138.
CLAIMS OR DEBTS—
Action on, not maintainable unless filed 5972.
Action pending at death 5972.
Affidavit to, form of 5965.
Allowance indorsed on 5973.
Approval or rejection 5967.
Barred by statute rejected 5969.
Compromise of 6028.
Contingent, disputed or not due 6057.
Court may approve, in vacation 4850.
Claims or debts—continued.
Devises and legacies subject to 6008.
District judge to act upon 5967.
Estate insufficient to pay 6054.
Examination, approval, rejection 5967.
Executor or administrator may file 5966.
Filed with clerk, how and when 5964.
Filing claim, failure bar to action, exception 5970.
Form of claim 5967.
Judge may file 5966.
Judgment on 5974, 5976.
No action on unless filed 5970.
Of executor or administrator, judge to pass upon 5977.
Order of payment 6052.
Paid according to will 6005.
Payment into court 6057.
Part allowed 5973.
Payment of 6056.
Preference in payment 6053-6055.
Rejected, action on 5968, 5973-5976.
Rejected, notice of 5968.
Sale of property to pay 5982.
Special administrator not to pay 5929
Statement of, to be filed 5979.
When may be filed 4977, 5964.
Clerk of court, record to keep 6103.
Compromise with debtors 6028.
Community and separate property, inventory to show 5944.
Community property, how disposed of 2164, 2165.
Contempt, failure to appear when cited 5954.
Contempt not to produce will 5865.
Contest of will 5872-5876.
Contract for purchase of land, sale of 6010-6013.
Contract of decedent, performance of 6147.
Contracts of decedent, specific performance of 6032, 6033.
Conversion of estate before letters, liability 5952-5955.
Conversion of estate, proceedings to recover 5953, 5954.
Coroner, duties as to property of decedent 7553-7557.
Cost of suit, liability for 5385, 5976, 5973, 6109.
Costs, how determined 6109.
Court fee in advance 2030.
Courtesy, no estate in 2161.
Creditors, debt of executor to recover 5946.
Creditors, notice to 5963, 5978.
Death by wrongful act, action for 4997, 5648.
Death, proof of 5904.
DEBTS. *See Claims*—
Debt of executor not discharged 5945, 5946.
Devisees and legatees, contribution between 6009.
Devises and legacies liable for debts 6008, 6009.
Decedent, residence of, jurisdiction 5857.
Decree admitting will to probate 5876.
Decree of discharge 6095.
Decree of distribution 6059, 6062, 6067.
Decree of distribution, form of 6073.
Degrees of kindred, how computed 6119.
Depositions, how taken 6108.
Descents and distribution 6116-6125, 6140, 6141.
Distributee, absent, agent for 6090-6094.
Distribution, decree of 6059, 6062, 6067.

Distribution or payment of legacies in advance on bond 6064-6071.
Distributee, rights of 6073.
District court, jurisdiction 321, 5857.
District court, powers over 4840, 4849, 4850.
District judge disqualified 5940-5941.
Disqualification of judge, duty 5940-5941.
Dower, no estate in 2161.
ESCHEATS—
Attorney-general, duty 6131.
Appeal from orders in relation to 6133.
Contest of 6132.
Informer, percentage to 6136.
Proceedings in 6130-6136.
Proceeds from, disposition of 6132, 6137.
When occurs 6116, 6130.
Estates in common, partition 6075-6091.
Estates, proof of value 5904.
Execution, issuance on judgment after death of party 5285, 5975.
Execution may be stayed without bond, when 5352.
Execution, when may or may not issue 5974, 5975.
Executions, issuance of 6109.
EXECUTORS. *See Executor or Administrator—*
Acts before revocation of letters valid 5938.
Debt to decedent not discharged 5945, 5946.
Executor of executor cannot be 5887.
Joint executors, powers 5888, 5889.
Minor may be 5888.
Neglect to file will 5861.
Objections to 5885.
Remaining of one or more, to act 5933.
Renunciation of trust 5860.
Special administrator to succeed 5932.
Who competent 5884.
EXECUTOR OR ADMINISTRATOR—
Absconded or concealed, citation, service on 6101.
Account, with what chargeable in 6035.
Actions by, joinder of parties 4987.
Allegation of, as legal conclusion, when sufficient 5078.
Bond of 5911-5933.
Bond of, action on 6026.
Bond of, sureties release of, how 2881, 5923-5924.
Bond of surety company may furnish 695.
Claims, action on 5967-5969.
Claims, not to purchase 6039.
Claims, statement of to file 5979.
Commissions and allowance 6040.
Commitment for contempt 6102.
Compensation and expenses 6038.
Conveyance by, in performance of contract of decedent 6147.
Decree of discharge 6095.
Death by wrongful act, action for may bring 4997, 5647.
Discharge, when entitled to 6056.
Duty to pay funeral and family expenses, when 6055.
Execution against for debts ordered paid 6058.
Failure to give additional surety required 5915, 5920, 5921, 5925.
Final account of 6060, 6072.
First account 6041.
Executor or administrator—continued.
Irrigation district, petition to annex land to, may sign 4772.
Liability for debts 6058.
New, appointed 5915.
Notice of appointment of, form, how given 5963.
Oath of 5910.
Oath to inventory 5947.
Order appointing reversed, prior acts valid 6115.
Personal liability 6034, 6036, 6037.
Property, right of possession, duties to 5950.
Property, to take possession of 6021.
Removal of, who may apply for 6100.
Resignation of 5937.
Revocation of letters 6099.
Sue or be sued 6022-6024.
Sureties on bond of, how released 2881.
Suspension by court in vacation 4850.
Suspension of powers 6097-6100.
Suspension pending giving additional surety 5921.
Vacancy in, effect on limitation of action 5971.
Executrix, marriage of, ends authority 5886.
Executrix, married woman may be 5886.
Exemplified copy of probate, evidence 5877.
Expenses, estate liable for 5951.
Expenses, last sickness, when payable 6055.
FAMILY—
Allowance for 5958.
Family allowance preferred charge 5959.
Family allowance, when payable 6055.
Family allowance, property sold for 5982.
Property set apart for, how apportioned 5960.
Property set apart for support of 5957.
Final account 6060, 6072.
Foreign wills, probate of 5878-5879.
Form of letters 5891-5893.
Fraudulent conveyance by decedent 6029-6031.
Full account 6042.
Funeral expenses preferred charge 5959.
Funeral expenses, when payable 6055.
Gifts and grants, when deemed advancement 6122.
Guardians (see index, Guardians) 6149-6201.
Heirs, attorney for 5872, 5990.
Heirs of creditors or purchasers, rights of 1085.
Heirs, unknown, how made parties to action 5009, 5010.
HOMESTEAD—
Decree setting apart, recorded 6111.
Set apart for family 2165, 5957.
Widow and children may retain 5956.
Husband and wife, separate property only affected 6125.
Illegitimate child, heirs of 6118.
Illegitimate child, inheritance of 5833, 6117.
Inheritance 6116-6125, 6140, 6141.
Inheritance, rights of 6116.
Insolvent estate, family allowance limited 5958.
Issue of fact, how determined 6109.
Issue of fact, how tried 5874.
INVENTORY—
Appraisement of, how made 5943, 5944, 5949.
Court may receive, in vacation 4850.
Nonreturn of, liability 5948.

Inventory—continued.
Oath to 5947.
Partnership interest included in 6025.
Return of 5942.
Separate and community property to show 5944.
Supplemental 5949.
What to include 5942-5945.
Joint executors 5888.
Joint executors, majority control 5889.
Joint executors, powers 5889.
Judge, disqualified to act, duty 5940-5941.
Judgment, death by wrongful act not liable for debts 5648.
Judgment, effect of execution not to issue 5974, 5976.
Judgment rendered after death of party, payable how 5272.
Jurisdiction of district court over 321, 5857.
Jurisdiction, residence of decedent controls 5857.
Kindred, degrees of, how computed 6119.
Kindred of half blood, inheritance of 6119.
Legacies, payment of 6059, 6064-6071.
Legacies, sale of property to pay 6004.
LETTERS OF ADMINISTRATION—
Administratrix, marriage of, extinguishes 5898.
Contest of petition 5900, 5901.
Form of 5909.
Granted to one not entitled on request 5905.
Granted to persons of lesser right 5903, 5906.
Males preferred to females 5895.
Notice of petition for 5899.
Notice of petition, proof 5902.
One or more may receive 5896.
Order of preference 5894.
Petition for, contents 5899.
Petition for revocation by one having preferred right 5907.
Proof required on hearing 5904.
Revocation obtained by one entitled to preference 5906-5908.
Revocation, prior acts valid 5938.
Revoked, failure to give additional surety 5915-5925.
Revoked for failure to give notice to creditors 5978.
Revoked in favor of surviving husband or wife 5908.
Revoked, proof of will 5935, 5936.
Signed, and sealed by clerk 5891.
Special, may be granted in vacation 4850. *See Special Administrator.*
Subsequent issuance of 6096.
Transcript of force 5939.
Vacancy, new to issue 5934.
Who entitled to 5894-5896.
Who not entitled to 5897.
Whole blood preferred to half blood 5895.
LETTERS TESTAMENTARY—
Form of 5892.
Revocation, prior acts valid 5938.
Revoked for failure to give notice to creditors 5978.
Revoked, failure to give additional surety 5915-5925.
Signed and sealed by clerk 5891.
Subsequent issuance of 6096.
To minors 5888.
Transcript of force 5939.
Letters testamentary—continued.
Vacancy, new to issue 5934.
When issued 5883.
Without bond 5916.
LETTERS WITH WILL ANNEXED 5884, 5887—
Form of 5893.
Petition for 5885.
Liens against, statute of limitations does not run 6014.
Limitation, action on rejected claim 5968.
Limitation, how reckoned 5971.
Lien, does not run against pending settlement of estate 6014.
Limitation of actions, how affected 4977, 4978.
Limitations, sale by executor or administrator 4964, 6018.
Marriage of administratrix extinguishes authority 5898.
Marriage of executrix, effect 5886.
Marriage, null or void, issue deemed legitimate 6117.
Married woman as executrix 5886.
Mines, belonging to, option, lease or sale 5980.
Minors, attorney for 5872, 5990, 6047.
Minors, guardian named in will 6150.
Minor heirs, guardians for, general act 6149-6201.
Minor may be executor 5888.
Mortgage or lien, form of claim for 5967.
Mortgage, payment of 6053.
Mortgaging of estate 6146.
Neglect to file will, liability 5861.
New administrator, letters, bonds, powers 5984.
Nonresident decedent 5857.
Nonresident, notice to of rejected claim 5968.
Notices, clerk may give without order 6143.
Notices, personal, how given 6104-6107.
Notice of appointment of executor or administrator 5963.
Notice of petition for letters administration 5899.
Notice of probate 5866.
Notice to creditors 5963, 5978.
Notice to creditors, failure to give, liability 5978.
Oath of executors or administrator 5910.
Oath, form, filing and record 5910.
Objections to executors, hearing 5885.
Orders, power to enforce 5867.
Parties to actions, joinder 6027.
Parties to actions unknown heirs, how made 5009-5010.
Partition of estates in common 6075-6091, 6166.
Partnership property 6025.
Patents to state land, how issued 3223.
Personal estate first liable for debts and expenses 5951.
Petition for distribution, notice of, service 6074.
Petition for letters of administration 5899, 5900.
Petition for probate of will 5860, 5866.
Posthumous children, rights of 6129.
Practice, civil practice act applies 6138.
Practice, hearings, when had 6144.
Preferred claims, wages 6145.
Probate foreign will 5878-5879.
Probate register 6103.
Probate of will, who may petition for 5862, 5863.
Proceedings of record 6126.

Proof, lost or destroyed will 5881.
Proof of will sufficiency 5873.
PROPERTY—
Conversion of before letters issued 5952-5955.
Coroners, duties as to 7553-7555.
How assessed 3629.
Liable for debts 5951.
Possession, how obtained 5953, 5954.
Possession of persons other than administrator 5955.
Rights of possession, duties to 5950.
Sale of, see sale of property 5980-6020.
Set apart for support of family 5957, 5960.
Public administrator. *See index Public Administrator 1615-1627.*
Publications, how made 6103.
Real estate may be sold for debts, when 5951.
Rejected claims 5967, 5968.
Resignation of administrator or executor 5937.
Revocation of letters, prior acts valid 5938.
"Right of representation" defined 6129.
SALE OF PROPERTY—
Authorized by will 6006, 6007.
By treasurer, when taken over by coroner 7554.
Executor or administrator not to purchase 6020.
Land contracts 6010-6013.
Objections to 5981.
Order of court required 5980.
Order for 5982.
Perishable 5982.
Personal notice of 5984.
Personal, procedure 5982, 5984.
Petition for, objections hearing 5981.
REAL—
Adjournment of 6003.
After acquired title to grantee 6000.
Appraisement 5997.
Assent to 5988.
Attorney for minors, creditors and heirs 5990.
Compelled, when 5993.
Confirmation of 5998, 5999.
Conveyance 5999, 6000.
Delinquent purchaser 5999.
Devised portion 5993.
Expenses 6015.
Fraud or misconduct in 6016, 6017.
Hearing 5989.
How, where and when made 5993, 5997.
Mortgage or lien satisfaction 6014.
Notice of 5996.
Notice of hearing 5988.
Notice of sale 6001.
Notice of service on whom 5990.
Order for, certified copy furnished 5995.
Order of confirmation 6001.
Order of sale 5992-5993.
Order to show cause 5987.
Petition for 5986.
Postponement of 6002.
Vacated, new sale 5998.
Witnesses, process for 5991.
Who may apply for 5994.
Return of, liability for neglect 6019.
Separate and community property inventory to show 5944.
Separate property of husband or wife only affected 6125.
Speedy settlement of 6126.
SPECIAL ADMINISTRATOR—
Account to render 5931, 6098.
Appointed in vacation 4850.
Appointment, no appeal from 5928.
Appointment and bond 6098.
Appointment and letters 5927, 5932.
Executor to succeed 5932.
Powers cease, when 5930.
Powers, duties and liabilities 5929, 5931.
Preference in appointment 5928.
Purpose of 5926.
When appointed 5926-5932.
Specific performance of contracts 6032, 6033, 6147.
State land patents issue to whom 3223.
Statute of limitations, claim barred by 5969.
Statute of limitations, vacancy in administration not regarded in 5971.
Statute of limitations, effect on actions 4977, 4978.
Subpena for witness to will 5870.
Subsequent issuance of letters may issue, when 6096.
SUMMARY ADMINISTRATION—
Allowable, when 6127.
Notice to creditors 6128.
Procedure and costs 6127.
Support of family 5957.
Surety company may furnish bonds 695.
Surviving partner, rights and liabilities 6025.
Taxation of 3629.
Time, order shortening 6103.
Trustee of part of estate, duties 5955.
Unclaimed, disposition of 6092.
Unknown heirs to real property, how made parties to action 5009, 5010.
Unlawful detainer, possession by ancestor, bar 5595.
Vacancy, executor or administrator 5934, 5974.
Value of not exceeding $500, disposition 5961, 5962.
Value of proof 5904.
Wages, claims for when preferred 6145.
Widow, estate not exceeding $500 5961-5962.
Widow, estate of heirs of deceased husband to inherit, when 6140.
Widow, homestead may retain 5956.
Widower, estate of, heirs of deceased wife to inherit, when 6141.
Witnesses, other party to transaction dead 5419, 5423.
WILLS—
Advancement considered in distribution 6120-6124.
Advancement, court to determine 6089.
Advancement, effect of 6218.
Agreement of testator to convey devised property 6213.
After-acquired property, how affected by 6221.
After-born children share in estate 6215, 6218.
Attestation of witnesses 6204.
Bond or agreement to convey devised property, effect on 6213.
Cancelation of second does not revive first, exception 6210.
Children born after, effect on 6215, 6218.
Children or issue of when unprovided for 6216, 6218.

Wills—continued.
Codicil included in 6222.
Competency to make 6202.
Contest, who may make 5872.
Creditor as witness 6205.
Debts not affected by 6005, 6202.
Decedents of devisee inherit share of 6219.
Delivery for probate 5859-5861.
Executor present for probate 5859.
Executor, renunciation of trust 5860.
Foreign, probate 5878, 5879.
Gifts or grants when deemed advancement 6122.
Guardian named in 6150, 6161.
Holographic 2223-2225.
Implied revocation 6209.
Inheritance by decedent of devisee 6219.
Invalid, may not be validated by special law (Const.) 278.
Land, devise of construed 6220.
Lost or destroyed, probate 5880-5882.
Marriage, effect on 6211, 6212.
Married woman, power to make, alter or revoke 6203.
Mortgage not revocation 6214.
Nuncupative 6204, 6206-6208.
Order for, production 5864, 5865.
Persons competent to make 6202.
Petition for probate 5860.
Probate of 5857-5893.
Probate, petition for 5865.
Probate, proof 5871.
Probate, proof, sufficiency of 5873.
Probate, who may petition for 5862, 5863.
Production required 5954.
Provisions for debts or expenses 6005, 6202.
Refusal to produce, penalty 5865.
Requisites of, valid 6204.
Revival of earlier 6210.
Revocation, how effected 6209.
Revoked by marriage 6211, 6212.
Sale of property authorized by 6006, 6007.
Subscribing witness, subpena for 6870.
Testamentary capacity 6202.
Who may make 6202.
Witnesses, attestation of 6204.
Witness, provision in favor, when void 6205.
HOLOGRAPHIC—
How made and executed 6224.
Proved as other wills 6225.
Validity of 6223.
Witnesses not required 6224.
NUNCUPATIVE WILL—
Contest, who may make 6208.
Estates of $1,000 or less limited to 6206.
Notice of probate 6208.
Probate of, procedure 6208.
Proof of 6206, 6207.
Three months for proof 6207.
Witness to 6206.
WITNESSES—
Compulsory attendance 5904.
Depositions of 6108.
To will, examination 5875.

Estates of minors. See Guardians, Minors.
District court, jurisdiction over 321, 4849.
Estray animals to be impounded 2261, 2265, 2329, 2331. See Live Stock.
Estrays, recorder to keep book and record of 2275, 2282.
Ethiopian or black race, marriage with white race, unlawful, penalty 6514.
Eureka County, creation, boundaries and seat 1462-1465.
Evidence. See Evidence under Civil Practice, Criminal Practice.
Accused not to be required to be witness against himself 237.
Affidavits 5450-5453, 7414.
Certified copy of notary's record to be prima facie 2754, 2755, 2759.
Certified copy of record of city clerk 818.
Depositions (civil action) taken within state 5454-5457.
Depositions (civil action) taken without state 5458-5463.
Depositions (criminal action) 7365-7384, 7414.
False, offering knowingly, penalty 6357.
Husband or wife, witness for or against each other 5424, 7452.
In action for libel, truth may be given 238.
Perpetuating testimony 5464-5473.
Public or private writings 5408-5415.
Two witnesses or confession required for conviction of treason 248.
Wilful destruction of, or alteration of, penalty 6358.
Witness shall not be rendered incompetent on account of religious belief 233.
Witnesses, competency of 5419-5449, 7451-7456, 7531.
Witnesses, not to be unreasonably detained 235.
Ex post facto laws not to be passed (U. S. Const.) 131-137 (Nev. Const.) 244.
Ex-soldiers, collection of claims for 4479-4480.
Examination. See Civil Practice.
Examination, preliminary 6970-6998. See Criminal Practice.
Examination to determine insanity 2210-2212.
Examiners, state board of, how constituted, and powers of 314, 4455-4481. See Board of Examiners.
Excavations, failure to protect, liability 3235-3237.
Must be fenced 3238.
Underneath railroads 3565.
Exceptions, how taken, civil practice 4847, 5315-5318. See Civil Practice.
How taken, criminal practice 7227-7231. See Criminal Practice.
Excessive bail or fines prohibited 235.
Excessive tax levy, commissioner voting for, penalty 3828.
Exchange, bills of, law pertaining to. See Negotiable Instruments 2548-2743.
Execution. See Civil Practice, Criminal Practice.
Bank in charge of examiner not subject to 671.
Civil judgment 5280-5306.
Criminal judgment 7264-7282.
Debtor's property, reasonable amount to be exempt 243.
Justice's court (civil) 5783-5785, 5805, 5808.
Justice's court (criminal) 7506, 7507. See Justice's Court and Justice of the Peace.
Proceedings supplementary to, civil judgment 5307-5314, 5787.

Execution—continued.
Property exempt from 5288. See Civil Practice.
Stay of criminal, pending appeal 7294.
Execution of criminal, authority 7268-7281.
Death penalty, how inflicted 7281.
Executor and executrix 5884, 5897. See Estates of Deceased Persons, Civil Practice.
Executrix, married woman may be 5886.
Executive business, governor to transact with civil and military forces, and may require information 299.
Executive department, person in, not to exercise legislative or judicial functions 258.
Secretary of state to keep record of official acts 313.
Executive power of state, supreme vested in governor 294.
Exemption from jury duty, who entitled to 3356, 4612, 4932, 4941. See Jury.
Exemptions from execution 5288. See Civil Practice.
Exemption of homestead from forced sale 288.
Exemption of reasonable amount of property of debtor 243.
Exemptions under bankruptcy act 548.
Exemptions under revenue laws 352, 1158, 1396, 1407, 3621, 3842. See Revenue.
Exhibit used in action, when original or certified copy may be brought up on appeal 5344.
Exhibits, collection, exhibits to mark 3938.
County commissioners, expenses to pay 3939.
Counties, may aid 3937.
Inspector of mines to collect 4201.
Panama-Pacific Exhibition, bureau of industry to aid at 4489.
Permanent, county may maintain, expense limited 3940.
Tax, county empowered to levy for, limited 3935, 3936.
Exhibitions, dangerous, unlawful 6590.
"Exhibitions between man and man." See Glove Contests 3881-3889.
Exhuming remains unlawfully 6552, 6553.
Exit precautions in mines 4220.
Experiment farms, agricultural, Logan and Pleasant Valley 465-476.
Experiment stations, federal aid to establish 4655.
Experiment station, state agricultural 456, 464.
Explosives, building, destruction of by, penalty 6572, 6573.
City may control 794(67).
County commissioners prohibit storage of, when petition filed, how 1946-1948.
Dealer in, duty to keep record of 6574, 6575.
Death caused by, when manslaughter 1947, 6409, 6560.
Destruction of building by 6572, 6573.
Endangering life or property by, penalty 6751.
Keeping unlawfully, penalty 6565.
Mines, use of in, regulations concerning 4211.
Explosives—continued.
Misdemeanor, county commissioners, permit storage of within city or town limits, when 1947.
Negligent storage of, liability for death of employee 5650.
Order giving notice to discontinue storage of, made how, when, by whom 1946.
Order giving notice to discontinue storage of, published how long, where 1948.
Penalty, county commissioners allow storage of within city or town limits 1947.
Penalty, corporation, firm or individual store, after given notice 1948.
Railroad property, placing near, maliciously, penalty 6751.
Selling or delivering for transportation without word "explosive" in large letters 6566.
Storage of, prohibited in town or city limits, exceptions 877, 1946.
Towns, storage of in, to regulate 877.
Unlawfully keeping, penalty 6565.
Various kinds, stored where 1946.
Violation of duty by dealer in 6574, 6575.
Express companies, rates may be fixed by railroad commission 4555, 4560, 4562.
Express companies, taxation of 3791, 3792.
Express malice, defined 6385.
Expulsion of member of legislature by two-thirds vote 264.
Extortion 6821.
By offering to prevent publication of libel 6433.
By blackmail 6739.
By public officer 6738.
By threats 6437-6438.
Threats to induce 6335, 6438, 6639, 6801.
Extradition 7435-7444.
Arrest of fugitive 7437.
Bail of fugitive 7438, 7439.
Bankrupt for 552.
Commitment of fugitive 7437, 7438.
Discharge, want of prosecution 7442.
District attorney, notice to and duty 7440, 7441.
District court to inquire into arrest 7443.
Expenses, county commissioners to allow 7444.
Magistrate may issue warrant of arrest 7436.
Magistrate, return of 7443.
Of bankrupt 552.
Seal, no charge for 7435.
Secretary of state to affix seal without charge 7435.
U. S. constitution, section on 161.
Extreme cruelty, ground for divorce, community property, how effected by, divorce for 5838.

F

Fact or facts. See Civil Practice.
Facts, courts not to charge in respect to 327. See Civil Practice.
Failure to provide wife with common necessaries, ground for divorce 5838.
Failure to support wife or child, penalty 6481-6483.
False, account or entry by officer 6658.
Assayers, record of bullion or ore purchased 2485.

False—continued.
Certificate by officer 6375.
Certificate of citizenship, penalty 2529.
Certificate of registration of animals 6746.
Entry in corporate records 1176, 1178, 1235.
Entry in public record 6664.
Evidence, knowingly offering 6357.
Financial statements, publication of 6720.
Fire alarm 6601, 6602.
Impersonating of another, penalty, evidence 6735, 7179.
Impersonating of doctor, penalty 2373.
Impersonating of officer 4291, 6734.
Imprisonment, defined 6440.
Imprisonment, limitation of action for 4967.
Making or issuing document purporting to be that of corporation, state or government 6666.
Oath, bank officers 660.
Or forged instrument, offering for filing, register or record 6348.
Or fraudulent claim, auditing, allowing or paying 6376.
Or misleading statement by public officer in official report 6349.
Or misleading statement or report to public officer 6805.
Permit, license, diploma or writing, filing for record or conducting business under 6719.
Personating officer or another, penalty, evidence 2373, 4291, 6734, 6735, 7179.
Pretenses, city power to punish for 794 (75).
Pretenses, credit or property obtained by 6696, 6704, 7179.
Pretenses, evidence, sufficiency 7179.
Pretenses, indictment for 7067.
Pretenses, obtaining signature by, trial, evidence 6705, 7179.
Pretensions of heirship 6370.
Record of bullion or ore purchased 2485.
Representations affecting real property of another 6706.
Representation as to property subject to mortgage or lien 6691-6700.
Statements to controller by insurance company 1328.
Statements, designed to affect market price 6723.
Statements, relative to corporations 1174.
Suit, bringing or instigating 6366.
Weights 4811. See Weights and Measures 4792-4823.
Family, desertion of, penalty 6446.
Estate set apart for support of 5956-5962. See Estates of Deceased Persons.
Fan tan, gambling game, unlawful, penalty 6518.
Fares and freights, maximum rate, proviso, powers of commission 3563, 4555. See Railroads, Railroad Commission.
Farmer, implements and certain property exempt from execution 5288.
Farms, experiment 465, 476. See Agriculture.
Faro, gambling game, penalty for conducting 6518.
Father, when acknowledgment of makes illegitimate child legitimate from birth 5833.
Father—continued.
When consent of required on adoption of child 5828.
When entitled to damages for death by wrongful act 5648.
When illegitimate child deemed adopted by conduct of 5833.
When may sue for seduction of daughter 4995.
Federal currency only to circulate as money 343.
Federal jurisdiction, civil process, service of, on such lands 1949.
Concurrent jurisdiction retained 1949.
Criminal process, service of, on such lands 1949.
Government land exempt from taxation 1950, 1952.
Jurisdiction ceded to United States 1949.
Plat to be filed with governor 1949.
Plat to be verified 1949.
State jurisdiction ceded 1951.
Federal mining laws 2375-2421. See Mines and Mining.
Federal office-holder disqualified to hold state office, when (Const.) 267, 305.
Federal townsites, actual settler entitled to adjoining lot 1956.
Actual settler entitled to preference 1956.
Additional entry may be made, when 1971.
Adjustment of size of lots 1959.
Adverse, clerk to serve notice 1984.
Adverse, conveyance to be made, when 1984.
Adverse, corporate authorities to certify to district court 1984.
Adverse, district judge to certify to district court 1984.
Adverse, proceedings to be certified to district court 1984.
Amount to be paid for deed 1984.
Appeal, allowed party aggrieved in adverse proceedings to townsite lots 1985.
Application of proceeds of unclaimed property 1987.
Area for townsites limited 1968.
Bar not to apply to minors or insane 1983.
Cause of failure or disability of trustee 1981.
Certain acts of trustee void 1964.
Certain townsites may be withdrawn and disposed of by secretary of interior 1977.
Charges for water rights 1975.
Claim, how made in certain cases 1983.
Claim of married women may be made by husbands 1983.
Claim of minors and insane to be made by guardian 1983.
Claimant to assign statement in writing 1983.
Claimants not to be affected 1989.
Claimants to pay expenses of survey 1967.
Claimant, when debarred 1983.
Clerk to serve notice in case of adverse 1984.
Contest suspends limitation of time for conveyance 1987.
Commissioner may require election 1970.
Commissioner may set off site 1970.
Contests, time allowed for conveyance after decision 1987.

Federal townsites—continued.
Corporate authorities required to convey title 1980.
Conveyance of public reservation 1974.
Contents of plat 1956.
Costs of surveying, how paid 1967.
County seat, townsite 1953.
Deed, how executed 1981.
Deed to be made out, when 1986.
Deed to lot, execution of after trial of adverse claim in district court 1984.
Deeds to minors or insane, how made 1986.
Deed, to whom executed 1981.
Deed, who to issue 1986.
Disability of trustee, how caused 1991.
Disability of trustee, how remedied 1991.
Disposition of lots 1956.
Disposition of proceeds of unclaimed lots or lands 1993.
Disposition of unsold lots 1956.
District judge may enter as trustee and dispose of lots under legislative authority 1961, 1982.
District judge required to convey title 1980.
Election of part of lands in case of excessive area 1970.
Entered by corporate authorities 1961.
Entered by judges as trustees 1961.
Entry filed, when, where 1962.
Entry to include what 1962.
Exceptions as to property to be sold if not paid for 1987.
Excessive area of lots 1959.
Excessive area, election of part of lands 1970.
Exemption of lands 1978.
Expenses 1973.
Expenses of improvement of public reservations 1974.
Expenses of survey, how paid 1990.
Expenses of survey to be paid by claimants 1967.
Failure of trustee, how caused, how remedied 1991.
Form of deed 1981.
How entered 1961.
If adverse claimants for lot, proceedings to be certified to district judge 1984.
Improvement of public reservations 1974.
Irrigation projects, lands for towns may be reserved on 1972.
Lands for federal purposes exempted 1966.
Lands for towns may be reserved on reclamation project 1972.
Lands unclaimed, sale of 1993.
Lease of water power, disposition of moneys from 1976.
Limits of 1963.
Limitation of fees and costs 1986.
Limitation on area of 1968.
Lots, cost of 1986.
Lots not conveyed within one year to be sold 1987.
Lots, sales of 1955.
Lots, surveys of 1955.
Lots unclaimed, sale of 1993.
Married women may apply for a lot, when 1983.
Federal townsites—continued.
Mines, title to, cannot be acquired 1965.
Municipal purposes have preference in lease of surplus water power 1976.
Minimum price of lots 1956.
Notice to lot claimants to be given, how, when 1982.
Patents for lots to issue 1957.
Patent, trustee to record 1992.
Payment for water rights of established towns 1975.
Plat to be filed 1956.
Proceeds 1973.
Proceeds of unclaimed lots or land, disposition of 1993.
Public purposes, lands may be reserved for 1972.
Public reservations, improvement of 1974.
Publication of notice 1989.
Reclamation funds may be used to defray expenses 1973.
Reclamation projects, lands for towns may be reserved on 1972.
Record of patent, proof of payment of taxes not required 1992.
Regulations as to limits of 1963.
Reservations for public purposes, lands may be reserved for 1972.
Restriction of size by other entries 1969.
Sale of lots 1955, 1956, 1973.
Sale of unclaimed lots or lands 1993.
Secretary of interior may contract for water rights 1975.
Secretary of interior may have plat made, when 1958.
Secretary of interior may have survey made, when 1958.
Secretary of interior may withdraw and dispose of certain townsites 1977.
Secretary of interior shall provide for water rights in established towns 1975.
Secretary of interior to make surveys and sales of lots 1955.
Size of townsites 1953, 1956.
Size, restriction of by other entries 1969.
Statement of entry to be filed 1962.
Surface rights on 1978.
Surplus power may be leased by secretary of interior 1976.
Surveys and sales of lots 1955.
Survey of townsites, how paid for 1990.
Time of filing of plat 1956.
Title conveyed to whom 1981.
Title of lots, subject to recognized veins 1960.
Title to mines cannot be required 1965.
Town may make additional entry 1971.
Townsites on mineral lands 1978.
Townsites on Walker River lands 1979.
Townsites platted by occupants 1956.
Townsites reserved by president 1954.
Townsites, surveys of, how paid for 1990.
Trustee, disability of, how caused, how remedied 1991.
Trustee, failure of, how caused, how remedied 1991.
Trustee to record patent 1991.
Unsurveyed lands, extension of limits after survey 1957.
Use of public reservations 1974.
Walker River lands, townsites on 1979.
Water rights for established towns 1975.

Federal townsites—continued.
When proceedings certified to district court 1984.
Feeble-minded persons admitted to hospital for mental diseases, expense of 2211, 2212.
Fee. See Fees, Civil Practice.
Fees, act not to apply to legislative officers 2042.
Animal, sale of for charges 5499.
Appeal from district to supreme court, deposit to cover, rule xxvi, p. 1425.
Appeal from district court to supreme court 2032.
Appeal from justice's court 2031.
Arbitrators, employer and employee 1935.
Application of act 2043.
Attorney, action for trespass of live stock 2336.
Attorney, action for workman, change of place of employment on misrepresentation 1938.
Attorney, for admission of 500, 503, 2006, 3953.
Attorney, governed by agreement, lien for 5376.
Attorney, prevailing party under employer's liability act 1923.
Attorney, no witness fees for, when 2033.
Attorney, justice's court, recoverable as costs 5814.
Book for officers to keep 2020.
Bureau of industry, may exact 4490.
Carey act lands, proceedings for 3067, 3070, 3081, 3089, 3094.
Charged only as provided by statute 2019.
Civil actions, attorneys, when allowable 1923, 1938, 2336.
Civil actions, attorneys, in justice's courts 5814.
Clerk of supreme court 2006.
Clerk of supreme court to pay over money 2034.
Commissioners of deeds 1004, 2028.
Compensation and fees of county and township officers, legislature may regulate 278.
Constables, counties polling less than 800 votes 1999.
Constables, counties polling more than 800 votes 2011.
Constable, mileage 2037.
Constables to make monthly statement of 2021.
Copies, prepared, fee for 2045.
Coroners 1998, 2010, 7556, 7558.
Coroners, mileage 2037.
Corporations, articles filing with secretary of state 1203, 1349.
County auditors 2002, 2014.
County clerks, counties polling less than 800 votes 1995.
Counties polling over 800 votes 2007.
Copies prepared 2045.
Corporations, proceedings to remove directors 1182.
Cost bill, need not be included in 5387.
Election. See Elections.
Guardianship 6196.
Inspection of mine by stockholder 2493.
Marriage licenses 2341.
Monthly statements of 2021.
Fees, county clerk—continued.
Naturalization 2526.
Receipt for, to give on demand 2033.
County recorders, counties polling less than 800 votes 1996.
Counties polling more than 800 votes 2008.
For recording certificates of proof of labor 2046.
For recording certificates of state engineer 4689.
For recording liens 2219.
For recording marriage certificates 2341, 2345.
To make monthly statement of 2021.
County surveyors 2017.
To make monthly statement of 2021.
Court reporter, when taxed as costs 4913.
Death or birth, certifying to certificate 2971.
Delinquent tax suit, publication and filing notice 3663.
District attorney, opinion, conviction 6493.
District attorney, tax suit 1603, 3673, 3677, 3709.
Toll road, forfeiture 3757.
District court 2030.
District mining recorders 2466, 2470.
Duties of clerks to give receipts and pay over money 2033.
Duty of district judge to give in charge to grand jury 2022.
Election contest 1811.
Election contest, not to receive, when 1815.
Election fees to be paid to secretary of state and county clerks. See index "Elections."
Elisor entitled to same as sheriff 5498.
Estrays, to county recorders and justices of the peace 2282.
Expenses of jurors, how paid 2035.
Fee book, officers to keep 2020.
Federal townsite, deed to lot 1986.
Fence viewers 3606.
Folio, how construed 2036.
For prepared copies 2045.
Foreign corporations, filing articles 1349.
Garnished, treasurer or disbursing officer may pay into court 2865.
Garnishee, may demand before answering 5174, 5189.
Guardianship, county clerks 6196.
Illegal, collection of, ground for removal 2852.
Insurance companies 1279.
Interpreters 2016.
Jurors, counties polling less than 425 votes 2001.
Counties polling more than 425 votes 2013.
Justice's court, appealed from 2031.
Justices of the peace, counties polling less than 800 votes 2003.
Counties polling more than 800 votes 2015.
Estray animals 2282.
Justices of the peace to make monthly statement of 2021.
Legislature may regulate fees of county and township officers 278.
Liens, recording 2219.

Fees—continued.
Marriage, clerks and recorders 2341, 2345.
Mileage, sheriff, constable or coroner, how computed 2037.
Mileage, where computed from 2040.
Military commission, no charge 3967.
Mining district recorder 2466, 2470.
Misdemeanor to violate fee act 2023.
Naturalization 2526.
Nomination papers, primary election 1742.
None for oath of office 2039.
No other to be charged 2019.
No witness fees for attorney 2038.
Not to receive to own use by certain officers 389.
Notaries public, counties polling less than 800 votes 2004.
Counties polling more than 800 votes 2018.
Oath of office, none for 2039.
Officers and certain members of legislature prohibited from receiving fees and perquisites 389.
Officers to keep books 2020.
Officers to make monthly statement of 2021.
Officers to post table of 2025.
Officers who may demand 1994.
On appeal to supreme court 2032.
Partition fences, proceedings for erection 3606.
Partition of property 5543.
Payable in advance 2027.
Perquisites and fees certain officers prohibited from receiving 389.
Pharmacist, application for license 4499.
Public administrators to make monthly statement of 2021.
Punishment for taking unlawful 2024.
Railroad, right of way, proceedings to obtain 3544.
Recorders, counties polling less than 800 votes 1996.
Counties polling more than 800 votes 2008.
Referees 5382, 5583.
Repeal of former acts 2044.
Return, written, no charge for 2041.
Secretary of state 4260.
Corporations filing articles 1203, 1349.
Pertaining to elections. See Elections.
Sheriffs, in counties polling less than 800 votes 1997.
In counties polling more than 800 votes 2009.
Mileage 2037.
Pure food and drug act 3501.
To make monthly statement of 2021.
Veterinarian act, court to allow 4384.
State engineer 4698.
Stationary engineer's license 3903.
Stockholder to inspect mines 2493.
Table of, officer to post, penalty 2025.
Taking unlawful, punishment 2024.
Townsite, deed to lot 1986.
Trademark, filing 4635.
Translators 2016.
Violaton of act, a misdemeanor 2023.
What officers may demand 2005.
When officers not to charge on return 2041.
Fees—continued.
Witnesses before public service commission 4531, 4532.
Counties polling less than 450 votes 2000.
Counties polling more than 450 votes 2012.
May demand when served 5431, 5433.
Fellow-servant, damages for personal injuries 5649.
Felony, definition of 6266.
Causing death, action for damages 5647.
Conviction of by witness, may be shown to affect credibility 5420, 5437.
Conviction of, ground for divorce 5838.
Limitation of actions for 6922, 6924.
Punishment when not fixed 6283.
When person is convicted of, cannot be an elector unless restored to civil rights 250.
Felony cases, supreme court has appellate jurisdiction 319.
Female, may be attorney 499.
May be school superintendent or trustee 371.
Name may be changed in divorce action, when, how 5844.
Not eligible to office, exceptions (Const.) 371.
Placing in house of prostitution 6445.
Slander of 6434-6436.
Feminine gender, included in the masculine 5475.
Fences, partition, erection and maintenance, viewers, when appointed, duties, powers and fees 3604-3608.
Partition, proceedings for erection at joint expense 3604-3608.
Railroad company to execute bond for building of, in proceedings under eminent domain 5619.
Railroads to maintain 3551.
Ferries, eminent domain may be exercised for 5606.
Fictitious checks, notes or other paper, uttering or passing 6665.
Field notes and plat for mining patent to be posted on claim 2383.
Fighting, men or animals, prohibition by city 794(75).
Filing of a paper construed to include the certificate of the same 2036.
Final decision deemed excepted to 5318.
Final judgment, appeal from, of what transcript to consist 5356.
Finances of county, quarterly statement to be published 1515.
Finances of state, monthly statement to be published 4456.
Findings. See Civil Practice.
Fines. See Crimes and Punishments, Civil Practice.
Action for, jurisdiction 5714.
Board of pardons may remit 307, 7622-7633.
City, imposed by municipal court paid into city treasury 797, 835.
City ordinance violation, mayor may remit 784.
Collected from penal laws, pledged to educational purposes 355.

Fines—continued.
Collection of may be suspended by governor not exceeding 60 days except in impeachment cases 306.
Excessive, not to be imposed 235.
For contempt 5403, 5679, 5707, 5798.
Governor may suspend collection 306.
Imprisonment for nonpayment 7257, 7500.
Municipal court, in city, may enforce 798, 832, 321.
Paid into state treasury 7463.
Remitted, may be by board of pardons 307.
School fund dedicated to 355.
Supreme court has appellate jurisdiction in action involving legality 319.
Fire, alarm, giving false 6601, 6602.
Apparatus, destruction or injury to 6576.
Combustible materials, storage, regulation, penalty 1946-1948. See Arson, Incendiarism.
Failure to extinguish 6632.
Insurance company, mutual, action may be maintained by, against members 1296.
Negligently setting or failing to extinguish 6579, 6632.
Obstructing extinguishment 6576.
Precautions, failure to take 905, 906.
Property may be taken for public use, and compensation afterwards made 237.
Setting negligent 6632, 6579.
Fire insurance companies 1105, 1106, 1266-1309, 1327, 1329. See Corporations.
Fire insurance fund in state treasury, created 4180.
State treasurer to keep 1360, 4180.
Firearms, aiming or discharging 6569, 6609.
Carrying concealed, penalty 6568.
City may regulate carrying 794(76).
Discharge of, prevention by city 794(75).
Officers, duty of to enforce law 6570.
Use of by minor 6610.
Firemen, obstructing or interfering with 6577.
Firewood, standard cord of, what 4807. See Weights and Measures.
Fireworks, discharge of, prevention by city 794(75).
First degree murder defined, penalty 6386.
First meeting, election of directors or trustees of corporations 1117. See Corporations.
Fiscal agent, bank or corporation may be for state, city, town or other corporation 1119.
Fiscal year to commence on first of January 348.
Fish. See Fish Commissioners.
Act, construction of 2075.
Assistance, officers may call for 2070.
Catch, limit of 2065, 2096.
Catching otherwise than by hook and line, penalty 2061.
Certain waters, commissioners to protect by extending closed season 2056.
Closed season 2059.
Selling or possessing during 2060.
Violation of 2058.
County commissioners may extend closed season in certain streams, orders to be published 2056, 2057.
Fish—continued.
Eggs and fish may be taken for scientific purposes 2073.
Exceptions to, provisions of act 2111.
Fishways and ladders 2049.
Hatchery, private, products of may be sold 2077.
Hotels and dealers, regulations concerning 2062.
Ladders, destruction or interference 2049.
Failing to provide 2048.
Fishing within one hundred feet of 2049, 2066.
License, how restored, when lost 2107.
Money derived from to be used for 2106.
Must exhibit, when 2108.
Officers to issue 2102.
Penalty for failure to procure or exhibit 2101, 2108.
Price of 2103.
Valid for one year 2105.
Where to be procured 2112.
Limit of catch 2065.
Night fishing defined and prohibited 2068, 2069.
Officers, assistance may call, refusal to aid, penalties, evidence 2071.
Private hatchery act, license for 2079.
May be established 2076.
Products, license for, dealed in 2080.
Sales, false invoice illegal 2083.
Form of invoice 2081.
Invoice to accompany 2081.
Invoice to shipment 2082.
Penalty for violation 2084.
Proprietors to report same 2083.
Violation of, penalty 2084.
Private hatchery, general act not to apply to 2072.
Private ponds, owner may take from at any season, general act not to apply to 2072.
Repealing provisions 2074, 2099.
School teachers to give instruction in 3347, 3348.
Selling or having, caught otherwise than by hook and line 2062.
Size, regulation concerning 2063.
Streams, obstruction of, certain cases misdemeanor 2048.
Obstruction of, punishment for violation 2050.
Unlawful to pollute, except 2047.
Transportation of, regulations concerning 2064.
Transporting or offering for sale outside state 2051.
To enforce act, officers empowered 2069.
To fish within one hundred feet of dam, unlawful 2066.
To fish within one mile of any government dam, unlawful 2067.
To sell or possess, during closed season, unlawful 2060.
Undersized, catching or having 2063.
United States reclamation dam, one-mile limit 2067.
Warden, appointment of by commissioners, bond and oath 2052.
Duties and powers of 2053, 2054.
Failure to aid on command 2070.

Fish, warden—continued.
Removal of 2054.
Salary, how fixed and paid 2055.
Fish commissioners, compensation, none 4483.
Expense, how paid 4483.
Governor to appoint, reports to 4483.
Office, term of 4483.
State fish hatchery, appropriation for 4485.
Claims, how paid 4485.
Provision for 4484.
Flag, desecration of, penalty 6603.
National, to be provided for schools 3352.
State 3353.
Flue dust, when eminent domain may be used for disposition of 5606.
Flume companies, rates of may be regulated by legislature 278.
Flumes, eminent domain may be exercised for 5606.
Folio, how construed for computing fees 2036.
Food, pure. See Pure Foods and Drugs 3486-3510.
Calf must be four weeks old 2991.
Certain animals not to be exposed for sale 2990-2993.
Definition of 3487.
Diseased animals not to be offered for sale 2989-2993.
Horse meat, sale of, when unlawful 6524, 6525.
Offered for sale, what deemed 2992.
Seized and destroyed, when 3508.
Forcible entry and unlawful detainer 6743.
Action for 5585-5605.
Jurisdiction 321, 4840. See Civil Practice.
Forcing woman to marry, penalty 6444.
Foreclosure of lien 2227.
Foreclosure of mortgage or lien. See Civil Practice.
Affidavit of payment of taxes to be made 3756.
Amount of property to be sold 5503.
Injury to real property may be enjoined 5519.
On mines, rights of holder 1091.
Receiver may be appointed, when 5193.
Sale of land in two or more counties 5501.
Sale, surplus money, how disposed of 5502.
Foreign building and loan association, agent doing business contrary to law 1363.
Unlicensed, soliciting business for 1358. See Corporations.
Foreign conviction or acquittal, defense 6279.
Foreign corporations. See Corporations.
Action against for doing business without filing certificate 1350.
Costs, failure to give security for dismissal of action 5391.
Doing business without authority 1350.
Eminent domain, may exercise 5629.
Failure to file annual statement with assessor 1353.
Failure to file copy of charter with recorder 1347.
General provisions concerning 1346-1364.
Resident agent to appoint 1178, 1304, 5024.
Foreign records, how admitted in evidence 5411, 5412, 528.
Foreign wills, probate of 5878, 5879. See Estates Deceased Persons.
Foreigners, entitled to same rights as natives 245.
Forests, act, object to protect water supply 2119.
Act, violation of, penalty 2120.
Cutting unlawfully, penalty 2114-2116.
Fact, issue of, as to title to real estate 2117.
Fire, setting negligent in 6579, 6632, 6633.
Setting fire in, penalty 6633.
Timber, cutting, misdemeanor, when 2115.
Timber, cutting on state land, penalty 2116.
Timber for domestic purposes, may be cut, when 2117.
Unlawful to cut or remove, when 2114.
Wood, from young trees, unlawful to sell, penalty 2118.
Forest reserves, application for homestead, reinstatement on 3134.
Established, regulations, mineral land not included 2420.
Forfeitures, certain abolished 6278.
District attorney to prosecute action for 1598.
Jurisdiction of action for 5714.
Limitations of action for 4967.
May be remitted by board of pardons, when, how 307.
Public utility, action for, how brought 4544.
Witness not liable to, for testifying before public utility commission 4536.
Forged instruments or bills, having or receiving with intent to utter or pass 6682.
Forgery, chapter concerning 6663-6694.
Conviction of, excludes from jury, unless restored to civil rights 285.
Definition of terms 6673.
Expert testimony on trial 7175.
False certificate of acknowledgment 6669.
Indictment for 7065.
Proof at trial 7175.
Signature of public officer 6685.
Signing or indorsing by fictitious or own name, penalty 6668.
Signing one's own name with intent to represent other person of same name, penalty 6668.
Trial for, expert testimony on 7175.
What acts considered 6663-6670.
Witnesses and proof in 6683, 6684, 7175.
Former acquittal, what constitutes 7111, 7112.
Former jeopardy 6279, 6280, 7111, 7113.
Order of discharge to become witness 7170.
Forms in civil proceedings. See Civil Practice.
Formula for sheep dip 4596.
Fornication defined, penalty 6458, 6517.
Foundries, location and control by city 794(54).
Foundrymen, liens, may obtain, when 2231.
Four may constitute jury by consent 5204.
Franchises. See Public Utility Commission, Revenue, Civil Practice.
Acceptances filed with recorder 2139.
Advertisement of application 2131.
Annual statement filed with assessor 2136.
Appliances to be kept in order 1262.
Applicant, agreement to file with county recorder 2135.
Application for, mode of 2130.
Appurtenances to be best make 1263.
Certain acts repealed, proviso 2140.

Franchises—continued.
Chinese not to be employed 3483-3485.
City may grant 794 (30, 36, 84).
Commissioners may grant 1261-1264, 2121-2141.
Construction, details of 2137.
Dissolution of corporation for nonuser of 5670.
Duration of 1264, 2130.
Electric light, heat and power 1261-1264, 2129, 2139.
Eminent domain 2138, 5606-5629.
Forfeiture for employing Chinese or Mongolians. when 3483-3485.
Gas companies, powers and privileges 1265, 2139.
Granted, when 2129.
Grantee, statement to submit 2136.
Guarantee, county commissioners to require 2134.
Highways, streets and alleys, may use 2129.
Length of 1264, 2130, 2140.
Maximum charge, 2133, 2140.
Mongolian labor not to be employed 3483-3485.
Objections to, how heard 2132.
Other acts also govern 2139.
Percentage to pay to counties 1261.
Petition to be filed 2131.
Petition, when granted 2133.
Profit, certain portions to go to school fund 2135.
Public service commission, control over 2140.
Qualifications for exercise of (as amended 1880) 250.
Railroad may sell 3574.
Repeal provisions 2140, 2141.
Sale of, when 1151, 1152, 2121.
School funds, portion of profits to go to 2135.
Streets and alleys, may use 2129.
Street railways 2121-2128, 2130, 2139.
Street railways, advertising, cost of, how paid 2127.
Duration of 2128.
Operators to keep street in good repair 2125.
Proceeds from sale of, to be used for 2123.
Proposals to be advertised 2122.
Purchasers, bond to furnish 2126.
When granted not to interfere with 2124.
Who authorized to sell 2121.
Telegraph 2139.
Telephone 2139.
Toll roads and bridges, forfeiture 3049. See Public Highways.
Water 2139.
Fraternal societies, insurance 1324. See Corporations.
Fraud, action for relief against, limitations 4967. See Civil Practice.
For debt contracted by and in case of libel and slander, imprisonment may be imposed 243.
On owner, by bailee of animal, vehicle or automobile 6707.
Or misconduct in sale of property of estates 6016, 6017. See Estates of Deceased Persons.
Fraudulent, acts concerning elections. See Elections.
Bank transactions, penalty 648.
Fraudulent—continued.
Conveyance by decedent 6029-6031. See Estates of Deceased Persons.
Conveyance, penalty for 6695.
Receiving knowingly, penalty 6703.
Conveyance, when void 1064, 1065, 1078.
Intent, question of fact 1068.
Issuance of corporate stock, penalty 6722.
Schemes or devices, penalties 6463, 6464.
Fraudulently, destroying or injuring deeds or other writings 6671.
Or maliciously executing or filing for record instrument affecting title of another to real property 6706.
Procuring filing of trademark, stamp or design 6693.
Selling real estate twice 6727.
Free and Accepted Masons, incorporation of 1418-1423.
Free public libraries, established, how 3227-3231. See Public Libraries.
Free text-books 3462-3472. See Public Schools.
Free transportation of certain freight allowed, of certain persons restricted 3583, 4556.
Freedom of speech and press guaranteed 171, 238.
Freight and fares, maximum rate, proviso, power of commission 3563, 4555. See Railroads.
Freight, certain may be carried free 3583, 4556.
Freight rates, may be regulated by legislature 278.
Freight, when common carrier may sell unclaimed property to pay 541.
Friends or Quakers, marriage ceremony of 2353.
Fruit, standard measure, what 4806. See Weights and Measures.
Fugitives from justice, requisition and extradition, procedure 7435-7444. See Criminal Practice.
Full crew for railroads, defined 3588, 3596.
Full faith and credit clause, Congress to prescribe enforcement 159.
Fumes, when eminent domain may be used for disposition of 5606.
Funds, when receiver may be appointed to take charge of 5193.
Funds, of county, assigned to payment of claim, if not collected, action required to revive 1536.
Funeral director. See Board of Embalmers.
Funeral expenses, preferred charge against estate 5959.
Furnishing board 4468-4475. See Board of Examiners.
Furnishing libelous information, penalty 6432.

G

Gallon, unit of measure, capacity defined 4798. See Weights and Measures.
Gambling, break open doors, officers have power to 6521.
Bunco-steering, penalty for 6464.
Certain games prohibited, penalty 6518.
Destruction of implements, when 6521.
Exhibiting paraphernalia, penalty 6520.
Horse races, books or pools on, penalty 6518.
Immunity to witness 6522.
Implements of in possession, penalty for 6520.

Gambling—continued.
Magistrate to destroy implements, when 6521.
Officer, duty on seizing paraphernalia 6521.
Percentage games deemed gambling 6518.
Permitting games to be carried on, penalty 6519.
Public nuisance, where carried on 6561.
Slot machines prohibited 6518, 6521.
Swindling by trick or fraudulent device, penalty 6463, 6464.
Witnesses, compelled to testify, immunity to, when 6522.
Game, wild, antelope and deer, open season for, limit 2093, 2094.
Beaver, protected 2100.
Birds, insectivorous, plumage or song, protected 2085.
County commissioners may adopt ordinance 2098.
County money appropriated 2110.
Curlew, closed season for 2089.
Deer and antelope, open season for, limit 2093, 2094.
Ducks, wild, closed season for 2089.
Exception to provisions of act 2111.
Fish and game warden to be appointed 2052.
Goose, closed season for 2089.
Grouse, or mountain quail, closed season for 2088.
License, county clerk, record of, to keep 2104.
Failure to exhibit, penalty 2109.
How restored, when lost 2107.
Money derived from, how to be used 2106.
Must exhibit, when 2108.
Must procure 2101.
Officers to issue 2102.
Price of 2103.
To exhibit, failure, penalty for 2108.
Valid for one year 2105.
Where to be procured 2112.
Limit to number taken 2092.
Mountain quail, closed season for 2088.
Nests and eggs protected 2091.
Ordinance, county commissioners to pass, when 2098.
Penalty for violation of act 2097.
Plover, closed season for 2089.
Possession of unlawful, when 2095.
Quail, closed season for 2088.
Repeal of provisions 2099.
Sagecock or sagehen, closed season for 2087.
Sandhill crane, closed season for 2089.
School teacher to give instruction in laws relating to 3348, 3349.
Shipment of, penalty for 2113.
Snipe, closed season for 2089.
Swan, closed season for 2089.
To destroy certain insectivorous, plume or song birds, unlawful 2085.
Transporting or receiving 2113.
Valley quail, closed season for 2090.
Warden, duties of, removal of 2054.
Warden, powers of 2053.
Salary, how fixed and paid 2055.
Wild duck and other game birds, closed season for 2089.
Woodcock, closed season for 2089.
Garnishment, civil action 5169-5191, 5194. See Civil Practice.
Gas companies 1265, 2139.
Gas companies, may condemn for right of way 2138. See Corporations.
Gas lands, patented to assignee 3178.
Gas wells, bounties for 702-717.
Gasoline forbidden underground, when 4219. See Explosives, Combustible Materials.
Gates, failing to close, penalty 6769.
Gender, masculine includes feminine and neuter in civil practice act 5475.
General election, to be held on Tuesday next after first Monday in November 373.
General manager of corporation, deposition may be taken 5454.
Geological specimens, exempt from execution 5822-5823.
Gifts, directors orphans' home to accept and control, exception 4104.
Gifts, Nevada bureau industry and agriculture may accept, when 4490.
Giving, offering or promising compensation or reward for office or employment 1829, 2822, 6317.
Giving, offering or promising compensation or reward for permission to exercise function of office or receive emolument of 1829, 2822, 6317. See Bribery.
Glove contests, admission fee allowed 3888.
Contest to be within enclosure 3885.
Contestants, physicians to certify condition of 3884.
County auditor to prepare license 3883.
License, county auditor to prepare 3883.
Money of, division between state and county 3887.
Sheriff to issue, cost thereof 3882.
Who may procure for 3881.
Municipal corporations, regulation by prohibited 3886.
Physicians to certify condition of contestants 3884.
Regulation by municipal corporations prohibited 3886.
Sheriff to issue license, cost thereof 3882.
Violation of act, penalty 3889.
Goat included in term "sheep" 4593. See Live Stock.
Liability of owner 2325-2331.
Permitting to run at large in cities or towns prohibited, when 2330.
Trespassing, liability of owner 2253, 2258.
Gold coin, judgment for damages to be in 5269.
Gold dust and bullion, returned as money, on execution 5287.
"Goods," when included in words "personal property" and "property" 5475.
Goose, closed season for, what 2089.
Gopher, bounty for 723-727.
Gospel, ministers of, services to hold at prison 7576.
Gospel, ministers of, chaplains of legislature 4119.
Government, county and township, legislature to establish uniform 283.
Government land, civil process, service on 1949, 1951. See Public Lands.
Governor, adjutant-general, to appoint, when (obsolete) 4039.

Governor—continued.
Adjutant-general rank of on governor's staff 3993.
Adjutant-general, to be suspended, when, how 3996.
Age qualification 296, 2766.
Agricultural society, state, directors of, governor to appoint 3918, 3922, 3932.
Appoint, arbitration commission, when 1929.
Bank examiner 665.
Board, of bank commissioners 664.
Of dental examiners 4428.
Of embalmers 4445.
Of fish commissioners 4482.
Of health 4952.
Of honorary visitors, university 4667.
Of medical examiners 2359.
Of pharmacy 4495.
Of sheep commissioners 4587.
Commissioners of deeds 1000.
Commissioner of industry, agriculture, and irrigation 4487.
Directors of district agricultural society 435.
Experiment dry farm 473, 475.
State agricultural society 3918, 3922, 3932.
Director of weather bureau 4408.
Notaries public, unlimited number 2762.
Private secretary 4190.
State, auditor 4148.
Detectives 4299-4303.
License and bullion tax agent 4240.
Police 4273.
Veterinarian 4376.
Arbor day, by proclamation, to designate 3349.
Attorney-general to report to governor 4132.
Attorney-general may be directed by governor to bring and defend certain actions, when 4133, 5658.
Bank commissioners, board of and bank examiner appointed by 661-665.
Board of control agricultural experiment station to report to, transmit to legislature 459.
Board of control, experiment farms to appoint 469, 475.
Bullion tax agent, governor to appoint 4240.
Bureau of industry 4489.
Cadets, commission to issue 4664.
Chairman board of capitol commissioners 4412.
Chairman board of industry, agriculture and irrigation, ex officio 4486.
Chairman ex officio state banking board 664.
Clerk, compensation 4194.
Clerk, may employ 4194.
Commander-in-chief 298, 3967.
Commissioner of deeds, to appoint 1000.
Commissioner of industry, agriculture and irrigation, to appoint 4487.
Commission by, to be in name of state (Const.) 309.
Commission, justices supreme court 2775.
Commission, to sign 2794.
Commission university cadet officers 4664.
Constitutional provisions, adjourn legislature, may, when 304.

Governor—continued.
Approve or disapprove legislative bills, when, how 293.
Commander-in-chief 298.
Commissions and grants by, to be in name of state 309.
Convene extra session of legislature, when 302.
Elected how, term of office 295.
Election for, returns of, made how 297.
Executive authority supreme, vested in 294.
Failure to act upon bill, when becomes law 293.
Information in writing from officers executive department, may require 299.
In time of war with consent of legislature may continue commander-in-chief out of state 311.
Keep great seal of state 308.
Keep office at seat of government 380.
Liable to impeachment 335.
Lieutenant-governor perform duties of in certain contingency 310.
May adjourn legislature in case disagreement between two houses 304.
May convene legislature by proclamation 302.
May convoke legislature in joint session for election U. S. senator 292.
May convoke legislature in special session 260.
May grant reprieves for limited period 306.
May suspend execution of sentence for treason 306.
Member of board of examiners 314.
Member of board of pardons 307.
Member of board of parole commissioners 7631.
Member board of prison commissioners 314.
Messages and recommendations to legislature 303.
Militia, may call out to execute laws, suppress insurrection or repel invasion 364.
Not to hold office under United States 305.
Office holder under United States not eligible 305.
Power to call out militia 364.
Power to fill vacancies in office 301, 406.
Power to suspend collection of fines 306.
President pro tem. of senate to act as, when 310.
Qualifications of 296.
Report to legislature reprieves and pardons granted 306.
Shall communicate with legislature by message 303.
Shall keep great seal 308.
Shall not receive fees and perquisites 389.
Shall sign grants, commissions 309, 404.
Shall see laws are faithfully executed 300.
Shall transact executive business with officers of government 299.
Sign all laws 293.
Supreme power of state vested in as chief magistrate 294.
Tie in election for, legislature to elect 297.
Votes to elect, plurality of 297.
Who eligible to office of 296.

Governor—continued.
Contagious diseases among stock, power to employ veterinary 2270.
Contracts with other states for care of delinquents 756.
Controller of state to report to, when 2929, 4156.
County jail, may order prisoner removed from, when 7612.
County, may declare in state of insurrection 2842-2843.
Court, may direct to be held in different district, when 4844.
Declare county in state of insurrection 2842.
Dental examiners, to appoint 4428.
Dental examiners to report to 4442.
Detectives, state, to appoint 4299-4303.
Domestic violence, legislature or governor may call on federal government for aid 165.
Drill, annual, to call out for 4022.
Duties devolve on lieutenant-governor, when 310-311.
Election of 295-296, 2765, 2733, 2774.
Election, duties pertaining to. See index to "Election."
Eligibility to office 296.
Embalmers, board of, to appoint 4445.
Encampment, to order, when 4036.
Epidemic or contagious diseases among live stock, powers to employ veterinary 2270.
Experiment dry farm, directors of, to appoint 473, 475.
Fees collected by private secretary not to be paid until statement filed 4191.
Fees received in office of, to go into library fund 4191.
Fees received in office, of, paid to treasurer 4191.
Fish commissioners, board of, to appoint 4482.
Foreign corporation, may direct action against for failure to file certificate 1350.
Health board, members of, to appoint 4952.
Honorary visitors, university, to appoint 4667.
Impeachment, liable to 334, 335.
Inform attorney-general and district attorney of violation of law by foreign corporations 1350.
Insurrection, may declare county in 2842-2843, 364.
Insurrection, may call out militia to suppress 364, 165.
Invasion, to suppress 364, 165.
Justice supreme court, governor to commission 2775.
Legislature, may be adjourned by, when 304.
Special session, to call 260. See Elections.
To notify of appointments 2811.
To report to 303, 1588, 459.
Vacancy in, presiding officer to notify 2800.
Vacancy in, to issue writ of election 2797, 2798.
Librarian, bond of, to approve 3958.
License and bullion tax agent, to appoint 4240.
Lieutenant-governor, powers devolve on, when (Const. 310, 311) 2807, 4250.
Governor—continued.
Live stock, diseases among, power to employ veterinary 2270.
May apply to federal government to suppress domestic violence 165.
May appoint bank examiner 665.
May appoint state banking board 664.
May declare county in state of insurrection 2842.
May direct attorney-general to bring and defend certain actions 4133.
May employ clerk, compensation 4194.
Medical examiners, board of, to appoint 2359.
Member board, of bank commissioners 664, 665.
Of capitol commissioners 4411.
Of commissioners care of insane 2198.
Of education 3239, 3240.
Of examiners 314, 4455-4475.
Of industry, agriculture and irrigation 4486.
Of pardons and parole 307, 7622-7633.
Of prison commissioners 314, 7560, 7562.
Of revenue 3809, 3828.
To appoint railroad commissioners 4549.
To approve probate officer 733.
State board of education 3239.
State board of irrigation 4706.
State text-book commission 3398.
Message and reports to the legislature, to transmit 303, 1588.
Message, copy to be furnished to state printer, when 4306.
Military force may order out, when 364, 2835-2840, 3982, 4058.
Military force may order to enforce process of court 2835.
Militia encampment to order 4036.
Notaries public to appoint 2762.
Oath of, before whom taken 2789.
Office at capitol 2774.
Officer impeached, vacancy to fill 6891.
Officer removed for malfeasance, successor may appoint 2853.
Official commissions, to sign 2793, 2794.
Official reports, when must be presented to 4305, 4315, 4316.
Pharmacy, board of, to appoint 4495.
Plats U. S. land, to be filed with governor by U. S. officer 1949.
Powers devolve on lieutenant-governor, when 2807.
Preside over state board of county assessors 3798, et seq.
President of state board of education 3240.
President of state board of prison commissioners 7562.
President of text-book commission 3399.
President pro tem. senate, when acting governor 2808.
Prisoner in county jail, may order removal of, when 7612.
Private secretary, compensation, duties, term of office, 4190, 4192, 4392.
Private secretary to be secretary board of parole commissioners 7634.
Private secretary to be secretary board of pardons 7623.
Police, state, expenses, transportation to order 4287.

Governor—continued.
Police, state, to appoint 4272-4273.
Police, state, to investigate 4281.
Probation officer appointed by district judge, to act on 733.
Proclamation of 774.
Proclamation of insurrection 774, 2842-2843.
Quo warranto, action in, may direct attorney-general or district attorney to bring 1814, 5658.
Railway commission to make annual report to 4580.
Railway commission, member of 4549.
Regents file annual reports and register with 2929, 4641, 4658.
Regents, vacancy in, filled how 4640.
Reports to be made to, by attorney-general 4132.
Board of dental examiners 4442.
Of embalmers 4452.
Of fish commissioners 4483.
Of health 2955.
Of honorary visitors university 4668.
Of pharmacy 4495.
Of sheep commissioners 4588.
Commissioner of industry, agriculture and irrigation 4486.
Controller 1329, 4156.
Inspector of mines 4208.
Mineral land commissioner 4144.
Mining inspector 4208.
Official sealer 4820.
Public service commissioner 4523.
Railroad commission 4580, 4523.
Regents of university 4641, 4658.
Secretary of state 4255.
State veterinarian 4385.
Superintendent of public instruction 3244.
Superintendent of state printing 4330.
Surveyor-general 4351.
Treasurer 4364.
Reports of officers and boards, drafts of, when to be sent to 2929.
Reports, to submit to board of examiners 2930.
Resignations made to 2798.
Resignations made to, what 2798.
Resignations to file in office of secretary of state 2795.
Rewards may offer, when 1831, 2831, 3905.
Salary of 4394.
Secretary district agricultural society, to report to 439.
Secretary of state, bond to approve 4251-4252.
Secretary of state, duties relative to official acts of, information to furnish 4225, 2929, 4262, 4268, 1350.
Secretary to, act as clerk of certain boards and commissions 4192, 4412.
Act as clerk of state board of assessors 3798.
Certain duties to perform, no additional compensation 4392.
Not to receive extra compensation 4192.
Salary, how paid 4192, 4193.
Seal, great, to be kept by 308, 4402.
Senate of United States, vacancies to fill temporarily 94.
Sheep commissioners, board of, to appoint 4587.
Governor—continued.
Staff of, how constituted 4004.
State agricultural society, to appoint board of agriculture 3922.
State board of agriculture, to appoint additional members 3932.
State officers' reports made to, when 4351.
State police, to investigate charges against 4281.
Surveyor-general to report to, when 4351.
Tax rate, state, board of state revenue to fix 3803.
Term of office 2774 (Const.) 295.
Text-book commission, to appoint 3398.
Tie vote in meeting state board of assessors, to decide 3798.
Treasurer, state, to report to, when 4364.
University, annual report of made by regents to 4641, 4658.
University cadet officers commissioned by 4664.
Vacancies, county commissioners, filled by 1501, 2805.
District judge, vacancy in to fill, when 2812.
Existence and cause certified to 2803.
House of representatives, writ of election to fill 91.
Regents university, to fill 4640.
State text-book commission, to fill 3398.
Supreme court vacancies filled, when 2812, 4831.
To fill, when 2802, 2804-2805, 2810, 2812.
To fill by appointment, when, term 2812.
U. S. senator 94.
Vacancy in certain offices, when may declare 2802.
Veterinarian, state, to appoint 4376, 4377.
Veterinarian to report to 4385.
Veterinary, when to employ 2270.
Visitors, honorary board of, to appoint 4667.
Weather bureau, director of, to appoint 4408.
With superintendent of public instruction may contract for care of delinquents, when 756.
Writ of election to fill vacancy in legislature, when and how to issue 2797, 2798 (U. S. Const.) 91.
Grafting, by agent or employee, penalty 6786.
Grafting, defined, penalty 6330.
Grand Army of Republic, unlawful to wear badge of, when 2505, 2507, 6715-6716.
Grand jury, accounts of officers, may examine 2858.
Accounts of officers, reports to concerning 2857.
Acting after challenge allowed, penalty 6369.
Action of juror not subject to question, exception 7033.
Additional selections, when 4931.
Age exemption 4941.
Attorney-general, may appear before 4137.
Challenge, acting after allowed, penalty 6369.
Decision, entry 7007.
How made and tried 7006.
Only mode of objection 7010.
Panel or individual, effect of allowance 7008, 7009.
To individual juror, grounds 7005.
To panel, grounds 7004.
To panel or juror, who may make 7003.

Grand jury—continued.
Charge by court 7014.
Clerk to assist in selection, when 4931.
Clerk to issue venire 4931.
Court to advise 7030.
Defendant, evidence for, not bound to hear 7025.
Deliberations, where 7015.
Discharge of 7015.
Disclosing transactions of 6374, 7031.
District attorney to advise 7030.
District judge to instruct on certain subjects 2022, 4924-4925, 7014.
Drawing of 4930-4939.
Drunkenness in office, court to charge concerning 2861.
Embracery, penalty for 6323.
Evidence for defendant not bound to hear 7025.
Evidence, receivable 7024.
Evidence, sufficient for indictment 7026.
Exemption from duty on, who entitled to 3356, 4612, 4932, 4941.
Failure of juror to attend, penalty 4934.
Fee act, judge to instruct on 2022.
Foreman, appointment 7011.
Foreman, oath of 7012.
Formation 4931, 4940, 7002.
How selected 4931, 4940.
Indictment, defined 7022.
Evidence to warrant 7026.
Felony cases required for 237.
How indorsed 7042.
Ignored, return 7043.
Twelve must concur 7042, 7043.
Indict officers neglecting to order accounts examined 2858.
Jails, may enter 7029.
Judge or clerk and commissioners, to select 4931.
Juror acting after challenge allowed, penalty 6369.
Having knowledge, duty 7027.
Perjury by 7033.
When required to disclose testimony 7032.
Mileage and per diem 2001, 2013, 4935.
Number of 4931.
Oath of 7012, 7013.
Penalty for nonattendance 4934.
Per diem and mileage 2001, 2013, 4935.
Perjury before, evidence of juror 7032.
Perjury by member of 7033.
Presentment, defined 7021.
Twelve must concur 7034.
Proceedings against corporation 7408.
Proceedings secret, exception 6374, 7031, 7032, 7036.
Powers and duty 7020, 7028, 7030.
Records, may examine 7029.
Reexamination after discharge 7092, 7093.
Resubmission after demurrer 7101, 7103.
Selected, how 4931, 4940.
Sheriff to summon 4931, 7017, 7018.
Special, how formed 7019.
Order for 7016, 7017.
Sheriff to summon 7017, 7018.
Special or local act in relation to, invalid 278.
Venire, clerk to issue to sheriff 4931.
Who allowed before 7030.
Witness, oath to 7023.

Grand larceny, animal stealing, taking, carrying, leading, driving or enticing away 6640.
Trial, evidence 7172.
Assault with intent to commit 6413.
By lodger 6646.
Defined 6638, 6640.
Indictment for 7068.
Jurisdiction of offense 6917.
Killing animal of another running at large 6640.
Marking or branding or altering or defacing mark or brand of animal of another with intent to steal or defraud 6640.
Property stolen, restored or disposed of, how 6650, 6651, 7428, 7445-7450.
Purchasing or selling carcass or hide of animal, brand or mark, cut out or obliterated 6640.
Realty, conversion into personalty 6643.
Grand lodge, Ancient Order Hibernians 1410-1415.
Free and Accepted Masons 1418-1423.
Independent Order Odd Fellows 1418-1423.
Knights of Pythias 1415-1417.
Royal Arch Masons 1424.
"Grant, bargain and sale," import of 1063. See Conveyances.
Grants of state land, signed by governor and secretary of state, and under great seal 309.
Grazing on public lands in possession, action for 5849.
Grazing sheep on lands of another or near ranch house, damages 2319.
Great seal of the State of Nevada 308, 4402-4404. See State Seal.
Gross misdemeanor, defined 6266.
Punishment, when not fixed 6284.
Grounds of challenge to jury for cause 285, 5206.
Grubstake, contracts for location of mines 2475.
Guardian ad litem. See Guardians, Civil Practice.
Guardians, ad litem, appointment 4992, 4993, 5726, 6161. See D. C. rules xxix-xxxi, p. 1430.
Guardians. See Civil Practice, Court Rules; general act, schedule of sections 6149.
Guardians for insane or incompetents, action by or against, to appear by 4992, 4993.
Appointed, when, bond of 2200, 2201.
Bond of 6164.
Bond to secretary of state for expenses 2201.
Partition of property 5572.
Petition for letters, procedure 6162.
Powers, qualifications 6164.
Guardians for minors, action by or against, appearance by 4992, 4993, 4996, 4997.
Action for seduction of female ward 4995. 4996.
Action to be commenced on guardian's bond within three years 6185.
Action to recover estate of sold by, limitation 4963.
Appointment for 6149.
Appointment, order of 6151.
Apprentices, liability for 492, 497.
Bond, additional, neglect to give 6157, 6159.
Bond of, conditions, sureties 6155-6158.

Guardians for minors—continued.
Consenting to employment of ward under fourteen 6824.
Custody may be taken from, when 734.
Death by wrongful act or injury, action for may bring, when 4996, 4997.
Deed to townsite lot made to 1986.
District court, power to appoint 4849.
Divorce, judgment of, how affects ward 5841.
Education and maintenance 6160.
Estate of, application to 6160.
Female, permitting in house of prostitution 6445.
Judge to approve 6152.
Juvenile court law, provisions 734, 735, 738, 739, 740, 751, 752.
Lawful age 6154.
Letters, revocation of 6158, 6159.
Limitation of action for estate sold by 4963.
Minor may nominate 6151, 6152.
Named in will 6150, 6161.
Next friend, sue or defend for 6161.
Notice of petition 6150.
Order appointing 6151.
Orphans 4096.
Parent entitled to be 6153.
Pendente lite 6161.
Petition for letters 6150.
Powers and duties of 6154.
Railroads, conveyance to by 3534.
Removal, procedure 6159.
Seduction of, may bring action for 4995.
Summons, service on 5023.
Superintendent of institution for care of may be 735.
Suspension, pending hearing of charges 6159.
Ward under 14, employment unlawful, when 6824.
Will, named in 6150.
Guardian for minors, nonresident, application for letters 6187.
Bond and qualifications 6187, 6189.
Duties and powers 6188, 6189.
Estate, removal of out of state, proceedings 6198-6201.
First granted, exclusive powers 6190.
Jurisdiction 6190.
Letters, application for 6187.
Local guardian, executor or administrator discharged 6201.
Nonresident guardian may be appointed 6187.
Powers and duties 6188, 6189.
Qualifications 6189.
Record of foreign proceedings, evidence 6187.
Removal of property out of state, proceedings 6198-6201.
Guardians, general provisions, accounts, how rendered 6168.
Accounts, settlement or compounding 6167.
Accounts, when may be required 4949.
Action against sureties, limitation 6185.
Action for partition 5561-5573, 6166.
Action on bond 6184.
Account, joint guardians 6194.
Ad litem, how appointed 4993, 5726, D. C. rules xxix-xxxi, p. 1430.
Guardians, general provisions—continued.
Allegation of as legal conclusion, when sufficient 5078.
Appointment and duties, juvenile court law 739, 740, 751.
Appointment, district judge may make 4849.
Appointment of successor 6181.
Assessed for estate 3929.
Bond, action on within three years 6185.
Bond, additional required on sale 6179.
Bond, form and filing 6184.
Bond, liability on 6184.
Bond of joint guardian 6193.
Bond, new required 6183.
Conversion or concealing estate 6186.
Compensation 6191.
Costs, sale proceedings 6177.
Credit on sales of realty 6195.
Debts, payment of 6165.
Discharge of 6182.
Discharge of sureties 6183.
District court, accounts may require 4849.
District court, power in vacation 4850.
Estate, conversion or concealing 6186.
Estate, investment of 6170-6172, 6180.
Expenses 6191.
Fees of clerk 6196.
Fraud, proceedings on, charge of 6186.
Income, application of 6166.
Income, insufficient, sale 6169.
Injury of ward, may bring action 4995, 4996.
Inventory of estate 6168.
Investment of estate, notice, hearing and order 6180.
Irrigation district may sign petition to annex land to 4772.
Joint, account of 6194.
Joint, bond of 6193.
Joint guardianship 6192-6194.
Justice's court, general may appear in, may appoint ad litem, when 5726.
Legal proceedings 6167.
Limitations, action against sureties 6185.
Management of estate 6166.
Mortgage of property 6165.
New bond required 6183.
Notice of petition to sell estate 6173, 6178, 7174.
Objections to sale of estate, hearing on 6175.
Order for investment 6180.
Order of sale of estate 6178.
Partition, may consent to 5573.
Partition, not to be interested in 5561.
Partition of property 6166.
Partition, sale, security may be taken on 5555.
Partition, to receive share of insane person 5572.
Payment of debts 6165.
Petition for order of sale 6173.
Procedure for sale of estate 6173-6178.
Proceeds of sale, application of 6170-6172.
Railroads, conveyance to 3534.
Removal of 6181.
Resignation of 6181.
Sale for investment 6170.
Sale of estate, procedure for 6173-6178.
Sale on partition, security may take 5555.

Guardians, general provisions—continued.
Sale of property 6165, 6166, 6169.
Sales of realty, credit 6195.
Sale, proceeds, application of 6171, 6172.
Successor to, appointment 6181.
Sureties, discharge of 6183.
Townsite lot, application for deed made to 1983, 1986.
Two or more appointed 6192.
Ward may be removed from custody of 734.
Waste may be sued for, treble damages 5505.
Will, guardian named in 6150, 6161.
Guardians, schedule of sections 6149.
Guardians, special, may be appointed by district judge in vacation 4850.
Guideboards, district judge to give law on to grand juries 4925.
On highways, to erect, defacing or destroying, punished 3026-3028. See Public Highways.

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HABEAS CORPUS

Accessory to avoidance of writ, penalty 6264.
Application for, what to state 6227.
Arrest of party restrained, when 6255-6259.
Arrest of person restraining, when 6234, 6256-6259.
Attachment upon refusal to obey 6234.
Avoidance of writ, misdemeanor 6263-6265.
Bail excessive, civil arrest 5113.
Bail, may release on 6247-6249.
Bail, on examination 6248, 7323.
Body to be produced, exception 6236-6238.
Charge not bailable, release, when 7323.
Clerks of courts to issue writs, warrants or process 6261.
Clerk to serve writ, when 6231.
Command of writ 6230.
Commitment to jail on refusal to make return 6234.
Concealment of place of confinement, penalty 6263-6265.
Custody, change of may order 6251.
Custody, may remand to 6250, 6252.
Custody, pending hearing 6252.
Defects of form of warrant or commitment not ground of discharge 6246.
Defect of form of writ immaterial 6253.
Delay not permitted 6229, 6231, 6232, 6239.
Directed to whom 6230.
Discharge, grounds for 6245, 6259.
Discharge, when ordered 6243, 6259.
Disobedience to writ, misdemeanor 6263-6265.
District court or judges may issue 321, 4840, 6228.
Elisor may be appointed to serve 6234.
Examination on charge 6247.
Excessive bail, civil arrest 5113.
Exchange of place of confinement, penalty 6263-6265.
Exemption from detention on same charge, exceptions 6254.
Forthwith return of writs, warrants and process 6261.
Grounds for discharge 6245, 6259.
Guarantee of writ (U. S. Const.) 130, (State Const.) 234.
Immediate hearing on return 6239.
Invasion on rebellion, suspension 130, 234.
Issued, when may be 319, 4834.
Judge of district court may issue 321, 4840, 6228.
Judge refusing writ, penalty 6262.
Judicial power U. S. courts 119, 159.
Jurisdiction state courts and judges 319, 321, 4834, 4840, 6228.
Justices supreme court may issue 319, 4834, 6228.
Murder, charge of, release on, when 7323.
Nonjudicial day, writ may issue on 6260.
Penalty for refusing to grant or obey writ 6262.
Penalties for violation or provisions of act 6262-6265.
Petition for, what to state 6227.
Power of judge on hearing 6242.
Process, clerk to issue 6261.
Rebellion or invasion, suspension 130, 234.
Refusal of writ, penalty 6262.
Refusal to obey, attachment to issue 6234.
Remanded, when 6244, 6259.
Removal from jurisdiction, misdemeanor 6263-6265.
Return forthwith of writs, warrants and process 6261.
Return, immediate hearing on 6239.
Return, traverse of 6240.
Return, when to be verified 6235.
Return, on writ, what to state in 6235, 6237.
Same charge, subsequent detention on when allowable 6254.
Service, how made 6233.
Service of writ 6231-6234.
Sheriff or deputy to serve when 6232.
Sickness of party detained 6236-6238.
Subpenas, clerk to issue 6261.
Summary proceeding 6241.
Sunday or nonjudicial day, writ may issue on 6260.
Supreme court or justices may issue 319, 4834, 6228.
Suspension of, when permitted (U. S. Const.) 130, (State Const.) 234.
Testimony, preliminary, may be used on, when 6977.
Time, when may issue 6228.
To whom directed 6230, 6255.
Transfer of custody to another, misdemeanor 6263-6265.
Traverse of return 6240.
U. S. courts powers 119, 159.
Warrant of arrest, execution of 6257.
Warrant of arrest, when may issue 6255-6259.
Warrants, clerk to issue 6261.
When may issue 6228, 6260.
Who may prosecute 6226.
Witnesses, attendance compelled 6242, 6247.
Writs, clerk to issue 6261.
Writ guaranteed (U. S. Const.) 130, (State Const.) 234.
Writ, service of 6231-6234.
Writ, what to command 6230.
Writs, supreme court may issue, to all parts of state 4834.

Habitual criminals defined 6292.
Operation to prevent procreation 6293.
Habitual drunkard, when consent not required on adoption of child 5828.
Habitual gross drunkenness, when ground for divorce 5838.
Hatpin, wearing dangerous, forbidden 6829, 6830.
Hazardous callings, enumerated under employers' liability act 1917. See Employer and Employee 1915-1945.
Headgates and weirs, installed by water users, how, when 4707. See Water 4672, 4791.
Health, boards of, creation and duties 794, 877, 2921, 2982.
Health, public, crimes against 6529-6560.
Quarantine, failure to observe 2999, 3000.
Regulations regarding sheep 4588.
Health officer, neglect of duty 2972. See Public Health, Live Stock.
Hearing, when district judge has entered upon, no other judge to act unless upon written request, rule xli, p. 1431.
Heir. See Estates of Deceased Persons.
Bound by judgment in action for partition 5541.
Defined 1057.
May sue for death of adult 4997.
Producing pretended or false, penalty 6370.
Unknown, may be made parties 5009, 5010.
Unknown, service of summons by publication 5028.
When entitled to damages for death by wrongful act 5648.
Hibernians, Ancient Order of 1410-1415.
Hide, failure to keep or exhibit, penalty 6641.
Hide inspector, appointment, duties and compensation 2285-2286. See Live Stock.
High crime, conviction of excludes from jury unless restored to civil rights (Nev. Const.) 285.
Highway, action to set aside damages awarded by viewers 3015.
Condemnation, viewers, damages, appeal to district court 3008.
Measure of damages for cutting timber for repair of 5507.
Highways, driving diseased or infected animal on forbidden 2266, 2268.
Guideboards, defacing or destroying or not erecting 3208.
Local or special laws for vacating, invalid (Nev. Const.) 278.
Obstructing of, punished, how 3009.
Public 3004-3062. See Public Highways, County Commissioners.
Running water upon, punished, how 3045, 3046, 6757, 6770, 6771.
Streets and alleys, public utility may use when granted franchise 2129.
Wilful and malicious injury to, punished, how 6752.
Historic and literary societies 1382-1389, 2545-2547.
Historical data 428-430.
Historical society, state 2545-2547. See Nevada Historical Society 2545-2547.
Hogs, running at large, liability of owner 2325-2331.
Hogs—continued.
Trespassing, may sell, when, liability of owner 2256-2260. See Live Stock 2233, 2337.
Hoisting during repairs prohibited, except 4229.
Hoisting machinery, indicator must be used 4214.
Hoisting machinery, operating without license punished 3904.
Hoisting ropes, factor of safety established 4226.
Hoisting ropes, iron or steel, when 4226. See Mining Inspector 4198-4239.
Hokey-pokey, game of, prohibited, punished, how 6518.
Holidays 4870. See Nonjudicial Days.
For schools 3351.
Negotiable instruments 2744.
Holographic will 6223-6225. See Wills, Estates of Deceased Persons.
Homestead, abandonment of 2143.
Alienation of (Const.) 288, 2160.
Appraisement of, when 2144.
Conveyance of 2143, 2146-2148, 2160.
Death, in case of, separate property to revert to, proviso 2145.
Declaration of 2142.
Decree, setting apart, recorded 6111.
Defined 2142.
Exemption, amount of 2142.
And descent to heirs 2145.
Appraisement when value exceeds amount of 2144.
Constitutional provision 288.
Entire premises to be sold, when 2144.
Excess to be sold, when 2144.
From execution 5288.
Mortgage, when 2142.
Not to extend to liens 288, 2143.
Purchase money excepted 288, 2142.
Family, set apart for, on death of husband 5957.
Gold coin, regarded as all amounts stated in this act 2150.
Insane wife, procedure for conveyance 2146-2148.
Joint tenants to be held as, proviso 2142.
Litigation, existing rights not affected 2145.
Liable for purchase money or lien 288.
Probate law concerning 5956, 6111.
Property not exempt from sale for taxes 288, 2149.
Recording, provision to be made for (Const.) 288, 2142, 6111.
Reversion of separate property in death of spouse 2145.
Selection of 2142.
Separate property, how declared on 2142; reversion upon death of spouse 2145.
Set apart for family, when 2165, 5957.
To convey how, when wife is insane, appeal 2146-2148.
Wages, not affected by preferred claim for 5494.
Widow and children may retain 5956.
Wife must join in conveyance or mortgage 2160.
Homestead land laws, federal 3115-3149, 2404. See Public Lands 3063-3226.

Homesteads, right and preference of homestead and additional homestead in forest reserves on lands settled upon before and since January 1, 1906. See Act of Congress of June 11, 1906. 34 U. S. Stats. L. p. 233, and National Forest Reserve Use Book.
Secretary of agriculture, to list lands for homestead entry on forest reserves. See Act of Congress of June 11, 1906, 34 U. S. Stats. L. p. 233, and National Forest Reserve Use Book.
Homicide 6384-6410.
Burden of proof, justification or mitigation 6399, 7174.
Committed in attempt to escape 6819.
Death within year and a day 6392.
Excusable by misadventure 6400.
Jurisdiction 6393.
Justifiable, defined 6384, 6394-6402, 6859-6861.
When justifiable or excusable 6397. See Murder, Manslaughter.
Honorably discharged soldiers, exempt from certain formalities to become naturalized 2506.
Honorary board of visitors state university 4666-4670. See University of Nevada.
Horses, animals. See Live Stock, Bureau of Animal Industry, State Veterinarian, Public Health.
False certificate of sheriff, penalty 2294.
Fees for inspection, lien on 2296.
Furnishing false pedigree of, penalty 2287.
Original not allowed at large 2252.
Pedigree, failure to keep posted, penalty 2288.
Receiving for transportation out of state without inspection, penalty 2289-2291.
Removing out of state without inspection, penalty 2295.
Sheriff as inspector, duties 2291-2296.
Shipping out of state without inspection, penalty 2290.
Unclaimed, sale of, when, redemption 2296.
Horse meat, sale of, when unlawful 6524, 6525.
Horse races, selling books or pools on, gambling, penalty 6518.
Horticulture, commissioner of 446-453.
Appointed, how 446.
Bond 451.
Compensation 450.
Duties of 446-449, 453.
Inspectors, to appoint 449.
Removal of 452.
Report, to make 453.
County districted 449.
Inspection of nursery stock, penalty for transporting unlawfully 6776, 6777.
Malicious injury to trees 6753, 6754.
Nursery stock, transporting without inspection, penalty 6776, 6777.
Pests destroyed 446-448.
Road not to be run through orchard without consent 3015.
Hospitals, city may regulate 794.
Hospital fees, collection from employees, when unlawful 1943.
Hospital for mental diseases 2195-2212. See Insane.
Hospitals—continued.
Incorporation of 1390-1397. See Corporations.
Near schools, forbidden 6534.
Hotel and lodging-house, baggage, proprietor may sell, when 2151, 2154.
Sale, how made 2153.
Sold, proceeds, how disposed of 2152.
Defrauding, penalty 6726.
Disorderly, when deemed, penalty 6484.
Runners of, city may regulate 794.
Houses of correction and detention, city may establish 794.
Houses of prostitution or ill-fame, acting or receiving reward for placing female in, penalty 6445(2).
Church, within 400 yards, forbidden, penalty 6510.
Earnings of prostitute, accepting, penalty 6445(5).
Enticing person to go to for immoral purpose 6445(5-7).
False representation to female as to, penalty 6445(6).
Female, placing in, penalty 6445(1).
Guardian permitting female ward to enter, penalty 6445(4).
Habitually resorting in, penalty 6460.
Husband consenting to wife entering, penalty 6445(4).
Living with prostitute, penalty 6445(5).
Location within certain limits of school, forbidden 3457, 6510.
Minor, enticing or decoying into, penalty 6445(7).
Parent permitting daughter to enter, penalty 6445(4).
Pimping, penalty 6445.
Reward or compensation, giving or receiving to procure female to enter, penalty 6445(1, 3).
School house, location within certain limits of, forbidden 3457, 6510.
Soliciting person to go to, for immoral purpose 6445(5, 7).
Trial for offenses concerning, evidence 7178.
Venereal disease, conveying by prostitute, penalty, physician to notify police 6529.
House of refuge for juvenile offenders, to be maintained by state 366.
Humboldt County, creation, boundaries and seat 390, 1448, 1466, 1467.
Hunting on enclosed ground, forbidden, when, penalty 6766-6768.
Husband and wife. See Civil Practice, Divorce, Marriage.
Abandonment of wife or child 6446, 6447.
Acknowledgment of wife to convey realty 1018, 1037, 2186.
Acts repealed, saving clause 2189.
Actions, parties to 4989, 4991.
Administration, letters of, preferred right 5894, 5908, 5843.
Adoption of child, consent of wife 5827.
Age and requirements on adoption of children 5825.
Alimony. See Divorce.
Bigamy defined, penalty 6456, 6457.
Community property, death of husband, homestead set apart 2165.

Husband and wife—continued.
Community property, how disposed of 2165.
Of wife to go to husband, exception 2164.
Defined 2156.
Divorce, in case of, how divided 2166.
Contracts, husband and wife may enter into 2173.
Contract marriage, minors may make, when 2185.
Not valid, when 2184.
Record of, to impart notice 2183.
To be in writing, form of 2181.
To be recorded 2182.
Contract of separation, not to alter legal relations, except, consideration 2174, 2175.
Conveyance, acknowledgment, effect of 1018, 1037, 2186, 2188.
Conveyance, by married woman, effect of 1018.
Courtesy, estate in, abolished 2161.
Divorce, division of property 2166.
Divorce, proceedings for 5838-5845. See Divorce.
Dower, estate in, abolished 2161.
Executrix, married woman may be 5886.
Failure to support, by husband, penalty 6481, 6483.
Forcing women to marry, penalty 6444.
Homestead 288, 2142, 2150, 2165, 5956, 5957, 6111. See Homestead.
Husband, deserted by wife may prosecute or defend in her name 4991.
Entitled to damages, for death of wife, by wrongful act 5648.
Separate property of wife not liable for debts of 2171.
Insane, wife as witness 5422.
Imprisonment, or adultery of, disposition of property in divorce action 5843.
Support of wife, not liable for, when 2177.
Support by wife, required, when 2178.
When must be joined as party with wife 4989.
When not liable for support of wife, when she abandons him 2177.
Marriage. See Marriage 2338, 2357, 6444, 6458, 6514.
Married woman, acknowledgment of, to conveyance 1018, 1037, 2186.
Covenants, binding on 1039.
Rights and liabilities of sole traders 3192.
To act as executrix 5886.
To revoke will 6203.
To transact business, husband not responsible for debts, except 2194.
Husband not to superintend or manage 2192.
In own name, application, hearing of 2191.
Oath, to take 2191.
Order, to be recorded 2191.
Order, to make 2191.
Responsible for maintenance of children 2193.
Responsible for maintenance of husband, when 2178.
To give notice 2191.
Statute of limitations, effect on 4976.
Townsite lots, when may make application for 1983.
Husband and wife—continued.
Necessaries furnished wife, liability of husband 2176.
Property, community, held as tenants in common 2162.
Homestead set apart from, when 2165.
No estate by dower or by courtesy 2161.
Rights to be governed by act, proviso 2180.
Subject to debts of husband 2165.
Separate property, defined 289, 2155.
Descent and distribution 6125.
Inventory of wife's 2157.
No interest in property of each other, except 2172.
Of husband 2155.
Of wife 289, 2155.
Of wife, failure to file, schedule, effect of 2159.
Of wife, filing to be notice 2158.
Of wife, inventory to be recorded 2157.
Of wife, supplemental inventory, to be recorded 2157.
Wife to control her own 2163.
Wife, abandonment of 6446, 6447.
And minor children, earnings of, while living separate are property of wife 2168.
Debts of, when contracted before marriage 2170.
Earnings of, deemed gift, when 2169.
Earnings of, not liable for debts of husband 2167.
Failure to support, penalty 6481, 6483.
Necessaries to be furnished, husband bound for 2176.
Power of attorney, how acknowledged 2187.
When living separate from husband may sue and be sued alone 2179.
When either may defend, if sued together 4990.
Will, married woman may alter or revoke 6203.
Witness, for or against each other 5424, 7452.
Wife as, if husband insane 5422.
Hydraulic engineer and experts, may be employed by court, when 4690. See Water.
Hygienic laboratory 3941-3945. See State Hygienic Laboratory.

I

Identification, may be required of voter, when 1717. See Elections.
Idiot, may be admitted to hospital for mental diseases, when, expense of, whom 2211-2212.
Idiots, not entitled to privileges of elector 250.
Illegitimate child, adopted, when deemed by conduct of father 5833.
Heirs of 6118.
Inheritance of 5833, 6117-6118.
Proof of paternity, established, how 765.
Support of, abandonment or neglect 765-766.
Ill-fame, houses of, crimes in relation to 3457, 6445, 6510. See Houses of Prostitution.
Imitating brand, prohibited, punished how 6745.
Immigration stations, how and where established 2514. See Naturalization 2506-2544.
Immoral show, act or performance, penalty 6461.

Immunity of witnesses in court granted, when 4565(a).
Impeachment, assembly has sole power (Const.) 334.
Duty of senate 6892.
From office (Nev. Const.) 334-336.
Justice supreme court, liable to 336.
Not bar to indictment 6873.
Of, person cannot be pardoned 307.
Other laws, applicable 6298.
Procedure 6879-6892.
Trial of, without presentment or indictment 237.
Who liable to (Const.) 335, 336.
Implied bias, defined 7147.
Implied malice, defined 6386.
Impost, district court has jurisdiction of cases involving legality 321, 5721.
Imprisonment for debt, prohibted, except in cases of fraud, slander and libel 243.
Imprisonment on two, or more, convictions 6303, 7256.
Imprisonment, when person may be sentenced to by legislature 265.
Improved lands, defined 3603.
Improvements, allowed as offset, when 5517.
Required by claimant of possession of public lands 5852.
Impure water, furnishing for domestic use, penalty 6540.
Incendiarism. See Arson.
Act to detect 7532-7539.
Complaint charging 7532.
Compulsory process 7538.
Examination of person charged 7537.
Fees, how paid 7539.
Free access to property 7536.
Inquisitors, appointment and qualifications 7532.
Justice of peace to summon three inquisitors 7532.
Oath of inquisitors 7533.
Subpenas to witnesses 7534.
Testimony reduced to writing 7534.
Verdict and testimony certified to district court 7535.
Warrant of arrest 7537.
Incest, defined, punishment 6468.
Incestuous marriage forbidden, penalty 645.
Incompetent person, guardian for 5726, 6162-6186.
Incorporated cities, may have recorder's courts 316, 324, 4853.
Incorporation. See Corporations 1105-1364.
Incorporation proceedings for cities 768.
Incumbrance, action to restore lost record of 5632.
Subject to lis pendens 5021.
Indebtedness, of territory, state became liable for 391.
Or liability of corporation or person to state, county or municipality, local or special law for release of, invalid 278.
Indecent exposure punished, how 6460.
Indefinite sentence, what 7260.
Indemnity of owner by contractor 1915, 1924.
Indemnity, no bar or defense to action for death or personal injury 5652.
Independence, Declaration of 65-70.
Independent candidates 1740. See Elections.
Indeterminate sentence, how imposed 7260.
Board of pardons to determine 7261.
Index books 1713. See Elections.
Index to county records, contract for 1560, 1561.
Index to justice's docket, must be kept 5802.
Indian, as witness in liquor case 7530, 7531.
Selling or giving liquor to 6507-6509.
Indians, amenable to criminal law 6270.
Indictment, accessory, trial and conviction 7071, 7072.
Against several, one or more convicted or acquitted 7071.
Answer to 7092.
Arraignment on 7074-7089. See Arraignment.
Bail on 7313.
Capital or infamous crime, prosecuted by 237.
Charge but one offense 7054.
Compounding offense 7073.
Concealing offense 7073.
Concurrence of twelve 7042.
Construction of words 7057.
Contemptuous conduct, when may be for 5405.
Defect in form 7060.
Defective, arrest of judgment 7238.
Defendant's name, erroneous or fictitious 7053.
Defendant not in custody 7047.
Defined 7022.
Demurrer to 7095-7105.
Allowed, order resubmitting 7101.
Allowed, when bar to other 7101.
Disallowed, plea forthwith 7104.
Form of 7098.
Grounds for 7097.
Hearing of 7099.
Judgment on 7100.
Objections must be taken by, exception 7105.
Sustained, bail exonerated 7102.
Sustained, defendant discharged 7102.
When put in 7096.
Discharge from, when 7092.
District attorney must sign 7051.
Embezzlement 7068.
Error as to person injured, immaterial 7056.
Facts alleged not constituting offense, resubmission 7188, 7189.
Facts, not constituting public offense, objection, how and when raised 7105.
Failure to find, dismissal 7395.
False pretenses, complaint or indictment for 7067.
Finding and presentment 7042-7043.
For embezzlement 7068.
For false pretenses 7067.
For forgery 7065.
For larceny 7068.
For libel 7064.
For perjury 7066.
Form 7051.
Form and rules of pleading 7048-7073.
Found in wrong county, proceedings 7186, 7187.
Ignored, resubmission 7044.
Impeachment, not bar to 335, 6893.
Indorsed and signed, how 7042.

Indictment—continued.
Judgment, how pleaded 7062.
Judicial notice, of what taken 7062, 7063.
Jurisdiction, question, how and when raised 7105.
Larceny 7068.
Lewd or obscene publication 7069.
Libel 7064.
Motion to set aside 7090-7094.
When heard 7092.
Need not state presumptions or matter of judicial knowledge 7061.
Objections to, grounds of 7090.
Waiver of 7091.
Of corporation 7408.
Order to set aside not bar to new 7094.
Perjury, indictment for 7066.
Plea, after demurrer 7104.
Defined 7095.
Form of 7107.
How put in 7107, 7108.
Kinds of 7106.
Of former acquittal 7111, 7113.
Of guilty, by corporation 7108.
May be withdrawn 7108.
How put in 7108.
Of not guilty, entered on defendant's refusal to make 7114.
Evidence under 7110.
What evidence admissible on 7110.
What issue raised 7109.
Refusal to enter 7114.
When entered 7104.
When put in 7096.
Presentment and filing 7046.
Presumptions of law, need not state 7061.
Principal and accessory, defined 6275, 7071. 7072.
Private statute, how pleaded 7063.
Prosecution by 6999.
Reindictment after arrest of judgment 7241.
Setting aside, grounds for 7090.
Sufficient, when 7059.
Term "indictment" or "information" includes what 6294.
Time of offense 7056.
Trial, proof showing higher offense, suspension, reindictment 7182, 7183.
Twelve to concur 7042.
Waiver of objections 7091.
What offenses prosecuted by 6854.
What to contain 7050, 7052.
When sufficient 7059, 7060.
When found 6925.
Words, how construed 7057.
Words of statute, not strictly followed 7058.
Indigent dead, burial of, by whom. See Poor and Poor Laws, County Commissioners 794(59).
Indigent insane, commitment to asylum at state expense 2204.
When state charge 2201.
Indigent of other county, recovery for relief furnished to 2922.
Indigent sick, care of 1508.
Indigents, counties must provide for 367, 2915-2925.
Individuals in partnership not assessed, when 3629.
Indorser, liabilities of, what 2614-2615. See Negotiable Instruments 2548-2744.
Industrial problems to be studied by bureau industry, agriculture and irrigation, when 4489.
Industries, regulation of, within and without limits of city, what 794(54).
Industry. See Bureau Industry, Agriculture and Irrigation 4486-4494.
Ineligibility to office. See Eligibility under the several office titles.
Infamous crime, conviction for, ground for divorce 5838.
Infant. See Civil Practice, Guardians, Children, and Minors.
Infected sheep, sheep commission must be given immediate notification 4594.
Infectious diseases among animals. See Live Stock.
Infectious diseases among humans. See Public Health.
Infectious diseases, state hygienic laboratory to report on 3944.
Infernal machine, making or having, forbidden 6561. See Explosives.
Inflammable material not to be kept within certain limits of shaft 4224.
Informal verdict, procedure to cure 5219.
Information, amendment proposed to art. i, sec. 8, of constitution, passed at legislative sessions 1909, 1911, subject to ratification by people at 1912 general election, provides that persons accused of crime may be prosecuted by information as well as by indictment 237.
Inheritance 6116-6119, 6140-6141. See Estates Deceased Persons, Table of Consanguinity in appendix.
Inheritance, adopted child entitled to 5826, 5829.
Injunction 5011, 5136-5146, 5194, 4564(a). See Civil Practice.
Sale of ore 2489.
Writ, may issue, by whom 331, 4840, 4843.
Injuring or tampering with property of public service companies 6732, 6733, 6735.
Injury to persons, action for 1925, 5649-5652. See Civil Practice.
Injury to property, forbidden, punished, how 6752-6754.
Injury to public records, forbidden, punished, how 2817, 6344, 6345.
Injury to workman, employer liable, when 1915, 1925. See Employer and Employee.
Initiative and referendum, proposed amendment to constitution by addition to sec. 3, art. xix, passed at legislative sessions 1909, 1911, subject to ratification by people 1912, p. 122.
Initiative and referendum, articles on 412, 413. See Elections.
Inland exchange, defined 2676. See Negotiable Instruments 2548-2744.
Inn, keeping disorderly 6484. See Hotel.
Innocence, presumption of 6277, 7163.
Inquest, coroner's 7542-7560. See Coroner.
Inquest, to determine incendiary 7532-7539.
Insane. See Guardians.
Acquittal in criminal action, when judgment of insanity 7252, 7217.
Action, appearance by general guardian 4992.
Asylum, selection of grounds 2195.
Board of control 2198.

Insane—continued.
Charges, payment of required, when 2200.
Claims, board of examiners to approve 2206.
Commissioners to certify to 2206.
How paid 2206.
Commitments, certificate, form of 2204.
District judges, duty in regard to 2204.
Commissioners, board created 2198.
Powers of 2202.
Quorum of 2199.
Rules and regulations 2202.
To report to legislature 2202.
Controller, commissioner 2198.
Conveyance, of homestead, how made when wife insane 2146-2148.
Convicts, escape deemed, punishment 2209.
When removed to asylum 2208.
When returned to prison 2209.
County clerk may commit, when 2210.
Criminal action, wherein defense insanity interposed, effect of verdict 7252, 7217.
Criminal insane 7217, 7252, 7271-7275, 7385-7394. See Criminal Practice.
Defendant insane, committed to asylum, when 7252, 7390.
Disability, effect on limitations 4966, 4976.
Estates of insane persons, jurisdiction of 321, 4840, 4849.
Examined for insanity, when 2210.
Expenses of examination insane 7393, 7394.
Feeble-minded persons admitted, expense of 2211, 2212.
Governor, commissioner 2198.
Guardian ad litem, appointed for insane by justice of the peace, when 5726.
Bond to give, expense to pay 2201.
Guardians for insane or incompetents 6162-6164, 6186.
To be appointed, when 2200.
Homestead conveyed, how, when insane, procedure, what 2146, 2148.
Homestead patent, federal, may issue to insane, when 3146.
Hospital for mental diseases, legal name 2196, 2197.
To be maintained by state 365.
Idiots and feeble-minded persons admitted to asylum, when and how, expenses of 2211, 2212.
Idiots and insane not liable to punishment 6268.
Incidental expenses of commissioners, board of examiners to approve 2207.
Controller, warrant to draw 2207.
Indigent, medical care of 2205.
Inquiry into, criminal 7271-7275, 7385-7394.
Insane defendant, restored to sanity, proceedings 7392.
Insanity as defense to crime, effect 7217.
Insanity, marriage not annulled for, when 2356, 2357.
Judgment may be arrested on ground of insanity, when 7252.
Jurisdiction of estates and persons, insane and incompetent 321, 4840, 4849..
Limitation of time for conveyance of townsite lot not to apply on account of insanity, when 1987.
Lot in federal townsite, guardian may apply for 1983.
Marriage of insane person void 2355, 2357.
Insane—continued.
Paying patients, terms directed by board 2205.
Punishment, not liable to 6268.
Report to legislature 2968.
Report to state board of health, superintendent must, when 2968.
State to foster institutions for 365.
Superintendent, qualifications of, and pay 2203.
Superintendent of hospital for mental diseases may be guardian of insane, when 735.
Superintendent, must report to state board of health, when 2968.
Town lot may be applied for by guardian of insane, when 1983.
Transportation expenses 2200.
Treasurer, commissioner 2198.
Trial of, as to insanity 7393, 7394.
Verdict of acquittal on ground of insanity, effect of, defendant 7217, 7252.
Vote, not entitled to 250.
Warden, duty of toward defendants and convicts insane 7275.
Witness, person cannot be 5423.
Insectivorous birds, killing or destroying eggs, prohibited 6812.
Insignia, illegal use or wearing, penalty 2503, 2505, 2507, 6715, 6717.
Insolvent bank, when deemed 629. See Banks and Banking.
Failure of officers of, to prevent deposit in 6725.
Payment of dividends, when liability 3568.
Insolvent banks, receiving deposits in, prohibited, penalized, how 2905. See Partnership.
Insolvent corporations, dissolution of 1190-1199.
Insolvency of partnership, effects general assignment, how 2905. See Partnership.
Insolvency. See Bankruptcy 543-615.
Inspection of written instruments 5063, 5416-5418, 5769. See Civil Practice.
Inspectors of election. See Elections.
Inspectors of hides, to make report, when 2285.
Inspector of horses, duties 2289-2296.
Inspector of horticulture 449. See Horticulture.
Inspector of mines 4198-4239. See Mining Inspector.
Installments, debt payable in, secured by mortgage, action on 5503.
Installments of taxes, how and when paid 3864, 3644, 3659. See Revenue.
Instituting suit in name of another, forbidden, punished, how 6372.
Institutions, state, for insane, deaf, dumb, and blind, to be fostered and supported by state 365.
Instruction, sectarian, not to be imparted at any school or university of state 361.
Instructions, judge shall not charge jury in respect to matters of fact, but may state testimony and declare the law 327. See Civil Practice, Criminal Practice.
Instrument, written. See Civil Practice.
Insular possession, when included in words "United States" 5475.
Insurable age, defined 1317.

Insurance company 1266-1284. See Corporations.
Doing business after certificate revoked 1270, 1274.
Doing business without license 1280.
Doing certain business without authority 1309.
Endownment 1310-1324. See Corporations.
Failure to file annual statement, doing business upon 1327-1328.
False affidavit relative to death or disability, deemed perjury 1317.
False statement to 1317.
False statement to annual report, perjury 1328.
Violation of act 1283.
Insurance policy, exempt from execution, when 5652.
No bar or defense to action for death or personal injury 5652.
On assessment plan, benefit not to be attached or seized 1318.
Insurers, several may be joined in action for loss on different policies 5002.
Insurrection, in county, governor may call out militia to suppress 364, 2842, 2843, 165.
No limit to debt which state may incur to suppress 350.
Intellectual improvement, to be encouraged by legislature 353.
Intemperance, bar to support of pauper, when 2916.
Intent to defraud, proof when sufficient 6306.
Intent to defraud, averment and proof 6294(5).
Intent, how manifested 6272.
Intent, when element of crime 6268.
Interest and money. See Money and Interest 2497-2500.
Interest, bonds, irrigation district 4746.
Excessive, charged by pawnbrokers, prohibited 6470.
Included in judgment 5278, 5388.
Judgment to draw 5271.
Legal rate, when not otherwise fixed 2499.
Partition, action for, allowed, when 5546.
Rebated in foreclosure of mortgage, when 5546.
State warrants, when allowed on 4370.
Time deposits in banks, limited 644.
Interference with officer in performance of duty, punished 6329, 6804, 6828.
Interlocutory order, deemed excepted to 5318.
Interpleader in garnishment proceedings 5180.
Interpreters and translators, fees of 2013, 2016.
Subpenaed, how, oath of 5430, 7360.
Interrogatories. See Civil Practice.
Interstate commerce law, if violated, railway commission may investigate 4569.
Interruption of telephone message, forbidden, penalized, how 4632, 4610, 6752.
Intervention in civil action 5006.
Intervention to prevent offense 6862-6863.
Intimidating legislator, prohibited, punished, how 6333.
Intimidation of arrested person 6807.
Intimidation, when unlawful 6749.
Intoxicated physician or surgeon, death caused by, penalized, how 6410.
Intoxicating liquor, impure, unlawful to sell 3486-3510, 6816. See Pure Food, Drug and Liquor Law.
Inspection of, by city authority 794(52).
Sale of near construction camp, prohibited 6839-6841.
Sale of to drunkards or dipsomaniacs, prohibited 6836-6838.
Sale of to Indian 6507-6509.
Sale or disposal at religious or camp meeting, prohibited 6598.
Selling or giving away on election day, prohibited 1830.
Intoxication of railway employees, forbidden 3564, 6583.
Intoxication, when mitigation 6282.
Invalid deed, local or special law giving effect to, invalid 278.
Invalid instrument, local or special law giving effect to, invalid 278.
Invalid will, local or special law giving effect to, invalid 278.
Invasion, governor may call militia to repel 364.
In case of writ of habeas corpus may be suspended if public safety requires 234.
No limit to debt which state may incur to repel 350.
Of states, protection against 165.
Inventory, dissolution of partnership 5676.
Of estates 5942-5949. See Estates of Deceased Persons 5857-6148, Partnership 2897-2914.
Of separate property of wife 2158.
Of state property, to be taken by whom, when 4471.
Investment of school moneys (Const.) 355, 3387.
Involuntary manslaughter 6390.
Involuntary servitude, not to be tolerated except as punishment for crime 246.
Prohibited except for crime 228.
Iron tamping bar, use forbidden, penalty 4212.
Irredeemable university fund, how constituted, and maintained 4653.
Irregularity, not affecting substantial rights, not ground for dismissal of appeal 5388.
Irrigation districts may be consolidated, how, when 4786. See Water.
Irrigation districts, organized, how 3431-3442.
Irrigation, eminent domain for 5606.
Injunction suits affecting, bond 5145.
State board of, members and powers 4692-4694, 4706.
Issuance and sale of irrigation bonds, how conducted 4745-4747. See Water.
Issuance medical certificates, made when, by whom, how 2363-2367.
Issue. See Civil Practice.

J

Jails 1762, 1646, 232, 5497, 7603. See State Prison and Jails, County Government, County Commissioners, Sheriff.
Janitor of state library and capitol building 3962-3964.
Jeopardy, not to be twice put in for same offense 175, 237.
Once in, bar 7113.
Jewelers and watch repairers, bailments 530, 531.

Joinder of causes of action 5039.
Joint convention of senate and assembly for election of U. S. senator 1908-1913. See Elections.
Joint debtor. See Civil Practice.
Joint property, liable on execution if part of defendants jointly liable are served 5031.
Liable for satisfaction of judgment on joint contract 5282.
Joint-stock companies. See Corporations, 338-344, 1105-1440.
Joint tenants, may bring action for partition 5527.
Judge. See Civil Practice, District Courts, Supreme Court.
Before removal from office by legislature, shall have opportunity to be heard in person or by counsel 336.
Defined 6294(15).
Except justice of the peace or city recorder, not to receive fees to his own use 325.
For reasonable cause may be removed on two-thirds vote of members elected to each branch of the legislature 336.
Legislature shall not grant leave of absence to, absence from state for 90 days vacates office 332.
Liable to impeachment for misdemeanor or malfeasance 335.
Not to charge jury in respect to matters of fact, but may state testimony and declare the law 329.
To be served with complaint on proceedings before legislature for removal from office 336.
Judgment. See Civil Practice, Criminal Practice, Justice's Court.
Civil 5236-5251, 5266-5279. See Civil Practice.
Confession of 5249-5251. See Civil Practice.
Constable, purchasing, penalty 2821.
District court, how rendered and entered 4922.
In civil cases, when may be entered 4842.
Power to enforce 4864.
On claim against estate 5974, 5976.
On impeachment, effect 335.
Removal from office 6905.
Supreme court, not effective until opinion filed 376.
Judgment debtor. See Civil Practice.
Judgment docket. See Civil Practice, Criminal Practice.
Judgment roll, what to constitute. See Civil Practice.
Judicial days for courts 4869, 4870.
Judicial department, article in constitution on 316-333.
Coordinate, not to exercise legislative or executive functions 258.
Judicial districts, act creating 4901-4905.
Judicial districts, provided for by legislature 320.
Legislature to establish 320.
Judicial notice, courts, when to take, of what 775, 5072.
Judicial notice, of what taken on indictment 7062, 7063.
Judicial officer, fees to own use not to receive, except by justice of peace or recorder 325.
Impeachment of 335.
Judicial officer—continued.
Leave of absence not to be granted to 332.
Legislature may remove from office 336.
Superseded on election of successor 333.
Judicial power, in what courts vested 316.
Judicial power, of state, where vested 316.
Of United States, where vested 153-155.
Judicial proceedings, authentication of, under act of Congress 526.
Judicial records, proof of 5408-5412. See Civil Practice.
Juries. See Jury, Grand Jury, Civil Practice.
Local or special laws for summoning or impaneling, not to be passed 278.
Persons convicted of certain crimes excluded from 285.
Jurisdiction of courts, bankruptcy, federal and state courts 544, 565, 566.
District courts 321, 4840, 4849.
Federal, over land within state 1949-1952.
Indictment, question how and when raised 7105.
Justice's court, civil 323, 5714; criminal 323, 4851, 7440.
Municipal courts 324.
Recorder's court 324, 4853, 4854.
Supreme court, appellate 319, 4832, 4833; original 319, 4834. See Supreme Court, District Court, Justice of the Peace, Recorder's Court, Civil Practice.
Jurors. See Civil Practice, Jury, Grand Jury.
Jury. See Grand Jury.
Trial jury, (District Court), general provisions.
Actual bias, defined 7147.
Age exemption 4941.
Agreement by three-fourths binding 232.
Board and lodging, expense taxed as costs 4942, 5208.
Box exhausted, commissioners to select additional 4940.
Box, kind and character, judge to approve 5204.
Bribery of, penalty 6320, 6323.
Charge to, restrictions as to fact and law 327.
Commissioners to select jurors 4939.
Conviction of high crime, disqualification (Nev. Const.) 285.
Discharge, final adjournment of court 7212.
Discharge of excess number 4936.
Discharge, may be on nonjudicial day 4870.
Discretion to exclude certain names in drawing panel 4930.
Drawing after box exhausted 4940.
Drawing and summons of panel, how done 4930, 4939.
Elector must be 4929.
Embracery, penalty for 6323.
English language, must have knowledge of 4929.
Excess number discharged 4936.
Excuse of juror for cause 4933.
Exemption from duty, who entitled to 3356, 4612, 4932, 4941.
Exemption, military service, false claim, penalty 4016.
Expense of board and lodging taxed as costs 2035, 4942, 5208.

Jury, trial—continued.
Expense of, charge against county government 7204, 7205.
Failure of juror to attend, penalty 4934.
Fees of jurors 2001, 2013.
Jury box 4930, 4938, 4950.
Juror asking or receiving bribe 6320, 6323.
Influencing or attempting to influence unlawfully 6323.
Not serving may be drawn again 4939.
Receiving communication unlawfully 6324.
Unlawful promise or agreement of 6324.
Word includes, what 6294(25).
Legislature may require unanimous verdict 232.
List of, commissioners to select 4937.
List of names on slips 4938.
List drawn to be made, certified and filed 4930.
List drawn open to inspection 4930.
May be waived 232.
Mileage and per diem 2001, 2013, 4935.
Misconduct of officer drawing, or in charge of 6325, 6327.
Number of trial jurors to be drawn 4930.
Officer drawing, misconduct of 6325.
Officer in charge of jury, misconduct of 6327.
Open venire, when and how summoned 4940.
Panel of trial jurors, when and how drawn 4930.
Per diem, and mileage 2001, 2013, 4935.
Penalty for nonattendance of juror 4934.
Persons excluded from (Const.) 285.
Qualifications 285, 4929.
Regular panel of trial jurors 4930.
Return of sheriff on venire 4930.
Selection of jurymen by commissioners, how made 4939.
Sickness, juror excused for 4933.
Sheriff to summon venire 4939, 4930.
Soliciting jury duty, penalty for 6326.
Subornation of, penalty 6323.
Trial by, guaranteed 232.
Venire to issue to sheriff 4930.
Verdict, may be received on nonjudicial day 4870.
Verdict, unanimous, legislature may require 232.
Waiver of, may be 232.
Trial jury, special provisions (civil trial), accident preventing verdict, retrial 5216.
Additional jurors drawn and summoned, when 5204.
Adjournment of court during absence 5217.
Agreement during recess of court 5217.
Apartments and food for, sheriff to provide 5208.
Assent to verdict in open court 5218, 5220.
Ballots exhausted before completion, others drawn and summoned 5204.
Board and lodging, expense of taxed as costs 2035.
Box, for names of jurors summoned, judge to approve kind 5204.
Challenge for cause, grounds 285, 5206.
Challenge for cause, how tried 5207.
Challenge to individual jurors, kind 5205.
Jury, trial—continued.
Charge to jury, settlement of 5210.
Charge to jury, what to state 327, 5212.
Clerk to draw twelve names 5204.
Clerk to prepare ballots of names of jurors summoned and deposit in box 5204.
Clerk to record verdict 5220.
Communication with jury forbidden, exception 5213.
Consent to jury of less than twelve 5204.
Consist of twelve, proviso for less 5204.
Correction of verdict when informal or defective 5219.
Court to try challenge for cause 5207.
Custody of jury 5208, 5213.
Defective verdict, procedure 5219.
Deliberations of 5213.
Discharged for sickness of juror, when 5209.
Discharged, may be, on nonjudicial day 4870.
Duty of officer in charge 5213.
Entry of verdict 5220, 5222, 5225.
Examination as to qualifications 5204.
Exclusive judges of fact, charge to state, when 327, 5212.
Excused jurors, names not to be put in box 5204.
Exhibits, may take on deliberation 5214.
Expense of board and lodging, taxed as costs 2035.
Fact, court not to charge concerning 327, 5212.
Failure to agree, again sent out 5220.
Foreman to declare verdict 5218.
Four may constitute jury by consent 5204.
General verdict, defined 5221.
Grounds of challenge for cause 285, 5206.
Impaneled, how 5204-5207.
Inconsistent verdicts, special controls general 5222.
Information of court, may request 5215.
Informal verdict, procedure 5219.
Instructions, further may request 5215.
Instructions to, settlement of 5210.
Judge to approve jury box 5204.
Jury box, kind, judge to approve 5204.
Jury trial guaranteed 232.
Kinds of challenge 5205.
Misconduct of officer drawing or in charge 6325, 6327.
Must be more than four 5204.
Not to separate 5208.
Number of peremptory challenges 5205.
Number of to constitute, twelve or less 5204.
Oath of jurors 5208.
Officer in charge, duties of 5213.
Parties may have representatives with 5213.
Penalty for misconduct 6327.
Officer drawing, misconduct, penalty 6325.
Order of trial before 5210.
Papers, or copies or notes, may take on deliberations 5214.
Parties may appoint persons to be with officer in charge 5213.
Parties may consent to separation 5208.
Parties united to join in challenge 5205.
Peremptory challenges, number of 5205.

Jury, trial—continued.
Persons excluded from (Const.) 285.
Polled, may be 5218, 5220.
Premises or property, view of 5211.
Qualifications, examination as to 5204.
Replevin, action in verdict, form of 5224.
Sealed verdict, when may return 5217.
Separation of, parties may consent to 5208.
Sheriff to have charge of 5208.
Sheriff to prepare apartments and food 4942, 5208.
Sickness of juror, procedure 5209.
Special and general verdict inconsistent 5222.
Special verdict, defined 5221.
Special verdict, when may be required 5222.
Subornation of, penalty for 6323.
Summoned and not excused, names to be put in box 5204.
Testimony, statement of in charge, rule concerning 327, 5212.
Three-fourths may agree on verdict 232, 5220.
Trial before, order of proceedings 5210.
Trial of challenge for cause, witnesses 5207.
Twelve constitute jury, less by consent 5204.
Verdict, action for recovery of personal property 5224.
Failure to render, retrial 5216.
For money damages 5223.
General or special, defined 5221.
General or special, when may be rendered 5222.
How rendered 5217, 5218.
Informal or defective 5219.
Nonjudicial day, may be received on 4870.
Recorded and read to 5220.
Sealed, when may return 5217.
View of property or premises 5211.
Trial by jury, special provisions, criminal trial, acquittal advised by court, jury may disregard 7203.
Acquittal, by, judgment for insanity 7217.
Adjournment of court during submission 7211, 7212.
Agreement of, return into court 7213.
Board and lodging, county charge 7204, 7205.
Call of jury, part not appearing, retrial 7213.
Challenge to individual juror, actual bias, defined 7147.
Before juror sworn 7140, 7142.
Court to allow or disallow 7155.
Defendant informed of rights as to 7140.
Denial of, trial, witnesses 7152-7154.
For actual or implied bias, how taken 7150.
For cause, by defendant first 7156.
Each party must exhaust 7156.
General 7146.
General or particular 7145.
Order of taking 7157.
Particular 7147, 7148.
For implied bias, grounds for 7148.
Exception to, denial of, and trial of 7151.

Jury, trial—continued.
Challenge, for implied bias, exemption not grounds for 7149.
Grounds for, implied bias 7148.
Implied bias, defined 7147.
Grounds for 7148,
Joint defendants must join in 7130.
Kinds 7129, 7141.
May be oral 7150.
Number of peremptory 7144.
Opinion founded on rumor or public press 7150.
Order of taking, for cause 7157.
Order of taking, peremptory 7158.
Peremptory, defined 7143.
How taken 7143.
Number allowed 7144.
Order of taking 7158.
When to be taken 7140, 7142.
Challenge to panel, amendment to 7136.
Bias of officer summoning 7138.
By joint defendants 7130.
Defined 7132.
Denial of, court to try question 7137.
Effect of allowing or disallowing 7138.
Exception to, court to try 7135.
Exception to, how taken 7135.
Exception, withdrawal of 7136.
For bias of officer summoning 7138.
Grounds for 7133, 7138.
Joint defendants, must join in 7130.
Kinds 7129, 7141.
When and how taken 7134.
Charge to 7159, 7198.
Conduct after submission to 7204, 7212.
Deciding by lot, ground new trial 7234.
Degree of crime, to determine 6290, 7218, 7219.
Denial of challenge, court to try 7137, 7152, 7154.
Disagreement 7224.
Discharge after verdict 7224.
Discharged, after deliberation, for what causes 7208.
After submission, when may be 7209-7212.
May be on nonjudicial day 4870.
Sickness of juror 7208.
Without verdict, retrial 7224.
Evidence received out of court, ground new trial 7234.
Exemption, for what allowed 3356, 4016, 4612, 4932, 4941.
Exception to challenge, court to try 7135.
How taken 7135.
Expense of board and lodging, charge against county government 7204, 7205.
Fact, to decide 7197.
Final adjournment, discharges 7212.
Food and lodging, sheriff to provide 4942, 7204, 7205.
Form of verdict 7216.
Formed as in civil actions 7124.
How polled 7223.
Informal verdict not to be recorded, when 7221.
Informal verdict reconsidered 7221, 7222.
Informal verdict, when deemed acquittal 7222.
Instructions and papers, may take on retiring to deliberate 7206.

Jury, trial—continued.
Instructions to 7198.
Judge of credibility 7451.
Juror as witness 7190.
Jury trial guaranteed 232.
May be polled 7223.
May disregard advice of judge to acquit 7203.
May return for further instructions 7207.
May separate, when 7192, 7193.
Misconduct of, ground new trial 7234.
Misconduct of officer in charge, penalty 6327.
Misdirection of, ground new trial 7234.
Must be kept together after case submitted 7201.
Not bound to acquit on advice of court 7203.
Officer in charge, duties, liability 6327, 7192, 7201.
Panel defined 7131.
Permitted to separate, admonished 7193.
Reconsideration of verdict 7221.
Return to court after agreement 7213.
Room for, county charge 7204.
Room to be provided for 7204.
Separating without leave, ground new trial 7234.
Separation, permission for 7193.
Sheriff to provide food and lodging 7205.
Sickness of juror after trial begun or submission to 7194, 7208.
Special inquiry into sanity by 7271.
Trial of challenge by court 7137, 7138.
Verdict, acquittal by reason of insanity, effect 7217.
Acquittal advised by court, may disregard 7203.
Declaration of 7215.
Form of 7216.
Nonjudicial day, may be received on 4870.
Of conviction, must be specific 7222.
Presence of defendant 7214.
Read to 7224.
Waived, when 7122.
View by 7191.
When may separate 7192, 7193.
Where may deliberate on case 7201.
Witness may be 7190. See Civil and Criminal Practice Acts.
Trial jury (Justice's Court), civil trial, agreement by three-fourths 232.
Challenge for cause, grounds 5206, 5768.
Challenge for cause, how tried 5768.
Challenges, kinds 5768.
Expenses of board and lodging, how taxed as costs 2035.
Grounds of challenge for cause 5206, 5768.
Issue of fact, tried by unless waived 5765.
Justice to try challenge for cause 5768.
May be waived, how 5766.
Misconduct of officer in charge 6327.
Number of 5768.
Peremptory challenges, number of 5768.
Summoned, how 5768.
Trial of challenge for cause 5768.
Verdict 5773.
Waiver of, how 5766.
Jury, trial—continued.
Trial jury (Justice's Court), special provisions, criminal trial, challenge, trial of 7486.
Deliberation of 7488.
Discharged, when 7492.
Fact, to decide 7487.
Formation of 7124.
Jury discharged, retrial 7493.
Misconduct of officer in charge 6327.
Number, how summoned 7122, 7483.
Number in misdemeanor trial 7122.
Oath of 7485.
Oath of officer in charge 7488.
To decide fact 7487.
To sit together 7486.
Verdict, entry 7489.
Waiver of 7122.
When discharged 7492. See Civil and Criminal Practice Acts.
Justice's court, and justice of the peace. (Civil Practice.)
Absence of justice of the peace, another may attend in his behalf 4926, 5811.
Abstract of judgment in justice's court, filed in recorder's office creates lien on land 5782.
May be obtained and entered in docket of district court and execution issued to other counties 5779.
Account, copy of as complaint in justice's court 5736.
When inspection and copy may be ordered in action in justice's court 5769.
Action, appeal from justice's court, power of district court, dismissal, damages, costs, judgment 5794.
Civil, how commenced in justice's court 5722.
Civil, in justice's court, adjournment not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
Alias summons may issue, time for appearance 5729, 5730.
Amendment to complaint or answer may be allowed 5741.
Amendment to pleadings, adjournment, costs, relief from judgment by denial 5742.
Answer and what to contain 5735, 5738.
Answer or demurrer allowed to amended pleadings 5743.
Arrest of defendant, must give undertaking before applying for postponement 5759.
Complaint defined and what to contain 5736.
Court to try issue of law 5764.
Defendant may appear and waive summons 5724.
Demurrer to complaint 5735, 5737.
Entry to be made in docket of date of trial or hearing and mailing notice 5733.
Failure of either party to appear, trial may proceed 5767.
How guardian appointed when necessary 5726.

Justice's court, action—continued.
How judgment entered 5775.
How jury waived 5766.
If defendant fails to set up counterclaim he cannot afterwards sue 5739.
Judgment taken by mistake, inadvertence or excusable neglect may be set aside 5742.
Jury, how summoned and challenged 5768.
Limitation of service of summons 5731.
Notice of hearing after service of summons or appearance 5733.
Parties entitled to one hour in which to appear after time fixed in notice 5733.
Parties may appear in person or by attorney 5725.
Place of trial 5715.
Pleadings and form of 5734, 5735.
Postponement of trial by consent 5758.
Postponement of trial on application of party, grounds, procedure 5759.
Proceedings on demurrer to complaint or answer 5741.
Summons, how served, directed and what to contain 5727.
Summons, how served by publication 5732.
Summons to be served out of town to have certificate and seal of county clerk attached 5732.
Time for appearance of defendant to be specified in summons 5728.
Vacancy does not affect 4884.
Voluntary appearance and pleading without summons 5715.
What statement on appeal on questions of law alone must contain, amendments and settlement 5789.
When admission that evidence would be given avoids postponement 5789.
When attachment to issue 5749, 5750.
When consent to taking of testimony or admission that it would be given avoids postponement 5759.
When court may postpone 5757.
When defendant may be arrested 5744.
When order for inspection of written instrument may be made 5769.
When plaintiff may demur to answer 5740.
When postponement discharges defendant from arrest 5759.
Action, civil, judgment by confession may be entered in justice's court 5771.
Justice of the peace to receive all money collected by sheriff or constable and pay same to parties entitled 5810.
Justice's court to which transferred has same jurisdiction 5719, 5720.
Transfer of from justice's court to district court 5721.
Trial by jury secured but may be waived (Nev. Const., art. i, sec. 3) 232.
Action for claim and delivery in justice's court 5124, 5135, 5753.
For collection of taxes not over $300, justice's court has jurisdiction 5714.
Justice's court, action—continued.
For enforcement of mechanic's lien where amount exclusive of interest does not exceed $300, justice's court does not have jurisdiction 5714.
For possession of land unlawfully obtained or withheld, justice's court has jurisdiction 5714.
For possession of land where relation of landlord and tenant exists, justice's court has jurisdiction 5714.
Action, in justice's court, abstract of judgment filed in recorder's office creates lien on land 4782.
By whom and how summons served and returned 5732.
Certain sections made applicable 5732.
Certificate of county clerk to writ of attachment for service in another county 5751.
Copy of note or instrument admitted unless denied in verified answer 5770.
Deposit may be made in lieu of undertaking 5816.
Entry of judgment after demurrer and failure to answer 5755.
Execution, duty of officer receiving 5786.
Execution may be renewed or alias issued 5785.
Execution to issue by county clerk to other counties on abstract of judgment docketed in district court 5781.
Fees of attorney recoverable as costs 5814.
For recovery of money or damages, when defendant may be arrested 5744.
If amount found due exceeds jurisdiction party may remit excess 5776.
Issuance and stay of execution 5783.
Issue of fact to be tried by jury unless waived 5765.
Judgment of dismissal may be entered without prejudice in certain cases 5772.
Judgment to be entered at close of trial if no jury 5774.
Judgment to be entered at once in conformity to verdict 5773.
Judgment upon default 5754, 5755.
No statement required on appeal to district court on questions of fact or both law and fact 5790.
Offer to allow judgment, when further costs not recoverable 5777.
Place of trial may be changed in certain cases or another justice called 5716, 5718.
Pleadings, issues of law and fact defined 5761-5763.
Proceedings after order changing place of trial 5719.
Undertaking on appeal, requirements with or without stay, deposit, justification of sureties 5792.
Waiver of objection that it is in wrong township 5772.
What entries to be made in docket 5800.
What execution must contain 4784.
What notice of appeal from judgment must contain 5788.

Justice's court, action—continued.
What papers to be transmitted on appeal to district court 5791.
What provisions of civil practice act are applicable 5815.
When place of trial cannot be changed more than once on motion of same party 5717.
When trial must be commenced and how continued 5756.
Who entitled to costs 5813.
Action, involving title to real property or legality of tax, impost, assessment, toll or municipal fine not to be tried in justice's court, 5721.
Action, justice of the peace may issue citation or other process on docket of predecessor 5805.
May issue subpena and final process to any part of county 5808.
May require deposit or undertaking as security for costs before issuing summons 5812.
On appeal to district court, provisions relating to change of place of trial applicable 5794.
Admission, of making of note or instrument in justice's court unless denied by verified answer 5770.
That evidence would be given, when avoids postponement of civil action in justice's court 5759.
Adjournment, entry regarding to be made in justice's court docket 5800.
In justice's court not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
On amendment of pleadings in justice's court if necessity for be shown under oath, costs 5742.
When civil action to be continued without in justice's court 5756.
Affidavit, for change of place of trial in justice's court 5716.
For arrest of defendant in civil action in justice's court 5745.
For attachment in civil action in justice's court 5747, 5749.
Of evidence expected to be obtained on application for postponement of civil action in justice's court 5759.
Showing cause for setting aside judgment in justice's court 5742.
Alias execution in justice's court 5785.
Alias summons in civil action in justice's court may issue, time for appearance 5729, 5730.
Alias venire for jurors in civil action in justice's court 5768.
Allegation in complaint controverted by answer and allegation of new matter in answer, when raises issue of fact in justice's court 5763.
Alphabetical index to docket in justice's court required to be kept 5802.
Amendment, failure to make after sustaining demurrer to complaint in justice's court, action may be dismissed 5772.
May be allowed to complaint or answer in justice's court 5741.
Justice's court, amendment—continued.
Of pleadings in civil action in justice's court 5742.
Of pleadings in justice's court, answer or demurrer allowed to 5743.
Of pleadings, when postponement allowed in action in justice's court 5757.
To statement on appeal on questions of law alone, when to be filed in justice's court 5789.
Answer, allowed to amended pleadings in justice's court 5743.
In civil action in justice's court, what to contain 5735, 5738.
New matter in, raises issue of fact in justice's court in absence of demurrer 5763.
Summons in justice's court to contain direction that defendant appear and answer 5727.
Verified in justice's court showing title of real property or legality of tax, impost, assessment, toll or municipal fine involved, case to be transferred to district court 5721.
With verified denial required in justice's court or written instrument will be admitted 5770.
Appeal, and notice of appeal from judgment in justice's court, what must contain 5788.
For failure to prosecute, district court after notice may order dismissal with costs and damages 5794.
From justice's court disregarded upon failure of sureties to justify 5792.
From justice's court, final 4840.
From justice's court, in district court either party may have benefit of objections 5791.
From justice's court, legislature may prescribe regarding (Nev. Const. art. vi, sec. 8) 323.
From justice's court, money transmitted to clerk in lieu of undertaking to be paid out on order of district court 5792.
From justice's court, on questions of fact or both law and fact, not statement but trial anew 5790.
From justice's court, undertaking on, requirement with or without stay, deposit, justification of sureties 5792.
From justice's court, what papers to be transmitted to district court 5791.
From justice's court, when stay of execution to be ordered, when officer to relinquish property 5793.
Judgment rendered on has same force as other judgments in district court 5794.
Notice and bond on, entry in justice's court docket 5800.
On questions of law alone on judgment in justice's court, what statement must contain, amendments and settlement 5789.
Reversal of judgment taken on overruling of objection that action in justice's court is in wrong township 5772.

Justice's court, appeal—continued.
To district court, provisions relating to change of place of trial applicable 5794.
Appearance, defendant may appear in justice's court and waive summons 5724.
Failure of defendant to make within one hour ground for dismissal of action in justice's court 5772.
Failure of either party to make in justice's court, trial to proceed 5767.
Failure to make in justice's court waives jury 5766.
Time for of defendant to be specified in alias summons in justice's court 5729, 5730.
Time of to be entered in justice's court docket 5800.
Voluntary without summons in justice's court 5715.
Arrest, of defendant in certain civil actions in justice's court 5744.
Of defendant in civil action in justice's court, affidavit and undertaking 5745.
Of defendant in civil action in justice's court, must give undertaking before applying for postponement 5759.
Of defendant in civil action in justice's court, officer must give notice to plaintiff, return 5747.
Of defendant in civil action in justice's court, to be detained until discharged by justice 5748.
Of defendant in civil action in justice's court, to be stated in judgment 5775.
Of defendant in civil action in justice's court, to be taken before justice, when to be taken before another justice 5746.
Of defendant in civil action in justice's court, when postponement discharges from 5759.
Of defendant in civil action in justice's court, when subject to on execution 5759.
Of elector on civil process not to be made on election day (Nev. Const. art. ii, sec. 4) 253.
Of person charged with contempt by justice's court 5797.
On civil process, members of legislature exempt from during session and for 15 days before (Nev. Const. art. iv, sec. 11) 269.
Order of in civil action to be entered in justice's court docket 5800.
Assessment, if legality of involved in justice's court, case to be transferred to district court for trial 5721.
Assignee cannot sue on counterclaim not set up in justice's court 5739.
Attachment, in civil action in justice's court, undertaking, exception to sureties, justification, waiver 5750.
In civil action in justice's court, undertaking for release of 5751.
In justice's court, certain sections made applicable 5752.
May issue on nonjudicial day 4870.
When issued in civil action in justice's court 5749, 5750.
Justice's court, attachment—continued.
Writ of in civil action in justice's court, substance of, several may be issued to different sheriffs 5751.
Writ of in justice's court for service in another county to have certificate under seal of county clerk 5751.
Writ of, issuance to be noted in justice's court docket 5800.
Attorney, any person except constable may appear as in justice's court 5725.
Authority of, to bind client 507.
Fee of attorney recoverable as costs in justice's court 5814.
Name of plaintiff's to be indorsed on summons in justice's court 5727.
Notice of hearing in justice's court, when to be given to 5735.
Authentication of records, federal act concerning 526-529.
Bill, copy of, as complaint in justice's court 5736.
Bill of exchange, or other instrument, when admitted in justice's court unless denied by verified answer 5770.
Blanks must be filled in all papers except subpena before issuance by justice of the peace 5809.
Bond, action upon, justice's court has jurisdiction if amount does not exceed $300 5714.
Copy of as complaint in justice's court 5736.
For payment of judgment when adjournment for more than ten days in justice's court 5760.
In justice's court, deposit may be made in lieu of in all cases 5616.
On appeal, entry of in justice's court docket 5800.
On appeal from justice's court, requirements with or without stay, deposit, justification of sureties 5792.
Surety company's, may accept premium taxed as costs 695-701.
Breach of the peace, when punishable as contempt in justice's court 5795.
Certificate, and seal of county clerk to be attached to summons in action in justice's court to be served out of town 5732.
Of district judge as to which justice of the peace is successor when two equally entitled, to be filed with county clerk 5807.
Challenges to jurors in civil action in justice's court, grounds and number 5768.
Civil action, appeal from justice's court, power of district court, dismissal, damages, costs, judgment 5794.
Entries in justice's court docket are prima facie evidence 5801.
For claim and delivery in justice's court 5124, 5135, 5753.
How commenced in justice's court 5722.
In justice's court, abstract of judgment filed in recorder's office creates lien on land 5782.
In justice's court, adjournment not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.

Justice's court, civil action—continued.
In justice's court, alias summons may issue, time for appearance 5729, 5730.
In justice's court, amendment to complaint or answer may be allowed 5741.
In justice's court, amendment to pleadings, adjournment, costs, relief from judgment by denial 5742.
In justice's court, answer and what to contain 5736, 5738.
In justice's court, answer or demurrer allowed to amended pleadings 5743.
In justice's court, arrest of defendant, must give undertaking before applying for postponement 5759.
In justice's court, attorneys' fees recoverable as costs 5814.
In justice's court, certain sections made applicable 5762.
In justice's court, certificate of county clerk to writ of attachment for service in another county 5751.
In justice's court, complaint defined and what to contain 5736.
In justice's court, copy of note or instrument admitted unless denied by verified answer 5770.
In justice's court, defendant may appear and waive summons 5724.
In justice's court, demurrer to complaint 5735, 5737.
In justice's court, deposit may be made in lieu of undertaking 5816.
In justice's court, entry to be made in docket of date of hearing and mailing notice 5733.
In justice's court, execution, duty of officer receiving 5786.
In justice's court, execution may be renewed or alias issued 5785.
In justice's court, execution to issue to county clerk on abstract of judgment docketed in district court 5781.
In justice's court, failure of either party to appear trial may proceed 5767.
In justice's court, hearing after service of summons or appearance 5733.
In justice's court, how guardian appointed when necessary 5726.
In justice's court, how judgment entered 5775.
In justice's court, how jury waived 5766.
In justice's court, how summons issued, directed and what to contain 5727.
In justice's court, if amount found due exceeds jurisdiction, party may remit excess 5776.
In justice's court, if defendant fails to set up counterclaim he cannot afterwards sue 5739.
In justice's court, issuance and stay of execution 5783.
In justice's court, issue of fact to be tried by jury unless waived 5765.
In justice's court, judgment of dismissal may be entered without prejudice in certain cases 5772.
In justice's court, judgment to be entered at close of trial if no jury 5774.
In justice's court, judgment to be entered at once in conformity to verdict 5773.
Justice's court, civil action—continued.
In justice's court, offer to allow judgment, when further costs not recoverable 5777.
In justice's court, parties may appear in person or by attorney 5725.
In justice's court, pleadings, form of 5734, 5735.
In justice's court, pleadings, issues of law and fact defined 5761-5763.
In justice's court, postponement by consent 5758.
In justice's court, postponement of trial on application of party, grounds, procedure 5759.
In justice's court, proceedings on demurrer to complaint or answer 5741.
In justice's court, summons, by whom and how served and returned 5732.
In justice's court, time for appearance of defendant to be specified in summons 5728.
In justice's court, judgment taken by mistake, inadvertence or excusable neglect may be set aside 5742.
In justice's court, jury, how summoned and challenged 5768.
In justice's court, limitation of service of summons 5731.
In justice's court, no statement required on appeal to district court on questions of fact or both law and fact 5790.
In justice's court, undertaking on appeal, requirements with or without stay, deposit, justification of sureties 5792.
In justice's court, waiver of objection that it is in wrong township 5772.
In justice's court, what entries to be made in docket 5800.
In justice's court, what execution must contain 5784.
In justice's court, what notice of appeal from judgment must contain 5788.
In justice's court, what papers to be transmitted on appeal to district court 5791.
In justice's court, what provisions of civil practice act are applicable 5815.
In justice's court, what statement on appeal on questions of law alone must contain, amendments and settlement 5789.
In justice's court, when admission that evidence would be given avoids postponement 5759.
In justice's court, when attachment to issue 5749, 5750.
In justice's court, when consent to taking of testimony or admission that it would be given avoids postponement 5759.
In justice's court, when court may postpone 5757.
In justice's court, when defendant may be arrested 5744.
In justice's court, when defendant may demur to answer 5740.
In justice's court, when order for inspection of written instrument may be made 5769.

Justice's court, civil action—continued.
In justice's court, when postponement discharges defendant from arrest 5759.
In justice's court, when trial must be commenced and how continued 5756.
In justice's court, who entitled to costs 5813.
Judgment by confession may be entered in justice's court 5771.
Justice of the peace may issue execution or other process upon docket of predecessor 5805.
Justice of the peace may issue subpena and final process to any part of county 5808.
Justice of the peace to receive all moneys collected by sheriff or constable and pay same to parties entitled 5810.
Justice's court may require deposit or undertaking as security for costs before issuing summons 5812.
Justice's court to fix time for trial 5733.
Justice's court to try issue of law 5764.
Justice's court to which transferred has same jurisdiction 5719, 5720.
Place of trial in justice's court 5715.
Transfer of from justice's court to district court 5721.
Trial by jury secured, but may be waived (Nev. Const. art i, sec. 3) 332.
Civil process, elector not to be arrested under on election day (Nev. Const. art. ii, sec. 4) 253.
Members of legislature exempt from arrest under during session and 15 days before (Nev. Const. art iv, sec. 11) 269.
Claim and delivery, action for, in justice's court 5124, 5753.
Clerk, county, to issue execution to other counties on abstract of judgment from justice's court docketed in district court 5781.
County, to file and docket abstract of judgment from justice's court 5780.
Pleadings and transcript to be certified to on transfer of case from justice's court to district court 5721.
To pay on order of court money transmitted in lieu of undertaking on appeal from justice's court 5792.
Complaint, and what to contain in civil action in justice's court 5734, 5735, 5736.
Filing of in justice's court 5722, 5723.
In civil action in justice's court to be indorsed with date of filing 5723.
In justice's court, copy of note or instrument admitted unless denied by verified answer 5770.
Confession, judgment by may be entered in civil action in justice's court 5771.
Judgment may be entered upon in justice's court if amount does not exceed $300 exclusive of interest 5714.
Consent of parties, to not more than 12 nor less than 4 jurors in justice's court in civil action 5768.
To taking of testimony in civil action in justice's court on postponement 5759.
Justice's court—continued.
Constable, duties imposed on sheriff extend to in action for claim and delivery 5753.
Duties of on receiving execution from justice's court 5786.
Fees 1999, 2011.
Local or special laws relating to jurisdiction and duties of, invalid (Nev. Const. art iv, sec. 20) 278.
May serve summons in action in justice's court 5732.
To be substituted for "sheriff" in proceedings supplementary to execution in justice's court 5787.
To detain defendant arrested in civil action in justice's court until discharged by justice 5748.
To give notice and make return on arrest of defendant in civil action in justice's court 5747.
To pay moneys collected on execution of process to justice of the peace 5810.
When may arrest defendant in civil action in justice's court 5744.
When not to act as attorney in justice's court 5725.
When substituted for "sheriff" in sections relating to attachment 5752.
When to relinquish property on stay of execution on appeal from justice's court 5793.
When to take defendant arrested in civil action in justice's court before another justice 5746.
Contempt, conviction of in justice's court to be entered in docket 5799.
In immediate view and presence of justice's court, proceedings for 5796.
Not in immediate view and presence of justice's court, proceedings for 5797
What acts punishable as in justice's court 5795.
What punishments may be imposed for by justice's court 5798.
Continuance in justice's court not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
Contract, entry of judgment upon by default in justice's court 5754.
Justice's court has jurisdiction of amount not exceeding $300 exclusive of interest 5714.
Obligation of two or more persons in different counties, limitation of service of summons in justice's court 5731.
Township in which action for to be brought in justice's court 5715.
Conviction of contempt in justice's court to be entered in docket 5799.
Costs, and damages, when may be ordered on dismissal of appeal to district court 5794.
Fees of attorney recoverable in justice's court 5814.
In justice's court to be included in judgment 5778.
Justice's court may require deposit or undertaking as security before issuing summons 5812.

Justice's court, costs—continued.
Payment of on adjournment made necessary by amendment of pleadings in justice's court 5742.
Payment of on change of place of trial of action in justice's court 5719.
Payment of on setting aside judgment by default in justice's court 5742.
To be included in entry of judgment in justice's court docket 5800.
When not recoverable after offer to allow judgment in justice's court, recovery against party refusing offer 5777.
Who entitled to in justice's court 5813.
Counterclaim, if not set up in action in justice's court defendant or assignee cannot afterwards sue 5739.
In civil action in justice's court 5738.
Counties, change in boundaries, justice of the peace successor of predecessor 5805.
County clerk, filing of certificate of district judge as to which of two justices of the peace entitled is successor 5807.
To certify to writ of attachment in justice's court for service in another county 5751.
To certify under seal to summons in justice's court for service in another county 5732.
To file and docket abstract of judgment from justice's court 5780.
To issue execution to other counties on abstract of judgment from justice's court docketed in district court 5781.
To receive docket and papers on death or removal of justice of the peace 5804.
Court, inferior, in cases appealed from district court has final appellate jurisdiction, Nev. Const. art. vi, sec. 6) 321.
Justice's, change of place of trial in civil action 5717.
Justice's, jurisdiction of (Nev. Const. art. vi, sec. 8) 323.
Justice's, legislature may prescribe regarding appeals from (Nev. Const. art. vi, sec. 8) 323.
Justice's, place of trial of civil actions 5715.
Justice's, when and where held, always open, jurisdiction in civil cases 5714.
Justice's, when place of trial in civil action ordered changed, parties may agree upon court 5718.
Of record, justices of the peace not to try cases in conflict with jurisdiction of (Nev. Const. art. vi, sec. 8) 323.
Damages, demand for to be contained in summons in justice's court 5727.
Entry of judgment for upon default in justice's court 5754.
Justice's court has jurisdiction of amount not exceeding $300 5714.
Township in which action for to be brought in justice's court 5715.
When may be ordered in addition to costs on dismissal of appeal to district court 5794.
Default, if made, to be entered in justice's court docket 5800.
Justice's court, default—continued.
Judgment upon in justice's court 5754, 5755.
Defense, what may be contained in answer in civil action in justice's court 5738.
Definition of issues of law and fact in justice's court 5761-5763.
Demand, exceeding $300 exclusive of interest not to be tried in justice's court (Nev. Const. art. vi, sec. 8) 323.
For jury in civil action in justice's court, failure to make, waiver 5766.
Demurrer, allowed to amended pleadings in justice's court 5743.
If overruled and failure to answer judgment may be ordered in justice's court 5755.
To complaint in civil action in justice's court 5735, 5737.
To complaint or answer in justice's court, proceedings on 5741.
To complaint or answer in justice's court, raises issue of law 5762.
When may be interposed to answer in justice's court 5740.
Denial, by verified answer in justice's court or written instrument admitted 5770.
In answer in civil action in justice's court 5738.
Departure from state with intention to defraud creditors, when defendant may be arrested in civil action in justice's court 5744.
Deposit in lieu of undertaking on appeal from justice's court 5792.
Deposition, may be taken by justice of the peace on postponement of civil action 5759.
Taken on postponement of civil action in justice's court may be read 5759.
Diligence in obtaining testimony must be shown to obtain postponement of trial in civil action in justice's court 5759.
Dismissal, of action without prejudice in justice's court 5772.
Of appeal to district court may be ordered after notice 5794.
Disobedience of order, subpena or process punishable as contempt in justice's court 5394, 5395, 5795.
Disorderly conduct, when punishable as contempt in justice's court 5795.
District court, entry in docket of abstract of judgment of justice's court and issuance of execution to other counties 5781.
For failure to prosecute an appeal, may order dismissal with costs and damages 5794.
Jurisdiction of on transfer of case from justice's court 5721.
May order justice's court to transmit papers on appeal, service of order, fine 5791.
On appeal, either party may have benefit of objections made in justice's court 5791.
Transfer of cases to from justice's court 5721.
When may order new trial on appeal from justice's court 5794.

Justice's court—continued.
When two justices of the peace equally entitled, district judge to certify which is successor 5807.
Docket, and papers in case of death or removal of justice of the peace to be delivered to other justice or county clerk 5804.
And papers must be delivered by justice of the peace to successor 5803.
Certified transcript of on change of place of trial in justice's court 5719.
Conviction of contempt in justice's court to be entered 5799.
Entry in judgment docket of district court of abstract of judgment in justice's court 5780.
Execution or other process may be issued by justice of the peace upon docket of predecessor 5805.
In justice's court, alphabetical index required to be kept 5802.
In justice's court, copy of to be used on appeal in district court 5789.
In justice's court, entry to be made of date of trial or hearing and mailing notice 5733.
In justice's court in civil action, entry of waiver of jury 5766.
In justice's court, what entries to be made 5800.
Of justice's court, certified copy to be transmitted on appeal to district court 5791.
Transcript of to be certified by justice's court on transfer of case to district court for trial 5721.
Election day, elector not to be arrested under civil process on (Nev. Const. art. ii, sec. 4) 253.
Elector not to be arrested under civil process on election day (Nev. Const. art. ii, sec. 4) 253.
Entries, in justice's court docket are prima facie evidence 5733, 5801.
In justice's court docket, what to be made 5800.
Evidence, affidavit of what expected to be obtained on postponement of civil action in justice's court 5759.
Entries in justice's court docket are prima facie 5733, 5801.
In action for libel truth may be given (Nev. Const. art. i, sec. 9) 238.
Justice's court may make order for inspection of written instrument and delivery of copy 5769.
Offer to allow judgment in justice's court not admissible 5777.
Only so much as necessary to explain grounds to be inserted in statement on appeal on questions of law alone from justice's court 5789.
Regarding forcible entry and detainer may be given in justice's court 5721.
Regarding title to real property or legality of tax, impost, assessment, toll or municipal fine not to be given in justice's court 5721.
Witness shall not be rendered incompetent on account of religious belief (Nev. Const. art. i, sec. 4) 233.
Justice's court, evidence—continued.
Exception to sureties on undertaking for attachment in justice's court 5750.
Execution, all blanks must be filled in by justice of the peace before issuance 5809.
Costs in aid of, who entitled to in justice's court 5813.
In civil action in justice's court, when defendant subject to arrest on 5759.
In justice's court, duty of officer receiving 5786.
In justice's court, may be issued, stay, 5783.
In justice's court, may be renewed or an alias issued 5785.
In justice's court, what must contain 5784.
Justice of the peace may issue upon docket of predecessor 5805.
Justice of the peace may issue to any part of county 5808.
Or renewals, issuance of, payment upon, entry to be made in justice's court docket 5800.
Proceedings supplementary relating to district court are applicable to justice's court 5787.
Resistance to punishable as contempt in justice's court 5795.
To issue by county clerk to other counties on abstract of judgment from justice's court docketed in district court 5781.
Undertaking or deposit for stay of on appeal from justice's court 5792.
When stay of to be ordered by justice's court pending appeal, when officer to relinquish property 5793.
Fact, issue of, how tried in justice's court 5765.
Issue of in justice's court defined 5761, 5763.
Facts, certain entries in justice's court docket are prima facie evidence 5801.
Fees, court, to be paid on appeal from 2031.
In counties polling over 800 votes 2015.
In counties polling not over 800 votes 2003.
In proceeding relating to apprentices 494.
Fence viewers, to appoint, when 3605.
Fine, action for, justice's court has jurisdiction if amount does not exceed $300, exception 5714.
May be imposed by district court on justice of the peace for failure to transmit papers on appeal 5791.
Municipal, if legality of involved in justice's court, case to be transferred to district court for trial 5721.
What may be imposed by justice's court for contempt 5798.
Forfeiture, justice's court has jurisdiction if amount does not exceed $300, exception 5714.
Form of abstract of justice's court judgment 5779.
Fraud, when ground for arrest of defendant in civil action in justice's court 5744.

Justice's court—continued.
Genuineness of signature to note or instrument admitted in justice's court unless denied by verified answer 5770.
Guardian, ad litem, how appointed in civil action in justice's court 5726.
General, how appointed in civil action in justice's court 5726.
Has jurisdiction concurrent with district judge in action for possession where relation of landlord and tenant exists or possession unlawfully withheld 5604.
Has jurisdiction in action on woodchopper's lien 2230.
Has jurisdiction of violation of city ordinances 886.
If justice material witness, place of trial of action in justice's court may be changed or another justice called 5716.
If two or more justices equally entitled to, district judge to certify who is successor 5807.
If vacancy by death or removal, docket and papers to be delivered to other justice or county clerk 5804.
Impost, if legality involved in justice's court, case to be transferred to district court for trial 5721.
Imprisonment, what may be imposed by justice's court for contempt 5798.
Incompetent person as party, how guardian ad litem appointed in civil action in justice's court 5726.
Index to docket in justice's court required to be kept 5802.
Infant, as party, how guardian ad litem appointed in civil action in justice's court 5726.
Under 14 years of age may apply for appointment of guardian ad litem in civil action in justice's court 5726.
Insane person as party, how guardian ad litem appointed in civil action in justice's court 5726.
Inspection of written instrument, order for in justice's court 5769.
Instrument, copy of as complaint in justice's court 5736.
When justice's court may make order for inspection of 5769.
Written, when admitted in justice's court unless denied by verified answer 5770.
Issue, of fact, how tried in justice's court 5765.
Of law in justice's court must be tried by court 5764.
Regarding title to real property or legality of tax, impost, assessment, toll or municipal fine not to be tried in justice's court, transfer for of from justice's court to district court 5721.
Issues, in civil action in justice's court, disposition of 5756.
Of law and fact in justice's court defined 5761-5763.
Judge, when "justice" to be substituted for in sections relating to attachment 5752.
Judgment, after demurrer overruled and failure to answer in justice's court 5755.
Justice's court, judgment—continued.
By confession may be entered in justice's court 5771.
Entry of in justice's court docket 5800.
Final process on may be issued by justice of the peace to any part of county 5808.
How entered in civil action in justice's court 5775.
In justice's court, abstract filed in recorder's office creates lien on lands 5782.
Abstract of may be obtained and entered in docket of district court and execution issue to other counties 5779, 5780, 5781.
Form of abstract 5779.
If amount found due exceeds jurisdiction, party may remit excess 5776.
Taken by mistake, inadvertence or excusable neglect may be set aside 5742.
To be entered at close of trial if no jury 5774.
To be entered at once in conformity to verdict 5773.
To include costs 5778.
Waiver of objection that action is in wrong township 5772.
What notice of appeal must contain 5788.
In justice's court in civil action, to state arrest of defendant 5775.
Justice's court may enter on confession if amount does not exceed $300 exclusive of interest 5714.
Not invalid except on appeal when taken after overruling objection in justice's court that action is in wrong township 5772.
Of dismissal without prejudice may be entered in justice's court in certain cases 5772.
Offer to allow in justice's court not admissible in evidence when further costs not recoverable 5777.
On conviction of contempt in justice's court to be entered in docket 5799.
Rendered on appeal from justice's court has same force as other judgments in district court 5794.
Undertaking for payment of if adjournment for more than ten days in justice's court 5760.
When defendant fails to appear in justice's court 5754.
Jurisdiction, duties of justice of the peace and constable, local or special laws invalid (Nev. Const. art. iv, sec. 20) 278.
In justice's court, if amount found due exceeds, party may remit excess 5776.
Justice of the peace may act in behalf of another in case of sickness or absence 5811.
Justice's court to which civil action is transferred has same 5719, 5720.
Of action by county against person for support of poor kindred 2916, 2917.
Of action for collection of taxes where amount does not exceed $300, in justice's court 5714.

Justice's court, jurisdiction—continued.
Of action for delinquent taxes for improvement of streets in unincorporated town 934.
Of action for possession of lands unlawfully obtained or withheld in justice's court 5714.
Of action involving title to real property does not lie in justice's court 5714.
Of action to enforce mechanic's lien, justice's court does not have 5714.
Of action to recover personal property where value does not exceed $300, in justice's court 5714.
Of action where relation of landlord and tenant exists in justice's court 5714.
Of district court on transfer of case from justice's court 5721.
Of justice's court in cases of forcible entry and detainer 5721.
Of justice's court in civil cases 5714.
Of justices of the peace (Nev. Const. art. vi, sec. 8) 323.
To enter judgment by confession when amount exclusive of interest does not exceed $300, in justice's court 5714.
What provisions of civil practice act are applicable to justice's court 5815.
Jurors' fees 2001, 2013.
Jurors, names of to be entered in justice's court docket 5800.
Jury, demand for, entry to be made in justice's court docket 5800.
Demand for in civil action in justice's court, postponement of trial 5757.
How summoned and challenged, number of challenges, in civil action in justice's court 5768.
In civil action in justice's court, parties may consent to number not more than twelve nor less than four 5678.
Three-fourths in civil cases may render verdict, but legislature by two-thirds vote may require unanimous (Nev. Const. art. i, sec. 3) 232.
Trial by secured but may be waived in civil cases (Nev. Const. art. I, sec 3) 232.
Trial, in civil action in justice s court, how waived 5766.
Trial, to be had in justice's court unless waived 5765.
Justice, duties imposed on extended to in actions for claim and delivery in justice's court 5753.
How to issue subpena requiring attendance out of court 5432.
May administer oath or affirmation 5483.
May take affidavit to be used in this state 5450.
"Justice," to be substituted for "judge" in proceedings supplementary to execution in justice's court 5787.
When to be substituted for "judge" in sections relating to attachment 5752.
When substituted for word "judge" in sections relating to publication of summons 5732.
Justice's court, abstract of judgment filed in recorder's office creates lien on lands 5782.
Justice's court—continued.
Abstract of judgment may be obtained and entered in docket of district court and execution issue to other counties 5779-5871.
Action, for claim and delivery 5124, 5135, 5753.
Action for possession of real property may be maintained on tax deed 3666.
Action, power of district court on appeal, dismissal, damages, costs 5794.
Action, who entitled to costs 5813.
Affidavit of evidence expected to be obtained on application for postponement in civil action 5759.
Amendment to pleadings, adjournment, costs, relief from judgment by denial 5742.
Answer and what to contain 5735, 5738.
Answer or demurrer allowed to amended pleadings 5743.
Appeal from disregarded upon failure of sureties to justify 5792.
Appeal on questions of fact or both law and fact, no statement but trial anew 5790.
Appeal to, district court, when will be dismissed, D. C. rule xxxvii, p. 1430.
Arrest of defendant, must give undertaking before applying for postponement in civil action 5759.
Civil action, copy of note or instrument admitted unless denied by verified answer 5770.
Civil action, how commenced in 5722.
Civil action, to be continued without adjournment 5756.
Civil action, when consent to taking of testimony or admission that it would be given avoids postponement 5759.
Complaint defined and what to contain 5736.
Constable not to charge for written return 2041.
Conviction of contempt to be entered in docket 5799.
Court to which civil action may be changed 5718.
Defendant may waive summons 5724.
Demurrer to complaint in civil action 5735, 5737.
Deposit may be made in lieu of undertaking in all cases 5816.
Docket, alphabetical index required to be kept 5802.
Docket, another justice may attend and make entries in case of sickness or absence 5811.
Docket, entries to be made the time they occur 5801.
Docket, or certified transcript, entries prima facie evidence 5801.
Docket, what entries to be made 5800.
Entry of judgment after demurrer overruled and failure to answer 5755.
Entry to be made in docket of date of trial or hearing and mailing notice 5733.
Evidence regarding forcible entry and detainer may be given 5721.
Execution, duty of officer receiving 5786.

Justice's court—continued.
Execution may be renewed or alias issued 5785.
Execution to issue by county clerk to other counties on abstract of judgment from justice's court docketed in district court 5781.
Execution, what must contain 5784.
Execution, when may be issued, stay 5783.
Fees of jurors 2001.
How guardian ad litem appointed when necessary 5726.
How jury waived in civil action 5766.
How to enter judgment in civil action 5775.
If amount found due exceeds jurisdiction, party may remit excess 5776.
If defendant fails to set up counterclaim he cannot afterwards sue 5739.
If place of trial ordered changed, parties may agree upon court 5718.
In case of disability of justice another may attend in his behalf 5811.
In cases appealed from, district court has final appellate jurisdiction (Nev. Const. art. vi, sec. 6) 321.
Issue of fact to be tried by jury unless waived 5765.
Issues of law and fact defined 5761-5763.
Judgment by default 5754, 5755.
Judgment to include costs 5778.
Jurisdiction of (Nev. Const. art. vi, sec. 8) 323.
Jurisdiction of in action to foreclose lien 2227.
Jurisdiction of in cases of forcible entry and detainer 5721.
Jurisdiction in possessory actions on public lands 5855.
Legislature may prescribe method of appeal from (Nev. Const. art. vi, sec. 8) 323.
Limitation of service of summons in civil action 5731.
May allow amendment of complaint or answer 5741.
May be compelled by district court to transmit papers on appeal 5791.
May dismiss action without prejudice in certain cases 5772.
May enter judgment by confession in civil action 5771.
May issue alias summons, time for appearance 5729, 5730.
May issue subpenas and final process to any part of county 5808.
May order execution in officer's own name for unpaid fees 2027.
May require deposit or undertaking as security for costs before issuing summons 5812.
May set aside judgment taken by mistake, inadvertence or excusable neglect 5742.
Mileage of constable computed for actual distance traveled 2040.
No adjournment to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
Justice's court—continued.
Not to hear evidence regarding title of real property or legality of tax, impost, assessment, toll or municipal fine 5721.
Notice of hearing after service of summons or appearance 5733.
Notice of time of trial on change of place of in civil action 5719.
Offer to allow judgment not admissible in evidence, when further costs not recoverable 5777.
Parties entitled to one hour in which to appear after time fixed in notice 5733.
Parties may appear in person or by attorney 5725.
Per diem of jurors 2013.
Place of trial may be changed or another justice called in certain cases 5716, 5718.
Place of trial of civil actions 5715.
Place of trial, schedule of sections 5715.
Pleadings and form of, entry of substance of oral in docket 5734, 5735.
Postponement of trial by consent in civil action 5758.
Proceedings after order changing place of trial 5719.
Proceedings for contempt, immediate view and presence 5796.
Proceedings for contempt not in immediate view and presence 5797.
Proceedings on demurrer to complaint or answer 5741.
Provisions regarding witness fees 2000.
Provisions relating to supplementary proceedings in district court applicable 5787.
Publication of process or paper, officer to be paid cost in advance 2026.
Summoning and challenging of jurors in civil action 5768.
Summons in civil action, how issued, directed and what to contain 5727.
Summons, by whom and how served and returned 5732.
Summons, how served by publication 5732.
Summons to be served out of town to have certificate of county clerk under seal attached, how returned 5732.
Time to be specified in summons for appearance of defendant 5728.
To enter judgment at close of trial if no jury 5774.
To enter judgment at once in conformity to verdict 5773.
To fix time for trial of civil action 5733.
To indorse date of filing of complaint in civil action 5723.
To make order for summoning of jurors in civil action 5768.
To try issue of law 5764.
To which civil action is transferred has same jurisdiction 5719.
Transfer of cases to district court 5721.
Trial in civil action to proceed on failure of either party to appear 5767.
Voluntary appearance and pleadings of parties without summons 5715.
Waiver of objection that action is in wrong township 5772.

Justice's court—continued.
What acts punishable as contempts 5795.
What papers to be transmitted to district court on appeal 5791.
What provisions of civil practice act applicable 5815.
What punishment may be imposed for contempts 5798.
What statement on appeal on questions of law alone must contain amendments and settlement 5789.
When admission in civil action that evidence would be given avoids postponement 5759.
When and where held, always open, jurisdiction in civil cases 5714.
When defendant subject to arrest in civil action on execution 5759.
When may make order for inspection of written instrument and delivery of copy 5769.
When may of its own motion postpone trial in civil action 5757.
When place of tria. cannot be changed more than once on motion of same party 5717.
When plaintiff may demur to answer 5740.
When postponement discharges defendant from arrest in civil action 5759.
When to certify pleadings, transfer of case to district court for trial 5721.
When to order defeudant discharged on giving undertakings on application for postponement in civil action 5759.
When trial must be commenced and how continued 5756.
Writ of attachment, certain sections made applicable 5752.
Writ of attachment, 1or service in another county to have certificate of county clerk 5751.
Justice of the peace, court fee to be paid on appeal from 2031.
Disability of, may call other to act 4926. 5811.
Disobedience of writ is contempt 5394, 5395.
Disqualification to act, grounds of 4865.
Duties in relation to estray animals 2274-2282.
Election contest for member of the legislature, to issue subpena for taking depositions, may attach and fine witness, certification of testimony to county clerk 1819.
Fees in counties polling over 800 votes 2015.
Fees of in proceedings relating to apprentices 494.
Fees when not over 800 votes in county 2003.
Has jurisdiction, concurrent with district judge, in action for possession where relation of landlord and tenant exists or possession unlawfully withheld 5604.
Has jurisdiction in action on woodchoppers lien 2230.
Justices of the peace—continued.
Has jurisdiction of violation of city ordinances 886.
If material witness, place of trial of action in justice's court may be changed or another justice called 5716.
If two or more equally entitled district judge to certify who is successor 5807.
If vacancy by death or removal docket and papers to be delivered to other justice or county clerk 5804.
Jurisdiction of action by county against person for support of poor kindred 2916, 2917.
Jurisdiction of action for delinquent taxes for improvement of streets in unincorporated town 934.
Legislature to determine number and powers of, limitation of jurisdiction (Nev. Const. art. vi, sec. 8) 323.
Legislature to prescribe method of appeal from justice's court (Nev. Const. art. vi, sec. 8) 323.
Local or special laws relating to jurisdiction and duties invalid (Nev. Const. art. iv, sec. 20) 278.
May administer oath or affirmation 5483.
May certify to transcript of docket 5801.
May indorse order of arrest on summons in civil action 5744.
May issue alias process for restoration of possession of land after conviction of contempt for reentry 5394, 5395.
May issue citation for discovery of personal property on which taxes delinquent 3679.
May issue execution or other process on docket of predecessor 5805.
May take affidavit to be used in this state 5450.
May take and certify to affidavit for examination of books of assayer, mill or purchaser of ore, gold dust or bullion 2484.
May take deposition on postponement of civil action 5759.
Must deliver to successor docket and papers 5803.
Must fill blanks in all papers before issuance, except subpenas 5809.
Or judge of police court, jurisdiction in action against party failing to fence dangerous excavation 3235, 3237.
Out of state may take deposition 5459.
Proceedings before to set aside covenants of apprenticeship 493.
Recovery before of penalty for failure of officer to post table of fees 2025.
Successor of predecessor notwithstanding change of county boundary 5805.
To act in proceedings for erection of partition fences 3605, 3606.
To act in regard to breach of contract of apprenticeship 490-492.
To order proper credit on judgment on release of joint debtor 5848.
To receive all moneys collected by sheriff or constable and pay same to parties entitled 5810.
To summon master and jurors in action for abuse of apprentices 490, 491.

Justices of the peace—continued.
To take depositions on contest for members of the legislature 1818, 1819.
To transmit to clerk of district court money deposited in lieu of undertaking on appeal 5792.
When defendant arrested in civil action to be taken before, when before another justice 5746.
When may make order for inspection of mine by stockholder, registration, oath, fee 2492, 2495.
When may order child transferred to district court under juvenile court law 741.
When one may act for another, also as registry agent 4926.
When to issue writ of attachment in civil action 5749, 5750.
When to pay to county treasurer surplus money in action on lien for charges on animals 5500.
When to order arrest of defendant in civil action 5744.
Without jurisdiction if demand exceeds $300 exclusive of interest (Nev. Const. art. vi, sec. 8) 323.
Without jurisdiction if title to real estate, mining claim or boundaries to land involved or if case conflicts with jurisdiction of court of record (Nev. Const. art. vi, sec. 8) 323.
Who successor of 5806, 5807.
Justification of sureties on undertaking on appeal from justice's court 5792.
Justification of sureties to undertaking for attachment in justice's court 5750.
Landlord and tenant, action for possession, justice's court has jurisdiction 5714.
Landlord and tenant, where relation exists legislature may confer power on justice's courts in actions for possession or where possession has been unlawfully obtained or withheld (Nev. Const. art. vi, sec. 8) 323.
Lands and tenements, action for possession of where relation of landlord and tenant exists, justice's court has jurisdiction 5714.
Lands and tenements, legislature may confer power on justice's court in action for possession of where relation of landlord and tenant exists, or where possession has been unlawfully obtained or withheld (Nev. Const. art. vi, sec. 8) 323.
Land and tenements, unlawfully obtained or withheld, justice's court has jurisdiction 5714.
Law, issue of, how tried in justice's court 5764.
Law, issue of in justice's court defined 5761, 5763.
Law, raises issue of fact on allegation of new matter in answer in justice's court without reply 5763.
Legislature may confer on justice's court jurisdiction concurrent with district court in certain actions relating to mechanic's liens and for possession of lands and tenements where relation of landlord and tenant exists or possession unlawfully obtained or withheld (Nev. Const. art. vi, sec. 8) 323.
Justices of the peace—continued.
Legislature may prescribe regarding appeals from justice's court (Nev. Const. art. vi, sec. 8) 323.
Members of exempt from arrest under civil process during session and for fifteen days before (Nev. Const. art. iv, sec. 11) 269.
To determine number and powers of justices of the peace (Nev. Const. art. vi, sec. 8) 323.
Libel, if true and made with good motive jury may exonerate (Nev. Const. art. i, sec. 9) 238.
Lien, abstract of judgment in justice's court filed in recorder's office creates lien on lands 5782.
Lien, mechanic's, action for enforcement where amount does not exceed $300 exclusive of interest, justice's court does not have jurisdiction 5714.
Lien, mechanic's, legislature may confer power on justice's court to enforce in certain cases (Nev. Const. art vi, sec. 8) 323.
Lien on personal property, action to enforce in justice's court, limitation of service of summons 5731.
Mechanic's lien, action for enforcement where amount does not exceed $300 exclusive of interest, justice's court does not have jurisdiction 5714.
Mechanic's lien, legislature may confer power on justice's court to enforce in certain cases (Nev. Const. art. vi, sec. 8) 323.
Mining claim, action involving title, jurisdiction does not lie in justice's court 5714.
Mining claims, trial of title to, not within jurisdiction of justice's court (Nev. Const. art. vi, sec. 8) 323.
Money, collected by sheriff or constable, when to be paid to justice of the peace and by him to parties entitled 5810.
Money, entry of judgment upon by default in justice's court 5754.
Motion for change of place of trial in justice's court 5716.
Motion to change place of trial in justice's court, when cannot be more than once by same party 5717.
Motion, when justice's court may of its own postpone trial 5757.
Motions, minutes of to be entered in justice's court docket 5800.
Municipal fine, if legality of involved in justice's court, case to be transferred to district court for trial 5721.
New matter, in answer raises issue of fact in justice's court 5763.
New trial, when district court may order on appeal from justice's court 5794.
Note, copy of as complaint in justice's court 5736.
Note, promissory, or other instrument, when admitted in justice's court unless denied by verified answer 5770.
Notice of appeal, from judgment in justice's court, what must contain 5788.
Notice of appeal, receipt of, entry in justice's court docket 5800.

Justices of the peace—continued.
Notice of hearing in justice's court after service of summons or appearance 5733.
Notice of hearing in justice's court, parties entitled to one hour in which to appear after time fixed in 5733.
Notice of time and place of trial to be issued by justice's court on transfer of civil action, service 5719.
Notice on exception to or justification of sureties on undertaking on appeal in justice's court 5792.
Oath, answer under must specifically deny or written instrument will be admitted in justice's court 5770.
Oath, necessity for adjournment to be shown under on amendment of pleadings in justice's court 5742.
Oath or verified answer showing grounds for transfer of case from justice's court to district court 5721.
Objections made in justice's court, either party may have benefit of on appeal 5791.
Offer, to allow judgment in justice's court not admissible in evidence when further costs not recoverable 5777.
Oral, what pleadings may be in civil action in justice's court 5734.
Order, by district court for transmission of papers by justice's court on appeal, service, fine 5791.
Disobedience of punishable as contempt in justice's court 5795.
For inspection and furnishing copy of written instrument in justice's court 5759.
Of arrest, if indorsed on summons in justice's court to be returnable forthwith 5728.
Of arrest, in civil action to be entered in justice's docket 5800.
Of arrest of defendant in certain civil actions in justice's court 5744.
Of arrest of defendant in civil action in justice's court, affidavit and undertaking 5745.
Of court for payment of money transmitted in lieu of undertaking on appeal from justice's court 5792.
Of justice's court adjudging person guilty of contempt 5796.
Of justice's court for summoning jurors in civil action 5768.
Papers, all blanks must be filled in by justice of the peace before issuance except subpenas 5809.
District court may compel transmission of by justice's court on appeal, service of order, fine 5791.
Transmission of on change of place of trial of civil action in justice's court 5719.
What to be transmitted by justice's court on appeal to district court 5791.
Parties, infant or insane, how guardian ad litem appointed in civil action in justice's court 5726.
May agree to postponement of civil action in justice's court 5758.
May appear in person or by attorney in justice's court 5725.
Justices of the peace—continued.
Parties may waive trial by jury in civil action in justice's court 5766.
Names of to be kept in alphabetical index to docket in justice's court 5802.
To action in justice's court, entitled to one hour in which to appear after time fixed in notice 5733.
Peace, breach of, when punishable as contempt in justice's court 5795.
Penalty, justice's court has jurisdiction if amount does not exceed $300, exception 5714.
Person, over 20 years of age and not party may serve summons in civil action in justice's court 5732.
Personal property, action for claim and delivery in justice's court 5124, 5135, 5753.
Personal property, action to recover, justice's court has jurisdiction if value does not exceed $300 5714.
Personal property, township in which action for to be brought in justice's court 5715.
Plaintiff, notice to be given to of arrest of defendant in civil action in justice's court 5747.
Pleading, defendant may file in justice's court and waive summons 5724.
In justice's court, issues of law and fact defined 5761, 5763.
In justice's court, what are and form of 5734, 5735.
Minute of to be entered in justice court docket 5800.
When postponement of trial allowed for amendment of in action in justice's court 5757.
When to be certified by justice's court on transfer of case to district court for trial 5721.
Without summons in justice's court 5715.
Possession of lands or tenements, legislature may confer power on justice's court in action for where relation of landlord and tenant exists or where possession has been unlawfully obtained or withheld (Nev. Const. art. vi. sec. 8) 323.
Possession, where relation of landlord and tenant exists or if unlawfully retained or withheld, justice's court has jurisdiction 5714.
Postponement, defendant under arrest in civil action in justice's court must give undertaking before applying for 5759.
In civil action in justice's court, consent to taking testimony of witness 5759.
In justice's court, not to be for more than ten days unless upon undertaking conditioned for payment of judgment 5760.
Of civil action in justice's court, affidavit of evidence expected to be obtained 5759.
Of civil action in justice's court, avoided by admission that evidence would be given 5759.
Of trial, by consent in civil action in justice's court 5758.

Justices of the peace—continued.
Postponement of trial, in civil action on court's own motion 5757.
Of trial, upon application of party in civil action in justice's court, grounds, procedure 5759.
When justice's court must order defendant discharged from arrest in civil action on giving undertaking 5759.
Proceedings, supplementary to execution, provisions relating to district court are applicable to justice's court 5787.
Process, civil, members of legislature exempt from arrest under during session and for fifteen days before (Nev. Const. art. iv, sec. 11) 269.
Justice of the peace may issue upon docket of predecessor 5805.
May be issued by justice of the peace to any part of county 5808.
Promissory note, or other instrument, when admitted in justice's court unless denied by verified answer 5770.
Provisional remedies in justice's courts 5744.
Public records, docket and papers must be delivered by justice of the peace to successor 5803.
Publication of summons in action in justice's court 5732.
Real property, action for possession where relation of landlord and tenant exists, justice's court has jurisdiction 5714.
Action involving title, jurisdiction does not lie in justice's court 5714.
Title of if involved in justice's court case to be transferred to district court for trial 5721.
Trial of title to, not within jurisdiction of justice's court (Nev. Const. art. vi, sec. 8) 323.
Relief, demand for to be contained in summons in justice's court 5727.
Religious belief, witness shall not be rendered incompetent on account of (Nev. Const. art. i, sec. 4) 233.
Renewal of execution, in justice's court 5785.
Reply not required in justice's court, law raises issue of fact upon new matter in answer 5763.
Return, on arrest of defendant in civil action in justice's court 5747.
Return on summons in justice's court served in another county 5732.
Seal and certificate of county clerk to be attached to summons to be served out of town in civil action in justice's court 5732.
Seal and certificate of county clerk, to writ of attachment in justice's court for service in another county 5751.
Search and seizure, not to take place except on probable cause supported by oath and particulars (Nev. Const. art. i, sec. 18) 247.
Service, of notice of hearing in justice's court after service of summons or appearance 5755.
Of notice of time and place of trial on transfer of civil action in justice's court 5719.
Justices of the peace—continued.
Service of summons by publication in justice's court 5732.
Of summons in action in justice's court, limitation on 5731.
Of summons in civil action in justice's court, if out of town certificate and seal of county to be attached 5732.
Of summons in justice's court, by whom and how made 5732.
Of summons, proof of before judgment by default in justice's court 5754.
Sheriff, duties of on receiving execution from justice's court 5786.
May serve summons in action in justice's court 5732.
Several writs of attachment in justice's court may be issued to different 5751.
To detain defendant arrested in civil action in justice's court until discharged by justice 5748.
To give notice and make return on arrest of defendant in civil action in justice's court 5747.
To pay moneys collected on execution of process to justice of the peace 5810.
When may arrest defendant in civil action in justice's court 5744.
When to relinquish property on stay of execution on appeal from justice's court 5793.
When to take defendant arrested in civil action in justice's court before another justice 5746.
"Sheriff," when word "constable" is to be substituted for in certain sections relating to attachment 5752.
Sickness of justice of the peace, another may attend on his behalf 5811.
Signature of makers of note or instrument admitted in justice's court unless denied by verified answer 5770.
Statement on appeal on questions of fact or both law and fact from justice's court, judgment not required 5790.
Statement on appeal on questions of law alone from judgment in justice's court, what must contain, amendments and settlement 5789.
Stay of execution, by undertaking or deposit on appeal from justice's court 5792
Stay of execution in justice's court 5783.
Stay of execution, when to be ordered by justice's court pending appeal, when officer to relinquish property 5793.
Subpena, disobedience of punishable as contempt in justice's court 5795.
Subpena may be issued by justice's court to any part of county 5808.
Successor of justice of the peace, who is 5806, 5807.
Summons, all blanks must be filled in by justice of the peace before issuance 5809.
Before issuing justice's court may require deposit or undertaking as security for costs 5812.
Date and return to be entered in justice's court docket 5800.
Defendant may waive in justice's court 5724.

Justices of the peace, summons—continued.
In action in justice's court, how served by publication 5732.
In civil action in justice's court, alias summons may issue, time for appearance 5729, 5730.
In civil action in justice's court, how issued, directed and what to contain 5727.
In civil action in justice's court, limitation on service 5731.
In civil action in justice's court to specify time for appearance of defendant, indorsement 5728.
In justice's court, by whom and how served and returned 5732.
In justice's court, if out of town certificate and seal of county clerk to be attached 5732.
In justice's court, name of plaintiff's attorney to be indorsed on 5727.
Issuance of in justice's court 5722, 5723.
May issue within a year after filing of complaint in justice's court 5723.
Proof of service of before judgment by default in justice's court 5754.
When order of arrest may be indorsed on in civil action in justice's court 5744.
Supplementary proceedings to execution, relating to district court are applicable to justice's court 5787.
Sureties, on undertaking for attachment in justice's court, exception to, justification, waiver 5750.
On undertaking for payment of judgment when adjournment for more than ten days in justice's court 5760.
On undertaking on appeal from justice's court 5792.
Tax, if legality of involved in justice's court, case to be transferred to district court for trial 5721.
Taxes, action for collection of, justice's court has jurisdiction where amount does not exceed $300 5714.
Testimony, consent to taking in civil action in justice's court on postponement 5759.
May be taken by deposition before justice of the peace on postponement of civil action 5759.
Time required for obtaining ground for postponement of civil action in justice's court 5759.
Time, when trial must be commenced in justice's court 5756.
Title, of action to be entered in justice's court docket 5800.
Of summons in civil action in justice's court 5727.
To real property, if involved in justice's court, case to be transferred to district court for trial 5721.
To real property or mining claims, action involving, jurisdiction does not lie in justice's court 5714.
To real property or mining claims or questions of boundaries not to be tried in justice's court (Nev. Const. art. vi, sec. 8) 323.
Justices of the peace—continued.
Toll, if legality of involved in justice's court, case to be transferred to district court for trial 5721.
Township, in which action to be brought in justice's court 5715.
Transcript of docket to be certified on change of place of trial in justice's court 5719.
Transcript of oral pleadings to be certified by justice's court on transfer of civil action to district court for trial 5721.
Trial, by jury, demand for, entry to be made in justice's court docket 5800.
By jury, in civil action in justice's court, how waived 5766.
By jury, secured but may be waived in civil cases (Nev. Const. art. i, sec. 3) 232.
De novo in justice's court when appeal from justice's court on questions of fact or both law and fact 5790.
In civil cases three-fourths of jury may render verdict, but legislature by two-thirds vote may require unanimous (Nev. Const. art. i, sec. 3) 232.
In district court on appeal, either party may have benefit of objections made in justice's court 5791.
In justice's court in civil action, when may be postponed of court's own motion 5757.
In justice's court, judgment to be entered at close of if no jury 5774.
In justice's court, may proceed if either party fails to appear 5767.
New, when district court may order on appeal from justice's court 5794.
Notice of time of, to be issued by justice's court on transfer of place of trial in civil action 5719.
Of civil action in justice's court, change of place of 5716.
Of civil action in justice's court, time for to be fixed by justice 5733.
Of issue of fact in justice's court, by jury unless waived 5765.
On appeal from justice's court, powers of district court, dismissal, damages, costs, judgment 5794.
Postponement of by consent in civil action in justice's court 5758.
Postponement of on application of party in civil action in justice's court, grounds, procedure 5759.
Proceedings after order changing place of in civil action in justice's court 5719.
Provisions relating to change of place of, applicable to cases appealed to district court 5794.
When must be commenced and how continued in civil action in justice's court 5756.
Undertaking, action upon, justice's court has jurisdiction if amount does not exceed $300 5714.
For arrest of defendant in civil action in justice's court 5745.

Justices of the peace—continued.
Undertaking for payment of judgment when adjournment for more than ten days in justice's court 5760.
For release of attachment in justice's court 5751.
In justice's court, deposit may be made in lieu of in all cases 5816.
On appeal from justice's court, requirements with or without stay, deposit, justification of sureties 5792.
On appeal, entry of in justice's court docket 5800.
On attachment in justice's court, exception to sureties, justification, waiver 5750.
Unlawful entry and detainer, evidence regarding may be given in justice's court 5721.
Vacancy in office of justice does not affect action 4884.
Venire, alias for jurors in civil action in justice's court 5768.
Venue, action brought in wrong in justice's court, when may be dismissed 5772.
In action in justice's court may be changed 5716, 5718.
Of action in justice's court, when cannot be changed more than once on motion of same party 5717.
Of civil actions in justice's courts 5715.
Overruling of objection that action in justice's court is in wrong, cause of reversal on appeal only 5772.
Provisions relating to change of applicable to trials on appeal in district court 5794.
Verdict, in justice's court, judgment to be entered at once in conformity to 5773.
Or disagreement of jury to be entered in justice's court docket 5800.
Verified answer or oath showing grounds for transfer of case from justice's court to district court 5721.
Verified denial in answer required in justice's court or written instrument will be admitted 5770.
Waiver, of objection that action in justice's court is in wrong township 5772.
Of objection to sureties to undertaking for attachment in justice's court 5750.
Of trial by jury in justice's court 5766.
Warrant, for arrest of person charged with contempt by justice's court 5797.
For search and seizure shall not issue but on probable cause supported by oath and particulars (Nev. Const. art. i, sec. 18) 247.
Witness, consent to taking of testimony in civil action in justice's court on postponement 5759.
Deposition taken on postponement of civil action in justice's court may be read 5759.
Fees 2000, 2012.
If justice of the peace material, when defendant arrested in civil action to be taken before another justice 5746.
Refusing to be sworn or answer, punishable for contempt in justice's court 5795.
Justices of the peace—continued.
Witness not to be rendered incompetent on account of religious belief (Nev. Const. art. i, sec. 4) 233.
Sworn, name of to be entered in justice's court docket 5800.
Testimony of may be taken before justice of the peace for postponement of civil action 5759.
Writ of attachment, in civil action in justice's court, substance of, several may be issued to different counties 5751.
In justice's court, certain sections made applicable 5752.
In justice's court, for service in another county, to have certificate under seal of county clerk 5751.
Issuance of to be noted in justice's court docket 5800.
Written instruments, when admitted in justice's court unless denied by verified answer 5770.
When inspection may be ordered in justice's court 5769.
Justice's court and justice of the peace (Criminal Practice), absence or illness of justice, other called 4926.
Action not affected by vacancy 4884.
Accused may appear and defend in person and with counsel 237.
Appeal to district court, final 321, 4840, 4848.
Apprentices, hearings concerning 490-496.
Bail, excessive, not to be required 235.
Right of (Nev. Const.) 236.
Bonds of surety company, may accept 695-701.
Children under 18, charged with crime, transfer to district court 741.
Children under 12 not to be committed to jail 742.
Concurrent jurisdiction 323, 5714.
Contempt to resist process 2833, 2834.
Contributory dependency and delinquency, duties under act 741, 742.
Court of justice 316, 4829.
Courts of record, not to conflict with 323.
Counsel, right to appear by 237.
Criminal jurisdiction 323, 4851, 7440.
Criminal powers on nonjudicial day 4870.
Criminal proceedings against minors 741.
Debt, imprisonment for, forbidden 243.
Disability of justice, other may call to act 4926, 5811.
Disqualification to act, grounds of 4865.
English language used 4885.
Excessive bail or fine not to be exacted 235.
Federal jurisdiction over certain property in state 1949-1952.
Final appeals from 4840.
Fines, excessive not to be imposed 235.
Fire, inquest to determine cause 7532-7539.
Imprisonment for debt prohibited 243.
Incendiarism, inquest to determine cause of fire 7532-7539. See Incendiarism.
Jeopardy, twice in, forbidden 237, 7113.
Judicial power, vested in what courts 316.
Jurisdiction, criminal 323, 4851, 7440.
Jury, may be waived 232.
Jury trial guaranteed 232.
Justice, not to have partner in practice 4867.
Sick, may call other to act 4926, 5811.

Justices of the peace—continued.
Minors, criminal proceedings against 741.
Misdemeanors, jurisdiction of 4851.
Nonjudicial days, certain business may be transacted on 4870.
Orders, power to enforce 4864.
Other justice, may call to act, when 4926, 5811.
Partition fences, proceedings to settle controversies over 3604-3608.
Partner, in practice, justice not to have 4867.
Proceedings public 4862.
Process, power to enforce 2833-2835, 4864.
Process, style of 328.
Prosecutions conducted in name of state 328.
Punishments, cruel or unusual forbidden 235.
Search warrant, constitutional regulations 247.
Search warrant, issue only on probable cause 247.
Sickness of justice, other may call to act 4926, 5811.
State, prosecutions conducted in name of 328.
Style of process 328.
Surety company bond, may accept 695-701.
Town ordinances, violations of, trial 886.
Townships to have 323.
Trial by jury guaranteed 232.
Trials for misdemeanor 7470, et seq.
Unlawful assembly to disperse 2836-2838.
Witness against self, not compelled in criminal case 237.
Witnesses, not to be unreasonably detained 235.
Justice's court and justice of the peace (Preliminary Examination), adjournment 6973, 6974.
After demurrer sustained 7101.
After discharge from indictment 7092.
Bail, minimum for felony 6989.
Bail on 7313, 7316.
Closed doors, when 6985.
Commitment of defendant, form of 6987-6992.
How executed 6991.
Counsel, right to have 6970-6972.
Defendant, informed of right to make statement 6978.
May become witness 6983.
Statement of, form and authentication 6983.
Statement, waiver of, cannot use against 6979, 6983.
Discharge, form of order 6986.
Magistrate, inform defendant of rights 6970, 6978.
Return of proceedings 6998.
Of corporation 7406, 7407.
Statement of defendant 6978-6982.
Stenographer, may be employed, compensation 6977.
Testimony, filed with clerk of district court 6977.
Used on trial or habeas corpus 6977.
Who may attend 6985.
Witnesses, examination of 6977.
Exclusion during examination of defendant or security for appearance 6993-6997.
Justices of the peace—continued.
Witnesses, subpena for 6976.
Without surety, conditionally examined 6997.
Justice's court and justice of the peace (Prosecutions for Misdemeanor), acquittal, malicious prosecution, costs 7501, 7502.
Action, how commenced 7471.
Affidavits, entitlement 7522.
Arrest of judgment, grounds 7494, 7496.
Appeal to district court, bail, pending 7515.
Complaint, dismissal on, grounds 7517.
Dismissal, grounds 7516.
Judgment and execution 7518.
Justice to transmit record 7514.
Notice of 7513.
Plea, anew 7518.
Record on 7514.
Right of 7286.
Stay of proceedings 7513.
Trial, anew 7516.
Trial, procedure 7518.
When to be taken 7512.
Witnesses, bond of or testimony 7515.
Bail, generally 7308-7347, 7520.
Bail, pending postponement of judgment 7498.
Bail or deposit, forfeiture 7510.
Complaint, form and sufficiency 7471, 7472.
Complaint read to defendant 7475.
Constable, when may be deputed 7524.
Contempt 7519, 7521.
Costs, judgment for 7499.
Costs, malicious prosecution 7501, 7502.
Costs not to be deducted from fines 3760, 7463.
Court to decide law 327, 7487.
Defendant discharged, when 7481, 7505.
Defendant, failing to appear for judgment 7511.
Presence of 7482.
Demurrer, grounds of 7480.
Sustained, new complaint 7481.
Docket 7474.
Evidence in public 7486.
Entitling affidavits 7522.
Execution of judgment, duty of officer 7507.
Fees, recovered as costs 7465.
Fine, costs not to be deducted from 3760.
How enforced 7503.
Imprisonment in lieu of 7500.
Paid to city treasurer, when 7508, 7509.
Forfeiture of bail on deposit 7510.
Grounds for arrest of judgment 7496.
Grounds for new trial 7495.
Gravity of offense, examination to determine 7477.
Higher offense, examination for 7477.
Imprisonment, how executed 7507.
Judgment, acquittal or fine, only defendant discharged 7505.
Fine, how enforced 7503.
Imprisonment in lieu of 7500.
Imprisonment, how executed 7507.
Imprisonment, until fine paid 7506.
Or imprisonment, costs 7499.
Pronounced, when 7497, 7498.
Several defendants 7491.
When entered 7511.
Jurisdiction 323, 4851, 7470.
Jury trial 7483-7493. See Trial, post.

Justices of the peace—continued.
Malicious prosecution, costs 7501, 7502.
Motion for new trial or arrest of judgment 7498.
Name of defendant 7475.
New trial, grounds 7494, 7495.
Officers executing judgment, duty 7507.
Plea, how entered 7477.
Plea, kinds of 7475, 7476.
Preliminary examination 6970-6998.
Questions of law and fact, how decided 7487.
Retrial, jury discharged 7493.
Subpena, form 7519.
Trial, defendant discharged, when 7505.
Form of verdict 7490.
Jury, challenge, trial of 7486.
Deliberation of 7488.
Discharged, retrial 7493.
Formation 7124.
Number, how summoned 7122, 7483.
Oath of 7485.
Oath of officer in charge 7488.
To decide fact 7487.
To sit together 7486.
Verdict, entry 7489.
Waiver of 7122.
When discharged 7492.
Oath of officer in charge of jury 7488.
Postponement for cause 7479.
Presence of defendant 7482.
Retrial, jury discharged 7493.
Several defendants, verdict, judgment 7491.
Verdict, entry of 7489, 7504.
Form of 7490.
Several defendants 7491.
When to begin 7478.
Waiver of jury 7122.
Warrant of arrest, failure to appear for judgment 7511.
Warrant of arrest, form 7473.
Witnesses 7519.
Witnesses, competency 7523.
Justice of the peace as ex officio coroner, action against for official misconduct may be commenced within two years 4967.
Burial, expense, how paid 7557.
Permit to issue 6549, 6550.
Dead body, duty in relation to 6814.
Deputy, appointment of 7543.
Responsible for on bond 7543.
District 8542.
Entitled to only one mileage for serving more than one process in same action requiring only one journey 2037.
Fees 1998, 2010.
Payable by county 7556, 7558.
Sheriff acting as 7558.
When acting as sheriff 2010.
Inquest, contempt, failure to obey subpena 7548.
Juror, failure to attend, penalty 7545.
Jurors, number 7544.
Juror, oath of 7546.
Physician or surgeon, may summon 7547.
Testimony reduced to writing, filing 7550.
Verdict, contents 7549.
Warrant of arrest for accused, service and return 7551, 7552.
Witnesses, subpena for 7547.
Jurisdiction, adjoining township 7559.
Justices of the peace, as coroner—continued.
Jurors, pay of 7560.
Justice of peace, ex officio 7543.
Mileage 2037.
Property found with deceased, disposition 7553.
Of deceased, affidavit of coroner concerning 7556.
Of deceased, proceeds paid to representatives 7555.
To deliver to treasurer, when 7553.
Sale of deceased's property, when 7554.
Sheriff acting as, fees 7558.
Coroner to succeed, when 2882.
Township, coroner's district 7542, 7559.
Without, nearest may act 7559.
Treasurer, custodian of property, sale of 7553, 7554.
When to return and stay execution pending appeal in district court, D. C. rule xxii, p. 1429.
Justice of the peace as ex officio registry agent 1705-1735. See Registration and Registry Agent under Elections.
Justice of the peace, miscellaneous provisions.
Absence or sickness, other may act 4926.
Acknowledgment may take 4883.
Action, buying or inducing, penalty 2821, 6367.
Affidavits may take 4883.
Apprentices, hearing concerning 490-496.
Bond, approval and filing 2786, 4852, 4927, 4928.
Boundaries of township changed, effect 2784.
Bounties, noxious animals, duties as to 719, 721, 725, 726.
Buying or inducing action, penalty 2821, 6367.
Cities and townships to have (Nev. Const.) 323.
Commissioners to approve bond 4927, 4928.
Commissioners to determine townships 2782.
Commissioners to fill vacancy 4852.
Conservators of the peace 1689.
Court held, where 4871.
Deputy, registry agent may appoint 1705.
Disability of, other may call to act 4926, 5811.
Duel, failure to prevent 2823.
Duties, and responsibilities, legislature to fix 323.
Election of 2765, 2773, 2782, 4852.
Estrays, duties and liabilities concerning, fees to receive 2277-2282.
Executive or legislative functions forbidden 258.
Fees 2003, 2015.
Fees and perquisites, may receive (Nev. Const.) 325, 203, 2015.
Fees, in estray cases 2882.
Monthly statement of, to make 2021.
Noxious animals 721, 726.
On appeal from 2031.
Fence viewers, to appoint, when 3605.
Fines, to pay to county treasurer 7508.
Foreigners, rights of 245.
Incendiarism, inquest to determine 7532-7539. See Incendiarism.
Judgments, power to enforce 4864.
Purchase of, penalty 2821.

Justices of the peace—continued.
Judicial days 4869.
Legislature to determine number and jurisdiction 323.
May act for police judge 836.
May act one for another 4926.
May depute constable, when 7524.
Mine, stockholder, may give order for admission to 2495.
New township created, effect 2783, 2784.
Noxious animals, duties as to bounties 719, 721, 724, 726.
Number of in county 2782.
Oath and bond 2786, 4927.
Other justice may call to act 4926, 5811.
Place of holding may be changed, when 4873, 4874.
Power to enforce order, judgments, and process 4864.
Purchasing judgment, penalty 2821.
Registry agent, deputy may appoint 1705. Duties 1705-1735. See Elections.
Riotous assembly to order to disperse 2836-2838.
Sickness of, other may call to act 4926, 5811.
Term of office 2782, 2783, 4852.
Time limit, other justice to act 4926.
Town government act, jurisdiction 886.
Township, boundaries changed, effect 2784.
Townships, to have 323.
Unlawful assembly, to disperse 2836-2838.
Vacancy, how filled 4852.
Where held 4871.
Justices of supreme court. See Constitution of Nevada, Supreme Court, Civil Practice.
Justifiable homicide, what constitutes 6394-6402.
Justification of bail and sureties. See Civil Practice.

JUVENILE COURT

Act construed 750, 764.
Adoption of children 746.
Agents of reformatories, duties and compensations 743.
Answer to summons 732.
Appeal to supreme court 753.
Bond to secure support of dependent child 759, 760.
CHILD—
Custody of 732.
How represented 732.
May be sent to hospital 738.
CHILDREN—
Adoption of 746.
Not to be confined with adult convicts 742.
Taken from custody of parent or guardian 734.
Clerk, duties of 733.
Contempt of court, order 732.
Contempt to interfere with orders of court 754.
Contracts made with other states 756.
Contributory delinquency, suspension of sentence 758-762.
Contributory dependency, suspension of sentence 758-762.
Construction of act 750, 764.
Corporations for care of delinquent children forbidden 744.
Criminal proceedings before magistrates 741.
Dependent child defined 728.
DETENTION HOME 734—
Superintendent or matron of 742.
To be provided 742.
Delinquent children not regarded as criminals 750.
Delinquent children, proceedings against 737.
Expense of maintenance and education, state charge 745.
Fees, when not to be charged or collected 749
Felony, indictment for, suspension of 737.
Foreign corporations, conditions bringing children into state 747.
Guardian or parent, duty to support 751.
GUARDIANS—
Powers over and duties of 734, 735, 739, 740, 752.
Qualification of 739.
Removal of 740.
To have custody only 752.
To report to judge 740.
Hearing, continuation of 732.
Indictment, felony for, suspension of 737.
Institutions for care of children 734, 735.
Jury trial 729.
Jurisdiction, district courts 729.
Juvenile department 730.
Neglected child defined 728.
Parent or guardian, duty to support 751.
Petition to, form of 731.
PROBATION COMMITTEE—
Detention home, to manage 734.
Powers and duties 734.
PROBATION OFFICER—
Appointment approved by governor, state and district superintendent of schools 733.
Appointment of, filed with clerk 733.
Assistant 733.
Duties 733.
Oath of office 733.
Powers 733, 763.
Removal of 733.
Salary 733.
Proof of dependency or delinquency 764.
Records, how kept 730.
Reformatories 743.
Reformatories, agents of 743.
Religious beliefs, respected 748.
Representatives of foreign corporations bringing children into state in violation of law, misdemeanor 747.
Summons, form and service 732.
Suspension of sentence 758-762.
Suspended sentence, conditions of 759, 760.
Suspended sentence, violation of conditions 761.
Terms defined 728. *See Civil Practice.*

Juvenile offenders, house of refuge to be maintained by state 366.

K

Kidnaping, consent, when defense 6421.
Defined 6419, 6421.
Jurisdiction of courts 6421, 6915.
Kin, next of, when entitled to damages for death by negligence of common carrier, mill or mine operator 5650.
Kindred, degrees of, how computed 6119. See chart on "Consanguinity," appendix, p. 2113.

Kindred—continued.
Liable for expenses of insane person, same lien on property of 2200.
May have damages for death by wrongful act 5648.
Of insane may be ordered by district judge to pay charges for insane, and order becomes lien upon property of 2200.
Klondyke, game prohibited, penalty 6518.
Knights of Pythias, body corporate, when 1416. See Corporations 338-344, 1105-1440.
"Knowingly," defined 6294(4).

L

Label, on drugs, omitted or made wrong, penalty 6542, 6543.
Labor. See Employer and Employee.
Action on lien for 2222-2228.
Amount of necessary to perform on mining claims annually 2382.
Conditions misrepresented unlawfully 1936.
Eight hours for mine, top men 1941.
Endangering life by refusal 6588.
Organization, agreements to become or not to become member 6792, 6793.
Patented mines considered in assessment (Const.) 352.
Preferred claims for wages 5493-5494, 6145.
Representative, bribing or receiving bribe 6794, 6795.
Laborers, false advertising or deception to change from one place to another 1936.
Have preferred lien for wages 5493, 5494.
Ladders and landings in mines, regulations as to 4216.
Lake County, creation and boundaries 1447, 1484, 1485. See Washoe County.
Land. See Public Lands.
Action for condemnation of, for mines 2459.
Assessed by board of assessors, how and when 3797.
Assessed how 3786.
Conflicting applications for state, certified to district court 3208.
Congress may legislate concerning certain lands (Const.) 127.
Contest before United States land office as to mineral or agricultural character of land 2397.
Deed made under tax sale by treasurer not prima facie evidence of title in purchase when record destroyed 563.
Defined 1088.
Eminent domain may be used for purpose of reclaiming 5606.
Grants by state signed how, state seal affixed 309.
Grants to state 355, 3179-3195.
Grants to state, dedicated to educational purposes 355.
Improvements on, assessed how 3786.
Marks, removal of, punished how 6676.
Mineral in character reserved from sale, when 2376.
Minimum assessment 3838-3840.
Of nonresident citizen, not to be taxed higher than resident 228.
Patents, record of, admissible in evidence 1053-1054, 5415.
Public, improvement required by claimant of possession 5852.
Land—continued.
Sales of state, reported to assessor by surveyor-general 3199.
Unassessed, taxes on, county assessor liable for 3839. See Revenue 3617-3904.
When, may be taken under eminent domain 5606, 5608.
Land office, federal, contest before as to mineral or agricultural character of land 2397.
Land patent, when admitted in evidence 5415.
Lander County, creation, boundaries and seat 390, 1455, 1467-1470.
Landlord and tenant, jurisdiction of actions concerning, legislature's power over 323. See District Court, Justice of the Peace, Civil Practice.
Lands and tenements, legislature may confer jurisdiction on justice's court, when 323. See Civil Practice.
Lansquenet, game of, prohibited, punished, how 6518.
Larceny. See Grand Larceny.
Animal, trial, evidence 7172.
Cattle, brand, prima facie proof of ownership 7172.
Chapter concerning 6638-6652.
Committed by lodger 6646.
Conviction of, excludes from jury unless restored to civil rights 285.
Crime of 7068.
Dog 6647.
From bank 646.
From person of another 6822.
Grand, defined 6638, 6640.
Jurisdiction of, what courts 6917.
Jury service, conviction of, excludes from 285.
Negotiable or other instrument 6645.
Part interest in property, no defense 6652.
Petit, defined 6639.
Property, stolen, how disposed of 6650, 6651, 7428, 7445-7450.
Last will and testament. See Wills 6202-6225, Estates of Deceased Persons 5857-6148.
Law. See Laws.
Due process of, guaranteed 175, 237.
Enacted by legislature, to embrace one subject, expressed in title 275.
Enacted by legislature, local or special, restrictions on 278.
Equal protection of, guaranteed 185.
Ex post facto, forbidden 131-137, 244.
Impairing obligation of contract, forbidden 131-137, 244.
Issue of, defined 5195; how tried 5198.
Judge may declare, to jury 327.
When bill becomes, without action of governor 293.
Law and equity administered in same action 329.
Law books and reports, secretary of state to distribute and sell 2932-2937.
Law day in district court on Saturday of each session, rule v, p. 1426.
Lawful age 6154.
Lawful resistance 6859, 6861. See Civil Practice.
Laws. See Constitution of Nevada, Law, Legislature, Civil Practice.

Laws—continued.
Compilation and annotation of 1005-1016.
Enacted by legislature, how 275, 281, 293.
General and uniform, to be, when 279.
Governor to have, faithfully executed 300.
Local or special, when invalid 278.
Of territory remain in force, when 386.
Subject to be expressed in title 275.
Laws and reports of state, to be distributed 1832, 2934.
Laws and judicial decisions, to be free for publication 376.
Lease. See Conveyances 1017-1104.
Lease, city lots or property, forbidden longer than twenty years 1092.
Lease, of agricultural lands runs for another year if tenant not notified 5589.
Leave of absence, granted state employees, what 4109.
Forbidden as to judicial officers 332.
Granted controller 4154.
Granted county officers, how 1566-1568.
Legacies. See Estate Deceased Persons 5857-6148.
Legal day's work, various vocations. See Eight-hour Law.
Legal disability, effect on statute limitations 4966, 4976.
Legal interest, rate, 7 per cent, when 2499.
Legal ballots. See Elections.
Legal notices posted, malicious removal or injury of 6752.
Legal residence, what 1016. See Residence.
Legal disability, time within which minor may bring action against sureties on bond of guardian 6185.
Legal title to real property, when holder presumed to be in possession 4955.
Legislative acts, authentication of, under acts of Congress 526.
Legislative authority of state, how vested 259.
Legislative department, persons in not to exercise executive or legislative functions 258.
Secretary of state to keep record of official acts 313.
Legislative sessions to be held at seat of government 259.
Legislature. See Constitution of Nevada, Civil Practice.
Allowance for stationery, not to exceed 4393.
Amendment or revision of laws, how 275.
Amendments to constitution to be ratified by 166.
Application to federal government, may make to suppress domestic violence 165.
Appointments, governor to notify of 2811.
Apportionment of school money, to provide for 352.
Arrest on civil process, members exempt from 269.
Assembly, officers and attachés of 4115, 4125.
Organization, roll to control 4112.
Secretary of state to call to order 4113.
To make out roll 4112.
Assembly or senate, adjournment from time to time 273.
Adjournment of, by governor, when 304.
Amend bills, originating in other house 274.
Attachés of 4114, 4115, 4125.
Legislature—continued.
Attendance, may compel 271.
Penalties for failure of, may prescribe 271.
Basis of representation 381.
Bills may originate 274.
Chambers of legislature may be used for public purposes 4416.
Choose own officers 264.
Compensation of members or officers of not to be increased or decreased during term 286.
Constitutional amendments, action on 383, 384.
Constitutional convention, calling of 384.
Contempt of, may punish 265.
County officers, powers concerning 290.
Disorderly conduct, may punish for 265.
Expulsion of members 264.
Journal to keep and publish 272.
Members, judge of qualifications 264.
Officers or attachés of 4114, 4115, 4125.
Penalties for nonattendance, may prescribe 271.
Qualifications, etc., of members, judge of 264.
Representation, basis of 381.
Treason, duty of in regard to 306.
Vetoed bills, action on 293.
Assemblymen, election of 2765, 2773, 2779.
Qualifications 2766.
Term of office 2779.
Assessment, uniform and equal, to prescribe 352.
Attestation of bills 276.
Authority, how vested 259.
Biennial sessions 260, 396.
Bills, action on 276, 293.
And resolutions, state printer to print 4120.
And resolutions, to introduce in triplicate 4121.
Attestation and signing 276.
Palpable errors, state printer to correct 4120.
Printed for enrollment, when 4124.
Reprinted for engrossment, when 4123.
Bills or laws of legislature fraudulently altered, punishable, how 6346, 6347.
Bribery or receiving bribe by legislator, punishable, how 6311, 6312.
Board of regents, to provide for 359.
Bribery, of legislator, penalty for 6318, 6319.
Chaplain, state controller, warrant to draw 4119.
Chaplain, state treasurer, warrant to pay 4119.
Committee of, witness refusing to attend or testify before, penalty 6334.
Controller to furnish information to 4167.
Copying and engrossing, price per folio 4126.
Corporations, laws concerning to be general 338.
County governments, to establish 283, 322.
Counties may be divided into two or more districts 322.
Courts of record, to designate 823.
Disturbing or intimidating, penalty 6333.
Elections by, viva voce vote 254.

Legislature—continued.
Elections, laws to enact, preserving purity of and manner of holding 255.
Special, to fill vacancy 2797, 2798.
Electors, provision to be made for registration and defining qualifications 255.
Enrolled bills, style to be uniform 4124.
Expenses, of members, stationery and supplies 291.
Extra clerks employed, when 4125.
Furnishing board, to report to 4472.
General and uniform laws, provisions concerning 278, 279.
Governor to notify of appointments 2811.
Governor to report to 303, 1588.
Intimidating members 6333.
Judicial officers, laws forbidding leave of absence to 332.
Juries, unanimous verdict, may require 323.
Justices of peace to determine number of 323.
Laws and resolutions, to take effect, when, except 4127.
Enacting clause of 281.
Granting leave of absence to judicial officers, forbidden 332.
How revised or amended 275.
Must be general and uniform, exception 278, 279.
One subject only, must embrace 275.
Subject of, to be expressed in title 275.
To be passed relative to appeals from justices' courts 323.
Appointments of officers 378.
Attendance on public schools 354.
Benevolent institutions 365.
Board of regents 359.
Compensation of members of legislature 286.
Compensation of reporter of convention 410.
Corporations, existing 341.
County commissioners 284.
County officers may be consolidated, diminished or abolished 290.
Court fee, special 331.
Duties of various county officers 290.
Dueling 371.
Education 353-359.
Elections 285.
Floating school land warrants 255.
Homestead, exemption of 288.
Investment of school funds 355.
Judicial districts, alterations in 320.
Juries, qualifications of 285.
Justices of the peace, number of 323.
Militia, organizing and disciplining 363.
Municipal courts 324.
Oath of professors and school teachers 357.
Organizing cities and towns 338, 345.
Printer, state, may change palpably erroneous copy 4120.
Publication of debates, etc., of convention 410.
Punishment of defalcation, bribery, and embezzlement 268.
Removal of civil officers, etc. 337.
Restricting powers of cities and towns 345.
Salaries 377.
Legislature—continued.
To enact statutes encouraging common schools 353, 354, 358.
School money, to be apportioned 352.
Separate property of the wife, etc. 289.
Soldiers' vote 427.
State university 356.
Support of the infirm, etc. 367.
Taxation 350, 352.
Teachers in schools, oath of 357.
Tenure in office 379.
Legislation, special, restricted 278, 279, 338.
Legislative department, article on (Const.) 259-293.
Legislative department (Const.) 259-293, 302-304.
Length of sessions 287.
Levy unlawful 6806.
Lieutenant-governor, president of senate 310. See Lieutenant-Governor.
Limit of membership 374.
Local or special laws, certain prohibited 278-279.
Members, election of, to canvass 1513.
Members, ineligible to certain offices 336.
Number limited 374.
Oath of 370.
Privilege from civil arrest 269.
Mines, taxation of, prescribe laws concerning 352.
Municipal courts, may create 324.
Nevada Reports, use of, entitled to 2938.
Normal schools, to establish 357.
Number limited 374.
Oath of members 370.
Oath of members, entry in journal 2788.
Officers and attachés, number of may be changed 4116.
And attachés, salaries of 4116.
Chaplains, to officiate 4118.
Power to remove 336.
Salaries, how paid 4117.
One subject, laws must embrace 275.
Poll tax, to provide for payment of 256.
President pro tem. of senate, when acting governor 2808.
President pro tem. of senate to be elected, when 2809.
Printed bill becomes official, when 4122.
Printing session laws, journal and appendix, and distributing same 4334-4338.
Public documents, legislators receiving, failure to return, liability 2940.
Qualifications of electors, to prescribe law for ascertaining 255.
Quorum of each house 271.
Railroads, narrow-gage, fare may be changed on 3517.
Registration of electors, to provide for 255.
Removal of officers from office 336.
Resignations made to governor 2798.
Salaries, increase or diminution, restricted 377.
Schools, may establish 357.
Money, to provide for apportionment 352.
Tax, special to provide for 408.
Secretary of state to furnish certain information to, what 4255.
Secretary of state to convene legislative session in the assembly and to preside until a presiding officer is elected 4112-4113.

Legislature—continued.
Senate, lieutenant-governor, president of 310.
Senate, lieutenant-governor, to sign bills 276.
Senate, officers and attachés of 4114.
Senate or assembly. See Assembly or Senate, supra.
Senate, to try impeachments 6886-6892.
Senators and assemblymen, apportionment of 4110.
Salary and mileage of 4393.
Election of 2765, 2773. See Elections.
Qualifications 2766.
Term of office 2780.
Sessions, biennial 260, 396.
Commencement of 260, 396.
Length of 287.
Special 287, 302.
Special election to fill vacancy 2797, 2798.
Special legislation, restrictions 278, 279, 338.
Special or local laws, prohibited, when 278, 279.
Special sessions 287, 302.
Special taxes for schools and territorial debt 358, 408.
State prison, books and papers of, may inspect 7575.
Convicts in, may recommend pardon of 7587.
Stationery, how issued to 4472-4474.
Statistics, to be reported to legislature by controller, what 1588.
Subject of laws to be expressed in title 275.
Tax levy for territorial debt 408.
Taxation, uniform and equal, in mines, prescribe 352.
Term of office 2780.
Territorial debt, special tax to provide for 408.
Title, subject of laws to be expressed in 275.
Township government, to establish 283.
United States senator, election of 93, 292.
University regents, to provide for 359.
University to establish 356.
Vacancy, governor to issue writ of election 2797.
Vacancy in, presiding officer to notify governor 2800.
Vacancies in, how filled 270.
Veterinarian, to report to 4389.
Viva voce vote 254.
Warrants of legislative officers, controller to draw 4117.
Warrants, old, unpaid, legislature to allow deficiency, when 4183.
Witness, refusal to attend or testify, penalty 6334.
Lessee of mine, when liable for improper working, danger, how assessed 5509.
Letters of administration. See Estates of Deceased Persons 5857-6148.
Letters of guardianship. See Guardianship.
Letters testamentary. See Estates of Deceased Persons 5857-6148.
Letters with will annexed 5884-5887. See Estates of Deceased Persons 5857-6148.
Levy and collection assessments, irrigation districts, how made, when, where 4755-4763. See Water 4672-4791.
Levy and collection of taxes. See Revenue 3617-3904.
Levy, tax, district court may order to meet obligations of city on disincorporation 873.
Lewd or obscene publication or literature, penalty for 6438, 6461.
Lewd or obscene publication, indictment for 7069.
Liability, created by statute, other than penalty or forfeiture, action may be commenced within 3 years 4967.
Liability, for death by wrongful act 5647.
Liability, not founded upon writing, action may be brought within 4 years 4967.
Liability or indebtedness of corporation or person to state, county or municipality, local or special law for release of, invalid (Nev. Const. art. iv, sec. 20) 278.
Libel, action for, may be brought within two years 4967.
Denial of, how published 6428-6433, 6826.
Civil action for 5073-5074.
Indictment for 6431, 7064.
Jury determine law and fact 238, 7196.
Pleaded, how 5073.
Proved, how 5074.
Threatening to publish, blackmail 6739.
Who may be liable for 6430-6433.
Liberty of speech and press guaranteed 238.
Liberty, right of enjoying and defending 233.
Librarian, state, secretary of state ex officio 3946-3964.
Library, claims to be approved by board of examiners 3956.
Library, district school 3393-3397. See Public Schools.
Library, private, exempt from execution, when 5288.
Library, public, may be established in cities, towns and school districts 3227-3231. See Public Libraries.
Library, state 3946-3964. See State Library.
License. See Revenue.
Attachment for 3737.
Attorneys 501, 503, 506.
Auctioneer, doing business without 3895.
Automobiles for rent, running without 3877-3878.
Bankers 3728.
Banking 662.
Boarding-houses 3734.
Bogus, possession or delivery of 3744.
Brokers 3729.
Bullion tax agent and collector of 4243-4246.
Business 662.
Cigarettes and cigarette papers 3872-3876.
City trustees, power to revoke 3867-3871.
Collection of 3746. See Revenue 3617-3804.
Collector may be suspended and another appointed to perform duties, when 3753.
Commercial travelers 3879-3880.
County commissioners, power to revoke 3867-3871.
Doing business without 3737, 6808-6810.
Duties city trustees pertaining thereto 3867-3871.
Duty county commissioners pertaining thereto 3867-3871.
Duty county treasurer pertaining thereto 3867-3871.

License—continued.
Duty sheriff pertaining thereto 3727. See Revenue.
Embalmers 4448.
Failure of officers to enforce 3871.
Failure to deliver on payment 3744.
Failure to post 6809.
Fish and game 2101-2108.
Forfeited 2101.
Glove contests 3881-3889.
Insurance company doing business without 1280.
Itinerant and unsettled merchants 3890-3895.
Liquor dealers 3733. See Revenue.
May be revoked, when 3867, 3868.
Merchants 3731.
Necessary practice medicine 2358.
Peddlers 3890-3895.
Peddling without 3735.
Personal property, certain, may be sold for payment of, when 3742.
Powers of county commissioners pertaining to stationary engineers 3898-3904.
Required, acting without 6808.
Resident, selling own products, exempt from 445.
Revoked, when 3867-3871, 6841.
Sheriff ex officio collector 3727.
Sheriff make list of and report quarterly 1661.
Soldiers and sailors, issuance to, when 3896-3897.
Stationary engineers, revocation of by county commissioners 3898-3904.
State liquor, violation of 3784.
Tobacco, forfeited, when 6503.
Town trustees, power to revoke 3867-3871.
Vending without 6810.
Licentious acts not to be excused by religious profession or worship 233.
Lien claimant, holding other securities may be required to first exhaust them in action for partition 5550.
Lienholder, proceeding when he becomes purchaser in action for partition 5564.
Liens, action on 2227, 5714(11), 323. See concluding paragraph 5714.
Affidavit, duty of owner to file, on completion 2217.
Affidavit, on foreclosure of 3756.
Against real property, when 3665.
Attach to real property for taxes, when 3619.
Bank to have on shares of stock, how and when 3825, 651.
Bankruptcy 609.
City lots, what constitute 2214.
Claim against estate 5967.
Claims, amendment to 2217.
Consolidated, when 2224.
Contents of same 2217.
Substitution of parties 2217.
Time within which may be filed 2217.
Contractor held as owner or agent 2213.
Discharged, how 1049-1052.
Expenses feeding live stock in transportation, to be, when 3586.
Expenses, to be, when 4591-4595.
Fees, recorder to charge 2219.
Fine, lien attaches for, how 7258.
Foreclosure of 833.
Foundrymen, applicable to 2231.
Liens—continued.
Homestead liable for improvements, when 288.
Judgment of fine 7250.
Justice court, action on trial in, when 2227.
Exemption, homestead not to extend to 288, 2143.
Labor or material, what constitutes 2213.
Land payments, deferred 3083.
Land subject to 2215.
Limitations of, as to estates 6014, 5967.
Limitations of, as to time 2220.
Material exempt from attachment, when 2225.
May be assigned, 2229.
Mechanic's, district court jurisdiction 321, 323.
Mechanic's, justice court concurrent jurisdiction, may have 323.
Mining claims, when may attach 2390, 2481.
Mortgage on growing crop when 1080.
Notices, owner to post, property responsible unless 2221.
Ore sold to mill 5492.
Original contractor, owner may recover from 2222.
Personal action not impaired 2226.
Preferred on irrigated lands, how and when 4759.
Priority of 2216.
Premises, sale of 2227.
Ranchmen have, on animals, when 5499-5500.
Ranch owner, may file, when 2232.
Rank or order of 2223.
Real property for taxes, when 3619.
Record of claim to be kept 2219.
Recorder to keep book of liens 2219.
Recovery upon 2222.
Satisfaction and discharge of 2228, 6014.
Separate building, amount to be stated 2218.
Special tax, when 3620.
Stock, to remove, without payment of help, a misdemeanor, penalty 2232.
Taxes on security and debt subject to 3787.
Time, limitation of, lien as to 2220.
Trial of 2227.
Woodchoppers, jurisdiction 2230.
Woodchoppers, may file on, 2230.
Woodchoppers, proceedings 2230. See Civil Practice.
Lieutenant-governor, acting governor becomes, when 311, 2807, 4250.
Adjutant-general, ex officio 4250. See Adjutant-General under State Militia.
Age qualification 2766.
Bills, legislative, to sign 276.
Board of capitol commissioners, member 4411.
Casting vote in senate 310.
Commissary of state police, ex officio 4294-4298.
Duties and powers (Const.) 276, 310.
Election of 310, 2765, 2773, 2774.
Eligibility 310.
Ex officio adjutant-general 4250.
Ex officio commissary of state police 4294-4298.
Ex officio member board to appoint railroad commission 4549.

Lieutenanant-governor—continued.
Governor, powers of devolve on, when 311, 2807, 4250.
Impeachment of 310, 334, 335.
Not required to reside at capital 4249.
Oath before justice of supreme court 2785.
Office, where 2774, 4249.
President of senate 291, 310, 4250.
Railroad commission, member of board to appoint 4549.
Residence of 4249.
Salary 291, 4250.
Term of office 310, 2774.
Life and endowment insurance 1310-1324, 1327-1329.
Life estate, how set for in action for partition 5548.
How terminated 3584.
Proceedings to terminate 5584. See Civil Practice.
Termination, proceedings of, how brought 5584.
Life insurance companies, duty of attorney-general in regard thereto 1320. See Corporations 338-344, 1105-1440.
Life insurance companies, when exempt from execution 5288.
Life, right of enjoying and defending 230.
Light and power, inspection of by city 794(37).
Limitation of civil actions 3603, 4946-4985, 5968, 5971, 6185, 6921, 6926. See Civil Practice.
Limitations of criminal actions. See Criminal Practice.
Limitation of time for redemption of property 3651, 4966, 4976.
Lincoln County, creation, boundaries and seat 1471-1473.
Lincoln, proclamation of President, on admission of Nevada 430.
Lines of telegraph and telephone, governed by general laws 4628.
Lion, bounty for 718-722.
Liquor, intoxicating. See Intoxicating Liquor.
Lis pendens 5021.
In action regarding real property 5021.
In action to determine adverse claim to real property, to be filed in office of county recorder 5522.
Proof of service, to be made before entry of judgment by default in action to determine adverse claim to real property 5524.
Literary improvement to be encouraged by legislature 353.
Literature, obscene or criminal, offenses concerning, prohibited 6461.
Little & Brown's edition of United States laws are evidence 529.
Liverymen, fraudulent use of animals or vehicles of, prohibited 6707.
Livery stables, location and control of 794 (54).
Livery stable keeper, has lien upon animals for charges 5499.
Live Stock. See Animals.
Act relating to, printed and distributed 2312.
Act, penalty for violation of 3587.
Animals, at large, duty of officers 2265.
At large, duty of sheriff and constable 2262.
Live stock, at large—continued.
Impounded and sold, disposition of proceeds 2264.
May be impounded and sold, when 2264.
Not to run at large in town or city 794 (71), 2261.
Violation of act pertaining to, penalty 2263.
Assessed, how 3843, 3845, 3861, 3848.
Attachment, writs of to issue against live stock, how, when 3856. See Revenue.
Attendants, allowed free transportation on stock trains 4556(a).
Board of health, state, certificate of to be procured before bringing into state, when 2988, 2994.
Brands and marks, transcript of 2235.
Brands, evidence of ownership 2237, 7172.
Defacing, penalty 6640.
Failure to keep or exhibit 6641.
Imitating, penalty 6745.
In same place as previous 2247.
On horses transported, certificate, sheriff to furnish 2293.
On horses transported, sheriff to inspect and report 2293.
Record, failure to keep, penalty 6641.
Similar, changes in recording, no charge for 2245.
Not to be used in same place 2243.
Other restrictions 2244.
Records to be changed 2244.
Unlawful to record 2246.
Use of, penalty 2247.
To be recorded 2234.
Transcript of 2235.
Unrecorded, penalty for using 2239.
Unlawful, penalty for 6640.
Bureau of animal industry (U. S.) 4390.
Calf must be four weeks old before sold for food 2991.
Contagious diseases, governor to employ veterinary, when 2270.
Quarantine, proclamation of, proviso 2269, 4591.
Violation of act, misdemeanor, penalty 2271.
Contagious or infectious diseases, animal dying, disposal of body 2272.
Animals dying of, burned or buried 2272.
State board of health, duties concerning 2988, 2994.
Violation of act, penalty 2273.
Constable to impound, when 2262.
Damages recoverable for spread of disease by, when 2268.
Diseased, exportation prevented, when 4390.
Diseased animal or flesh of not to be sold as food 2989, 2990.
Diseased sheep, information, herder to give, refusal, misdemeanor 2306.
Diseased stock, examined and quarantined, when 4380.
Diseased stock on highways, damages, entitled to recover 2268.
Carcasses, disposition of 4381.
Carcasses, penalty 2268.
To be herded or enclosed 2267.
Unlawful to drive on highways 2266.
Duty of railroad company in transporting, time for confinement 3572.

Live stock—continued.
Estrays, fees of justices and recorders 2282.
How restored to owner 2275.
Justices, failure to comply, misdemeanor 2274.
Justices, record to keep 2275.
Money paid, how disposed of 2281.
Moving of, penalty 2278.
Neglect to comply with act, penalty 2276.
Not to be used, penalty 2277.
Removing, larceny, when 2279.
Reported, procedure 2274.
Right to reclaim forfeited 2280.
Stallion and Spanish bulls to be castrated 2284.
Taken up, costs, by whom paid 2283.
Taken up, failure to comply, larceny 2274.
Taken up, not liable for escape or death of 2283.
To be reported to a justice 2274.
Trespassing, treated as 2333.
Fees for recording brands 2234.
Food, selling diseased for, penalty 2989-2993.
Form of certificate required to bring into any county 3846.
Goats and swine running at large 2325-2331.
Prohibited from running at large during certain season 2325.
Running at large, owner liable to damage 2326.
Trespassing, liability of owner 2253-2258.
Grazing, owned by resident of state, assessed, how 3849.
Health, state board of, certificate of to obtain to bring into state, when 2988-2994.
Herded or grazed on lands of another, liable to attachment for damages and attorney fees 2336.
Hide inspector, appointment of 2285.
Compensation 2286.
Duties of 2285.
Hogs or goats, running at large 2325-2331.
Trespassing 2253.
Arbitration of charges 2257.
Forfeiture of property 2256.
Notice to be posted 2254.
Restitution of 2255.
Sale by constable, when 2256.
Sold, fees of constable 2258.
Horse growers, erroneous pedigree, punishment for 2287.
Horse growers, pedigree, to keep posted, penalty 2288.
Horse meat, sale of, when unlawful, penalty 6524, 6525.
Horses, inspection of required before removal from state 2289.
Transported, avoiding inspection, punishment for 2295.
False certificate, punishment 2294.
Fees, a lien on same 2296.
Fees, for inspection of 2296.
Unclaimed, sale of 2296.
Unclaimed, sold, redemption of 2296.
Infected sheep, false complaint, liability for making 2311.
Infectious diseases, failure to dip, misdemeanor 2302.
Infectious diseases in sheep, inspector to notify 2302.

Live stock—continued.
Injuring railroad property, owner's liability 3551.
Inspection of horses, clearance certificate, sheriff to give 2292.
Expenses 2292.
Railroad companies held liable for 2290.
Sheriff to act 2291.
Sheriff to make report 2291.
Insurance of 1325-1326.
Killed, notice of given by railroad company, penalty noncompliance 3600-3601.
Killed or injured, railroad company not liable in certain cases 3551.
Liable, jointly and severally, for violation of this act 2306.
Mark or brand, but one to be used, except 2238.
Mark or brand, unlawful if not recorded 2241.
Marks, not more than half ear removed, penalty, 2240.
Mismarking or misbranding, to defraud, a misdemeanor 2242, 6640.
Not to be brought into state until public health act complied with 2988-2995.
Nonresident owner of, assessed, how 3843.
Original horses not allowed to run at large 2252.
Taken up, constable may sell 2252.
Taken up, sold, proceeds, how disposed of 2252.
Owner liable for trespass, animal not to be injured 2333.
Animal treated as estray 2333.
Jurisdiction 2333.
When 2332.
Railroad to give notice of when killed 3600.
Running at large, assessed how, 3843.
Particular brand, must have, when 2233.
Per capita tax on transient 3848.
Recorder, neglect of, may be sued for 2236.
Precedence to, when 4559.
Precedence to, when, penalty for 2236.
Railroad companies feeding in transportation, may charge expense to owners, when 3573.
Sale of diseased animal or flesh of, or offer for sale, penalty 2989-2995.
Sales by constable, surplus money paid to 2259.
Sales for trespass, constable, liability of 2260.
Scabby sheep, possession of a misdemeanor, penalty 2310.
Sheep, coming into state, duties of inspector 2300.
Violation of act, penalty 2300.
Diseased, permit to move, when 4598.
Estrays, when deemed 2321.
Failure of inspector to examine, penalty 2304.
Infected, moving without permit, penalty 2301.
Moving from county to county, permit to be obtained, failure, penalty 2308.
On entering state, owner to notify 2315.
Permit to move 2301.
Prohibited to graze on land of others, or within one mile of ranch house 2319.
To be dipped, when 2302, 2314.

Live stock, sheep—continued.
Transient, per capita tax on 3848.
Transportation of, certificate to show, failure, penalty 2309.
Unlawful grazing of, penalty, damages 2320.
Unlawful to graze within three miles of town, penalty 2317, 2318.
With scab, failure to report, misdemeanor 2305.
Sheep commission 4586-4592. See Sheep Commission.
Sheep inspector, appointment of 2298, 4591.
Authority under commission act, record to keep 4588, 4581.
Bond to furnish, approval 2298.
Deputies 2299.
Duties of 2316, 4588, 4591.
Expenses sale, to pay 2316.
Fees of, how paid 2303.
Fees, to collect, when paid 2313.
Powers and duties 2299, 4588, 4591.
Prosecutions to make, proviso 2307.
Sheep inspection fund 4589-4590.
Situs for purpose of taxation 3843.
Stallion, at large, unlawful 2249.
Duty of person taking up 2250.
Running at large 2297.
Taken up, may be sold, when 2251.
Taken up, sold, proceeds, how disposed of 2251.
State board of health, certificate to grant to bring into state, when 2988.
State sheep commission 4586-4292. See Sheep Commission.
State veterinarian 4376-4389. See State Veterinarian.
Statute, limitations begins to run against action for recovery, when 4967.
Stock, marked with unrecorded brand, sales 2241.
Stock, marked with unrecorded brand to have counterbrand, when 2241.
Stock, to be branded, when 2237.
Swine, free commoners, not to be 2322.
Owner of, responsible for twice the value of property destroyed 2323.
Owners of, liable for damages, action tried where 2324.
Swine, goats or sheep at large in city or town, impounded animals to be sold, escheats 2331.
At large, owner may be fined 2330.
At large, to impound 2329.
Unlawful to run at large in city or town limits 2328.
Transient stock, defined 3845.
Transient stock, per capita tax on 3848, 3849.
Transportation to attendants of, free on stock trains, no discrimination 4556(a).
Trespassing, duties of constable relating thereto 2251-2260.
Trespass on lands enclosed by lawful fence, damages recoverable, when 2332.
On real estate, act not applicable to certain stock, when 2337.
Consent of owner to be obtained 2335.
Damages, how recovered 2336.
Lien superior 2336.
Stock may be attached 2336.
Live stock, trespass—continued.
When lands of two or more are under one enclosure, damages 2334.
Unlawful to confine longer than 36 hours 3585.
Watered and fed, lien for expenses, when 3586.
Writs of attachment, to issue against live stock, when and how 3856. See Revenue.
Local and special laws, certain, prohibited 278, 279.
Local health officers, duties 2973, 2970.
Local rules and customs, location and transfer of mines under, prior to 1863, 1102.
Location of mines before 1863, proved by local rules and custom of miners 1102.
Location of mining claim, how marked 2382. See Mines and Mining.
Location notice, antedating, punished, how 6675.
Location notices contain, what 2382. See Mines and Mining.
Location notices, duplicate in county recorder's office evidence same as original 2473.
Location principal office of corporation 1170. See Corporations.
Location tunnels 2440-2443. See Mines and Mining.
Lode claims, regulations concerning 2421. See Mines and Mining.
Lodges, property may be exempt from taxes, when (Const.) 352.
Lodging-house. See Hotels 2151-2154.
Long-and-short-haul clause 3578.
Lost or destroyed will, proved, how 5881.
Lost records, restoration of 5630-5646. See Civil Practice.
Lots in federal townsite, procedure to obtain title 1983-1986. See Federal Townsites, Civil Practice.
Lottery, conducting or selling tickets prohibited 7178.
Defined, penalties for engaging in business concerning 6494-6501.
Prohibited (Const.) 282.
Property forfeited to state 6500.
"L. S." or word "seal" sufficient description of seal in telegraphing papers for service and word "stamp" sufficient to indicate revenue stamp 5372.
Lynx, bounty for 718-722.
Lyon County, creation, boundaries and seat 390, 1445, 1474-1478.

M

Machinery, failure to protect, punished, how 6797, 6798.
Magistrate, breach of peace before, security for peace 6873.
Defined 6928, 6929, 7461.
May command militia, when 2835, 2839, 2840, 3982, 4058.
Other may act, when 6940, 6945, 6947.
Powers of arrest 6940, 6845.
Powers on nonjudicial day 4870.
When may order child transferred to district court under juvenile court law 741.
Who are 6929.
Magna carta 1-64.
Mail, time for notice of motion, when served by 5364.

Mail, when service of notices and papers may be made by 5370.
Major, each battalion to have one 4028.
Major-general, staff of 4005. See State Militia.
Male and female, lawful age of, what 431, 2339.
Malfeasance of state or judicial officer, liability for 335.
When decree to be entered for removal of officer 2852.
When officer to be removed for 2851, 2852.
Malfeasance or misfeasance of city officer, punished, how 648, 808, 6660.
Judgment of removal, copy of, to be transmitted to governor or county commissioners, when 2853.
Judgment of removal, pending appeal, office, how filled 2854.
Malice, express and implied 6385, 6386.
"Malice" or "maliciously," defined 6294(3).
Malice, when inferred 6294(3).
Malicious damage to cemetery property, punished 6752.
Malicious injury to private property, penalty 6753.
Malicious injury to public or private property, penalty 6752.
Malicious mischief, penalty 6752-6762.
Malicious prosecution 6365, 7501, 7502, 7262.
Maliciously destroying or injuring deeds or other writings 6671.
Maliciously wounding or poisoning cattle or domestic animals 6747.
Mandamus 319, 321, 5694, 5707, 5711-5713. See Civil Practice.
May issue at chambers 4840, 4843.
To compel registration 1710.
Manslaughter. See Criminal Practice.
Death caused by intoxicated physician 6410.
Death caused by overloading passenger vessel 6406.
Death caused by reckless or negligent operation of steamboat or boiler 6408.
Death caused by vicious or dangerous animal 6407.
Death caused from unlawful keeping of explosives 1947, 6409.
Dueling, when deemed 6426.
Killing unborn quick child 6403.
To aid suicide 6381, 6383.
Voluntary and involuntary, defined 6387-6391.
Map of irrigation district lands, provided, how, where kept 7457. See Water.
Of railroad, to be filed with secretary of state 3554.
Of state, to be made by surveyor-general, when 4349.
Maps, lost or restored, validated, how 5639.
Of county and state, boundaries, filed with surveyor-general 4355.
Of county boundaries, county surveyor to prepare, when 1492.
Marine insurance companies 1105-1106. See Corporations.
Mark, signature by, how made 3913, 7457, 7458.
Included in signature or subscription 5475.
When made as signature or subscription, to be witnessed, and if for acknowledgment or sworn statement, by two witnessess, 5475.
Markets, regulation and control of by cities 794(46-48).
Marking ballots illegally, forbidden 1859. See Elections.
Marking or misbranding animals with intent to steal or defraud, grand larceny 6640.
Marks and brands. See Live Stock.
Branding animals unlawfully 6640.
Failure to keep or exhibit, penalty 6641.
Failure to keep record of, penalty 6641.
Imitating, penalty 6745.
Marking or branding animals unlawfully 6640.
Prima facie proof of ownership 7172.
Record of 2234-2236, 2244, 2248.
Marriage, administratrix, marriage of extinguishes authority 5886, 5898.
Age qualifications 2339.
Annulment, action for 2357.
Between certain races, forbidden 6514-6515.
Between certain races, penalty for performing 6516.
Bigamy, penalty for 6456, 6457.
Ceremony, performing without license, penalty 6479, 6480, 6516.
Ceremony, where known legal impediment, penalty 2348.
Ceremony, who may perform 2340.
Certificate 2323.
Failure to record, penalty 2346.
Form of 2344.
To be filed and recorded 2345.
Civil contract 2338.
Consanguinity, restrictions 2339.
Consent of parents, when 2339.
Contract of, minors may make, when 2185.
Clerk, record to keep 2340.
County clerk to grant license, when 2341.
Divorce. See Divorce 5838-5845.
Effect on wills 6211, 6212.
Evidence of, record presumptive 2350.
Executrix, marriage of, effect 5886.
False certificate, penalty 2347.
Fees, of clerk and recorder 2341-2345.
Fines, application of 2352.
Forcing woman to marry, penalty 6444.
Form, used by "Friends" or Quakers, valid 2353.
Illegitimate children, legitimatized, when 2351.
Incest, penalty for 6458.
Incestuous, void 6458.
Insanity, not to be judged a cause for a nullity, when 2356.
Issue legitimate, marriage null or void 6117.
Legal age 2339.
Legal impediment, when known to exist, penalty 2348.
License, county clerk to grant 2341
Performing ceremony without, penalty 6479, 6480.
To receive 2340.
Married woman acting under threats and coercion of husband, not punishable for certain crimes, when 6286.
Married woman as party to action 4989.
Married woman. See Husband and Wife.
Marrying a married person, punished, how 6467.
Ministers must be licensed, exhibit same 2340.

Marriage—continued.
Minor must secure consent of parents for marriage 2339.
Null or void, issue legitimate 6117.
Of administratrix or executrix, effect 5886, 5898.
Parents, consent of, when required 2339.
Parties incapable of assenting, or when fraud practiced, void, when 2355.
Performing ceremony without license 6479, 6480.
Power, want of unknown, valid 2349.
Produced by force 6444.
Races, certain prohibited between 6514, 6515.
Separate property of wife, defined (Const.) 289.
Solemnization, no particular form, witnesses 2322.
Unauthorized persons performing, penalty 2348.
Void or null marriage, issue deemed legitimate, when 6117.
When not to be judged a nullity 2356.
When void without decree of divorce 2354.
Wills, effect of on 6211, 6212.
Witnesses 2322. See Civil Practice.
Marriage certificate, or certified copy presumptive evidence 2350.
Marriage contract, completely dissolved by divorce, and name of female may be changed 5844.
Marriage contract, recording of, imparts notice 2183.
Married persons, not lawfully separated, cannot adopt children without consent of both 5827.
Married woman, acting as sole trader, liable for maintenance of children 2193.
Action by or against, when husband must be joined 4989.
As sole trader may sue or be sued alone 2192.
As sole trader, when husband not responsible for debts 2194.
District court may make order allowing her to carry on business in her own name, procedure 2191.
When statute of limitations does not run in civil action 4976.
Marshals of city or town, have charge of prisoners in city or town jail, and may employ when directed 7617, 7619.
Martial law, army regulations to prevail, when 4282.
Masculine gender, includes the feminine and neuter 5475.
Master, proceedings against to determine whether breach of contract of apprenticeship 491.
To pay costs on proceeding to set aside covenants of apprenticeship 493.
Material, action on lien for 2222-2228.
Matrimony, divorce from bonds of, grounds for, verified complaint, venue 5838.
Maximum rate for freight and fares, proviso 3563.
Maximum sentence, court to fix, when 7260.
Mayhem, assault with intent to commit, penalty 6413.
Defined 6416-6418.
Mayor and city officers elected, when, how 801-805. See Elections.
Mayor and councilmen, may utilize labor of convicts in city jail 7616.
Mayor, may control militia, when 4058.
Mayor may order police to attend public meeting 2832.
Mayor of any city may call state militia 2835, 2839, 2840, 3982.
Mayor or councilmen, malfeasance 808.
Measure of damages for cutting timber for repair of highway or bridge 5507.
Measurement of water, what measure deemed standard 4677. See Water.
Meat, diseased or impure, sale of, forbidden 2989-2995.
Selling without having hide, unlawful 6641.
Mechanic, has preferred claim for wages 5493, 5494.
Tools and certain property exempt from execution 5288.
Mechanic arts, school of, established 356, 4639, 4656.
Improvement to be encouraged by legislature 353.
Mechanic's lien, legislature may confer power on justice's court to enforce in certain cases 323. See Liens, Civil Practice.
Medical examiners, board of, on refusal to grant certificate applicant may appeal to courts 2366.
Medicine, surgery and obstetrics 2358-2374.
Administer oaths, board of examiners, when 2362.
Appeal to courts, unsuccessful applicants before board medical examiners, may, when 2366.
Applicant for certificate to practice may appeal to courts from decision medical examiners 2366.
Board of medical examiners, appointed by whom, when to serve, how long, qualifications 2359.
Meet and organize, when 2361.
Certificate issued by board medical examiners recorded, where 2369.
Revoked, when, causes 2369.
Certificate to practice medicine, surgery, obstetrics, obtained how, when 2364.
Issued to whom, when 2363.
Examination and application, candidates to practice medicine, qualifications, fee 2365.
False impersonation medical profession, penalized, how 2373.
Fee for registration and examination medical board of examiners, what 2363-2365.
Governor to appoint state board medical examiners, when 2359.
Issuance medical certificates, by whom, how, when, to whom 2363-2367.
Issuing false certificate to practice 2373.
License necessary practice medicine, surgery, obstetrics 2358.
Meeting board medical examiners, when 2361.
Notice board medical examiners, given how, published, where 2361.
Oath board medical examiners, what 2360.
Penalty practicing medicine without license 2371.
Practicing without license to practice medicine, penalized 2371.

Medicine—continued.
Qualifications board medical examiners 2359.
Quorum of medical board, what 2363.
Register of applicants and those admitted practice medicine, surgery, obstetrics, kept where, by whom 2367.
Registration fee imposed 2364-2365.
Salary secretary board medical examiners, what 2368.
Secretary board medical examiners, salary, what 2368.
Who 2362.
Terms in act concerning medicine, surgery, obstetrics, defined 2370.
Unprofessional conduct medical profession, defined 2369.
Member of Congress, age of 89.
Election of 2765, 2772, 2773.
Members of legislature. See Legislature.
Memorandum of exceptions upon motion for new trial, when to be filed 5322.
Merchandise, false representation as to, unlawful 6709.
Purchased in bulk, requirements 3908-3909.
Sale of, in violation of bulk act 3910.
Merger two or more corporations effected, how 1145. See Corporations.
Message of governor to legislature 303.
Message, telegraph. See Telegraph.
Messenger appointed to get election returns, compensation 1799.
Metal-bearing ores, specimens exempt from execution 5822-5824.
Metric system, when used 4792.
Mice, extermination of 454-455.
Midwives must register with local health officer, birth certificates to register, failure, penalty 2964, 2967, 2972, 2986, 2987.
Mileage, books or passes issued, to be reported 4567(a).
How computed 2040, 2037, 2013.
Of constable, how computed 2040.
Of jurors, how computed 2013.
Of senators and assemblymen 4393.
Of sheriff, constable or coroner allowed what, how computed 2037, 2040.
Transporting prisoners 7606.
Warden to certify to, when 7565.
When paid garnishee 5189.
Witnesses, per diem may be demanded in advance 5431.
Military. See State Militia.
Military duty, who liable to 3998.
Military fine, no person to be imprisoned for in time of peace 243.
Military forces of state, governor commander-in-chief 298.
Military not to be charged toll 3047.
Military officers, governor to transact executive business with and require information from 299.
Military power, subordinate to civil, when 240.
Military property, refusal to return 4052.
Military returns and votes, how canvassed 297, 1887-1893.
Military service, person in, to enjoy right of suffrage 252.
Military tribunal, not affected by act 6299.
Militia, when members of exempt from arrest under civil process 5650. See Military, State Militia.
Milk, sale of adulterated, skimmed or impure, unlawful 6536-6539. See Pure Food Law.
Mills or smelters, hours of labor in. See Eight-hour Law 6555, 6556.
Millsite, located, how 2438. See Mines and Mining.
Mill operator, liability for death or injury of employee 5650.
Liable for death or personal injury if caused by gross negligence, notwithstanding slight negligence of employee 5651.
Mills, eminent domain, may be used for supplying water 5606.
Mineral cabinets, exempt from execution 5822-5824.
Mineral County, boundaries and seat 1479, 1480.
Part of seventh judicial district 4905.
Minerals, analysis of, at university 4660-4662.

MINES AND MINING

Federal Laws 2375-2421:
Act authorizing entry of lands containing petroleum and other mineral oils under the laws relating to placer locations 2394.
Act authorizing entry of land valuable for building stone, under placer mining laws 2393.
Act authorizing use of timber on public domain for mining and domestic purposes 2414-2416.
Act extending to saline lands the laws relating to placer locations 2392.
Act for refunding certain payments made by applicants for mineral surveys 2421.
Act modifying act so as to allow the acquiring of mines in addition to 320 acres of other land, and regarding townsite entries on mineral lands 2418, 2419.
Act providing that annual assessment work on oil lands may be done on any one of a group of not more than five claims 2395.
Act relating to forest reserves, mineral and agricultural lands therein and the use of timber and stone thereon, and rights of settlers 2420.
Act restricting entry under all land laws to 320 acres and reserving right of way for government canals 2417.
General mining laws of United States relating to lode and placer claims, tunnels and millsites, appearing in United States Revised Statutes 2375-2391, 2396-2407.
Amendment providing that money expended on tunnel shall be considered as money expended on claim 2382.
United States laws relating to coal lands 2408-2413.

Acreage, applicant for coal lands, entitled to 2408-2409.
Action for recovery of ore, commenced, when 2489.
Action for trespass on 5504-5513.
Action to determine right of possession upon application for patent 5526.
Action to prevent injurious working of 5509.

Federal laws—continued.
Additional bond of assessor for payment of taxes on proceeds of mines 3705.
Adverse claim, may be verified by agent or attorney in fact, when 2384.
Proceedings and judgment-roll must be certified by register to commissioners general land office, when 2384.
Regulations for filing and contesting 2421.
To application for patent, made how, proceedings 2384.
Stays controversy until, when 2384.
Affidavit of two persons attached to notice posted on mining claims 2383.
Affidavits and papers on application for land verified by whom 2397.
Agent of nonresident applicant for patent may apply, when 2383.
Agent or attorney in fact may verify adverse claim of applicant, when 2384.
Agricultural land in placer claim subject to homestead and preemption purposes, when 2389.
Agricultural land, when may be set aside as such, by whom 2404.
Amount of labor necessary to be expended on claim for patent, what 2383.
Amount per acre to be paid by applicant for patent, designated 2383.
Annual assessment work, period within which must be done, what 2382, 2430.
Annual labor on oil lands to consist of, what 2395.
Annual statements of companies filed, with whom 1330-1340.
Annual work on claims, period of, what 2382.
Applicant assumed to be entitled to patent if no adverse claim filed, when 2383.
Applicant for mineral patent residing beyond mineral district make oath or proof of citizenship before whom, how 2384.
Applicant to mineral land must file sworn statement of fees and charges for survey and file same, where 2396.
Applicant for patent to mineral land entitled to patent, when 2383.
Application, filing on claims, how and when 2410.
For patent by nonresident made by agent, when 2383.
For patent to mineral ground, to whom made, how 2383.
Appointment of surveyors, charges, proceedings and regulations therefor 2421.
Arbitration between employers and employees 1929.
Assessment, annual work, period within which must be done 2382, 2430.
Assessment of 352. See Revenue.
Assessment patented 352.
Attorney-general, ex officio mineral land commissioner 4146.
Attorney in fact or agent may verify adverse claim of applicant 2384.
Auditor may demand books of company 3691, 3694.
Blind lode discovered in running tunnel, made how 2381, 2443.
Board of county commissioners to exact additional bond of assessor for payment taxes on proceeds of 3705.

Federal laws—continued.
Boundaries locating placer claim, made how and marked 2387, 2389, 2434.
Boundaries mining claim may be changed, effect of 2382, 2427.
Building-stone lands valuable for building purposes located as placer claim by whom, how, when 2393.
Capital stock of company may be paid for by deed to ground 1200.
Certificate of location, original may be amended or additional certificate filed how, when 2382, 2427.
Certificate of proof of labor, fee for filing 2046.
Changing value of ore 6710.
Citizens of United States and those declaring intention to become such may locate mineral land, how 2377.
Citizenship, association unincorporated, what 2379.
Corporation, proof of 2379.
Individual, proof of 2379.
Proof of, established how, regulations and procedure in proving when acquiring mining, millsite and other special rights 2421.
Claims, action for recovery 4951.
Mortgage on, rights of mortgagee 1091.
Unpatented, exempt from taxation 3621.
Coal-land laws 2408-2413.
Coal lands, acquired how, by whom, cost per acre 2408.
Number of acres each person may acquire 2408-2409.
Commissioner general land office authorized to make rules and regulations governing coal lands 2412.
Power to establish maximum cost of surveys and publication of notices, what 2396.
Companies, delinquent, list of, made by assessor 3695, 3699.
Condemnation proceedings of land for mines, basis for determining 2462.
Conditions of sale and rules for working mines, may be made by legislature, when 2400, 2422, et seq.
Conflicting claims to coal lands determined how, by whom 2412.
Contests and proofs as to agricultural or mineral character of land, taken how, before whom, noticed, how 2397.
Conveyance of 1100-1102.
Conveyance by minors 1103, 1104.
Conveyances of, not to be construed as conflicting with customs, rules and regulations 1091.
Coowner failing to contribute share of legal expenditure forfeits interests in, how, when 2382.
Corporate stock in company not to be assessed unless power reserved in certificate of incorporation 1200.
Corporations, may become stockholders in tunnel companies 1202.
May consolidate 1216-1218.
Report annually to attorney-general and county recorder 1330-1340.
Cost, coal lands, per acre 2408.
Millsite land patented, per acre 2399.

Federal laws—continued.
Cost, placer claim containing lode, per acre 2391.
Not containing lode 2391.
Costs allowable to prevailing party in adverse claim proceedings, determined, how 2384.
County auditor to furnish statement of taxable mining property 3697.
Customs or rules of miners in mineral district determine location of mineral land 2382.
County commissioners to equalize taxation of 3693.
Courts to have jurisdiction in tax suit against 3707.
Damages or injuries accruing from ditch or canal, when recoverable, from whom 2401.
Day's labor, number hours to constitute for assessment purposes 2382, 2427.
Defective or erroneous certificate location amended how, when 2382, 2427.
Description vein or claim on unsurveyed or surveyed land must contain, what 2385.
Dimensions mining claim upon veins or lodes determined, how 2378.
Discovery vein or lode, prerequisite to valid location 2378.
District attorneys to enforce statements of companies 1340.
District laws govern corporations formed for purposes of 1201.
Effect of oldest or prior location 2398.
Eight-hour law, to govern in cement and plaster mills 6559.
In smelters, quartz mills and ore reduction works 6555.
For surface men 1941, 1942.
In underground workings 6554.
Eminent domain, right of, over land and water for purposes of 5606.
Employers' liability act 1915.
End lines of claim must be parallel 2378.
Entry, coal land may be made by whom, how, when 2408.
Entry, land chiefly valuable for building stone located under placer mining laws 2393.
Entry, under all land laws restricted to 320 acres 2417.
Estate deceased person, property disposed of, how 5982.
Evidence of possession to establish right to patent, what 2390.
Exemption of veins on mineral townsites 1918.
Existing rights affected by pending application for patent 2386.
Excessive number on cages 4235.
Expenses of survey of vein or lode claims paid by whom 2396.
Failure coowner to contribute share expenditures, forfeits interest, how, when 2382.
Federal law applicable to Nevada, use of timber on public domain for mining and domestic purpose, what 2414-2416.
Fees, proceedings on adverse claim suit, what, borne by parties interested, how 2384.
Proof of labor on claims 2046.
Federal laws—continued.
Fees, register and receiver, how and when payable, for what 2421.
Field notes and plat to patented mining claims to be posted on, when, where 2383.
Forest reserve lands may be restored for mining and agricultural purposes on recommendation secretary interior with approval of president United States 2420.
Forest reservations, laws and regulations applying thereto 2420.
Open to prospecting and location of mineral claims 2420.
When to be established 2420.
Grant of lands to states or corporations not to include mineral land 2407, 2457.
Hearing to determine character of land, rules of practice, what 2421.
Hoists to be operated by licensed engineers 3904.
Homestead laws, miners to receive benefit of 3126.
Homesteads may be made on mineral lands, when 2403.
Homesteads and preemption claims not impaired by placer locations 2388.
Homesteads on mineral lands, acreage thereof, what, price per acre 2403.
Inspection of mine by stockholder, when 2492, 2495.
Inspector of mines, duties, qualifications, salary, elected, how 4198-4238.
Act, noncompliance with 4238.
Judgment on adverse claim proceedings entitles prevailing party to possession, when 2384.
Jurisdiction in suits for delinquent tax, determined, how 3707.
Labor, amount of, necessary to perform on mining claim annually, what 2382.
Ladders and landings, regulations as to 4216.
Land condemned for mines and mining purposes, basis of determining value of 2462.
Land containing petroleum and mineral oils subject to entry and patent under placer mining laws, how, by whom, when 2394.
Land districts and officers thereof provided by president of United States 2405.
Land entered under mineral laws not included in restriction to the 320 acres, when 2419.
Land, mineral character, reserved from sale, when 2376.
Legislature may make rules for working mines and conditions of sale, when 2400.
Length of time for adverse claimant to commence proceedings to determine right of possession, what 2384.
Lien attaches to for taxes, when 3688.
Lien on mining claim or property attached prior to issuance of patent not impaired by patent, when 2390.
Liens on for labor and material, when 2213.
List of delinquent mining companies made by assessor 3699.
Limitation of actions for recovery of 4951.
Location blind lode discovered in running tunnel, how 2381, 2443.
Location mining claim marked, how 2382.

Federal laws—continued.
Location notice, antedating prohibited 6675.
Location notices, contain what 2382.
Location of tunnels 2440-2443, 2381.
Location placer claim, made, how 2387, 2389, 2434.
Locator authorized follow veins, lodes or ledges outside side lines, when 2380.
Locator's rights to mining ground, what 2380.
Lode claims, regulations concerning 2421.
Maximum number of acres allowed in placer claims, what 2388.
Method of survey of mining claims, regulations and general information concerning 2421.
Mileage, assessor to receive for selling property of for taxes 3700.
Mill company, books of, to be inspected by assessor 3694.
Mill, mine and tunnel locations, annual labor recorded 2424, 2431, 2435, 2438, 2442, 2446, 2448, 2451, 2463, 2469, 2473.
Millsite on nonmineral land patentable, how 2399.
Millsite, patents limited to acreage, how 2399.
Regulations and proceedings to acquire, what 2421.
Mineral land commissioner, attorney-general ex officio 4146.
Mineral land in forest reservation subject to location and entry, how, when 2420.
Open to location, what, when 2377.
Mineral land not liable to entry under homestead act 3128.
Mineral land on which no valuable mines are discovered open to homestead, when 2403.
Mineral land, patent for, obtained, how 2383.
Reserved from sale, when 2376.
Within national forests, rules and regulations concerning 2421.
Mineral township, state land in to be advertised before sale 3219.
Mineral vein, claimant on federal townsite not to claim surface ground 1978.
Miners in each mining district may make regulations governing location and possession mining claims, how, when 2382.
To receive benefit homestead laws 3126.
Mining claim, dimensions of, designated 2378.
Method of surveying, general rules and information relating to regulations thereof, 2421.
Open to relocation, when 2382.
Surveys of, general provisions and regulations applying thereto 2421.
Mining inspector, duties, qualifications, salary, elected, how 4198-4238.
Money expended on tunnel deemed expended on lode 2382.
Monuments on patented claims control conflict on boundaries, how, when 2385.
Mortgage on, claims, rights of mortgagee 1091.
National forests containing mineral land, rules and regulations applying thereto 2421.
Federal laws—continued.
National forests, transfer of, information and instructions in relation thereto 2421.
Net proceeds of, defined 3687.
New boundaries, locating abandoned mining claim, made, how 2382, 2428.
Notice by land register filing application for patent published in newspaper, how long 2383.
Notice of contest on mineral or agricultural character of land given, how 2397.
Notice to delinquent coowners of mining claims given, how, when, where 2382.
Number of saline claims one person authorized to locate, designated 2392, 2447-2450.
Oath of adverse claimant residing beyond limits of district may be taken before whom 2384.
Oil land, annual work required thereon 2395.
Oil, mineral and petroleum subject to entry and patent under placer mining laws 2394.
Only one entry allowed by same persons or association for coal land 2411.
Open cut, hours of labor 6557, 6558.
Operators of to furnish assessor with statement, contain what 3690.
Order for underground survey 5511.
Ores, assess for taxes, how 3687.
Owners and companies, state license and bullion tax agent may inspect books and require reports 4244, 4246.
Owners of quartz mills or reduction works entitled to millsite, when 2399.
Owners of tunnels, rights of 2381.
Partition of mines 5576, et seq.
Patent application to be shown in adverse action 5526.
Application, suit on adverse claim 2384.
Mineral ground obtained, how 2383.
Mineral land, lode claim, regulations therefor 2421.
Mining claim conveys, what 2386.
Nonmineral land for millsite may be issued, when 2399.
Placer claim containing lode, proceedings, defined 2391.
Placer claim conveys title to what 2391.
Preemption and homestead subject to vested and accrued water rights 2402.
To issue on termination of adverse claim proceedings, when 2384.
Patented and unpatented mining claims assessed, how 352, 1578. See Revenue.
Patented mineral land deemed segregated from public domain 2385.
Payment of taxes on, receipted for by assessor 3701.
Pending applications for patent under former laws may be prosecuted to final decision in general land office 2386.
Period of annual work designated 2382.
Perjury for mining company to furnish false statement to assessor 3690.
Persons in possession coal lands making improvements have preference of entry, when 2409.
Petroleum and mineral oil lands patented to assigneee 3178.
Subject to entry and patent, by whom 2394.

Federal laws—continued.
Placer claim containing lode, may be patented, proceedings 2391.
Law in relation thereto 2387-2392.
Limit of, designated 2387.
Limit of, to individual claimant, what 2389.
Must conform to survey, required by the United States 2387.
On surveyed land, no further survey or plat required, when 2389.
Patent conveys title to what 2391.
Regulations and proceedings to obtain patents 2421.
Regulations concerning location thereof 2421.
Subject to entry and patent under similar proceedings, provided vein or lode claims, how, when 2387.
Plat and field notes, proposed patented mining claim made how, filed where 2383.
To patented claim posted on claim, when 2383.
Possession necessary to establish right to patent, what evidence required 2390.
Possessors of veins protected from townsite entries how, when 1978, 2418.
Possessory action for recovery of title or damages, what 2375.
Possessory right, regulations concerning proof of, what 2421.
Preemption and homestead claims not impaired by placer locations, when 2388.
Preference in conflicting claims to coal lands, to whom given 2412.
President United States provide and appoint officers for land districts, how, when 2405.
Price per acre for homesteads on mineral lands, what 2403.
Prior rights to gold, silver or copper mines not impaired by coal-land laws 2413.
Proceeds of, false oath concerning 3690.
Proceeds of, taxes on collected, when 3689, 3687, 4240-4248.
Proceedings for patent for placer claims containing lode, what 2391.
Procedure to obtain patent to mineral lands, what 2421.
Proof of citizenship determined, how 2379.
May be verified by applicant for mineral patent when residing beyond limit of mineral district, how, when 2384.
Proof of labor, certificate of, fee for filing 2046.
Property deceased person disposed of, how 5982.
Prospector may enter and work mine on public lands 3226, 2456, 2458, 2459.
Publication of mining notices, charges fixed by commissioner general land office 2396.
Quartz mill or reduction works owner entitled to patent for millsite, how, when 2399.
Railroad corporations not authorized to use timber on public domain 2414.
Receiver, fees payable to for what, how, when 2421.
Records, impart notice, evidence 1635, 1636.
Records of mining locations contain what 2382.
Federal laws—continued.
Recorders, file certificates of proof of labor 2046.
Reduction works or quartz mill owners entitled to patent for millsite, how, when 2399.
Register and receiver to ascertain if timber being cut for unauthorized purposes 2415.
Register, fees payable to, for what, how, when 2421.
Register land office, duty to publish application for patent 2383.
Must certify to commissioner of general land office proceedings and judgment-roll in adverse claim contest, how, when 2384.
To designate newspaper to publish notice of contest 2397.
Regulations concerning location of lode claims 2421.
Regulations concerning location of placer mining claims 2421.
Regulations concerning nature and extent of mining claims 2421.
Regulations for acquiring mineral lands, what 2377.
Regulations in general, information and instructions of U. S. land office concerning millsites, forest reserves, mines and mining, surveys, fees, register and receiver's duties 2421, pp. 711-728.
Regulations under saline act 2421.
Repayment of deposits for mineral surveys to be made to applicant, how, when 2421.
Reservations in patents for right of way for ditches and canals acquired, how, what 2417.
Reservoir sites and locations restricted, how 2419.
Restoration of mineral or agricultural lands to public domain 2420.
Right of eminent domain over land and water for purposes of 5606.
Right of possession to veins, lodes, ledges beyond boundary mining claims, defined 2380.
Right of way for ditches and canals 2401, 2417.
Right of possession to veins and lodes given tunnel owners, when 2381.
Rights of way for ditches and canals acknowledged and confirmed, how 2401.
Through forest reservations, permissible, to whom 2420.
Where veins intersect, given whom, when 2398.
Rules and regulations interior department, when authorized, have the effect of laws, how, when 2421.
Rules not affected by act 1091.
Safety appliances in mines 6799.
Saline and unoccupied land of United States subject to location under same provisions of law relating to placer claims 2392, 2447-2450.
Saline lands, regulations concerning location thereof 2421.
Secretary of interior, may authorize timber and stone locations on forest reservations to certain persons, when 2420.

Federal laws—continued.
Secretary of interior, may designate and set apart agricultural lands 2404.
Secretary of treasury authorized to repay deposits for mineral surveys to applicants, how, when 2421.
Smelting company furnish assessor with statement 3694.
State disclaims interest in mineral lands 2457.
Statute of limitations affects applications for patent, how 2390, 4949-4966.
Stolen ore recovered, how, procedure 2484.
Stone lands valuable for building-stone material, located under placer mining laws, by whom, how, when 2393.
Subdivisions of forty-acre tracts subject to subdivision, how, when 2388.
Subsequent location of veins intersecting affect right of way, how 2398.
Substituting value of ore 6710.
Suit against company, collection of taxes 3700-3709.
Surface veins apexing on claim belong to locator, when 2380.
Surface rights on federal townsites 1978.
Survey mining claim, general provisions and other information concerning 2421.
Survey vein or lode claims to be paid by applicant, how much, when 2396.
Surveyor-general, and commissioner general land office to approve repayment of deposits made by applicant for mineral surveys, when 2421.
May adjust boundaries to correspond with true location of patented claims, when 2385.
May appoint competent surveyors 2396.
Surveyors may be appointed by surveyor-general 2396.
Sutro tunnel rights not impaired by federal provisions this act 2406.
Taxation, mining property, ore and mills. See Revenue.
Net proceeds 3687.
Patented mines, as amended 352.
Proceeds 3699.
Timber may be used by citizens of Nevada and elsewhere on public domain, how, when 2414.
Time, annual work required to be done unpatented claim 2382, 2430.
Failure to work on tunnel forfeits right to vein or lode 2381.
Filing claims for coal lands 2410.
Proof and payment for claims to coal lands 2411.
Title, cannot be acquired under federal townsite law 1965.
Town lots on federal townsites subject to possessory rights 1078.
Vests, how and when, when property sold for taxes 3700.
Town lots on mineral land, title thereto determined, how 2418, 1978, 2392.
Townsite lots subject to recognized veins 1960, 1978.
Townsite on mineral land authorized, how, when 1978, 2418, 2392.
Transfer of national forests, information and directions thereon 2421.
Federal laws—continued.
Transferred same as other real estate 1100, 1102.
Tunnels, location of 2440-2443, 2381.
Regulations concerning, and effect of Revised Statutes thereon 2421.
Work on, deemed development work, when 2381.
United States deputy surveyors, may be employed by applicants for mineral land patents, when 2396 2377.
United States land office, contest to determine character of land 2397.
United States laws relating to lands 3063.
United States laws relating to mines 2375.
United States surveyor-general authorized make plat and field notes patented claims, how, when 2383.
Unpatented, exempt from taxes, when 3621.
Using metal tamping bar 4212.
Valuable mineral land not to be included in forest reservations 2420.
Vested rights of water by priority of possession supreme, when 2401.
Violation of provisions concerning cutting timber on public domain, penalized, how, when 2416.
Water rights vested by priority of possession supreme, when 2401, 3194, 3182.
Water rights, vested, superior to rights obtained by patents, preemption and homestead, how, when 2402.
When lands may be set apart as agricultural lands 2404.
Where veins intersect, priority of title governs location, how, when 2398.
Who authorized to locate mineral land 2377, 2422. See Civil Practice.

State Laws, 2422-2496:
Act allowing prospecting for minerals upon lands held or patented by the state 2456, 2457.
Act authorizing prospecting on unfenced and unimproved land in private ownership, and for acquiring title thereto 2458-2462.
Act for better protection of rights locators mining claims relating to certificates of location, receipts, and seal of district mining recorder 2451-2455.
Act facilitate the recovery of ores and metals taken by theft or trespass 2483-2486.
Act provide for location lands containing salt 2447-2450.
Act provide for recording of grubstake contracts 2475.
Acts providing for the better preservation of mining records 2463-2474.
Act relating to inspection of mines by stockholders 2492-2496.
Act regulate the purchase of ore 2487-2491.
General act relating to location and holding of mining claims, millsites and tunnel rights 2422-2446.

Annual statements of companies, filed with whom 1330-1340.
Annual work for assessment purposes, how much required 2382, 2430.

State laws—continued.
Apex of lode determines when lode may not be followed 2426.
Application for underground survey, how made in action for trespass 5511.
Arbitration between employers and employees 1929.
Assayer keeping false record bullion or ore purchased, punished, how 2485.
Assayers and buyers bullion and ore must keep record of, how, where, when, what to state 2483.
Assessment of mining property, ore and mills. See Revenue.
Assessment of patented and unpatented claims 352.
Assessment work, annually to be performed 2382, 2430.
Assessor, make out list of delinquent companies 3699.
Auditor may demand company books 3691, 3694.
Auditor to furnish sworn statement to controller of taxable property 3697.
Authenticated copy location notice evidence, when 2424.
Basis of determining value land taken for mining purposes 2462, 5606, 5629.
Belonging to estates, lease or sale of 5980.
Blind lode discovered in running tunnel made, how 2341, 2483.
Books of mill company to be inspected by assessor 3694.
Boundaries, locating placer claims, how made and marked 2434, 2387, 2389.
Millsite marked, how 2437.
Mining claim, how and when defined 2423.
May be changed, effect of 2427, 2382.
May be changed or remedied if defective 2427, 2382.
Capital stock may be paid for by deed to ground 1200.
Certificate, location and labor, to hold claims need not be sworn to 2445.
Location and labor, to hold claims, no specified form, must state facts 2445.
Location original, may be amended or additional certificate filed 2427, 2382.
Proof of labor, fee for filing and recording 2046.
Changing value of ore 6710.
Claimant serving notice and not bringing suit liable for double damages 2490.
Claims, action for recovery, limitations 4951.
Mortgage on, rights of mortgagee 1091.
Unpatented, exempt from taxation 3621.
Company to pay taxes 3687.
Compensation for injury to lands for mining purposes, recovered, how 2456.
Condemnation proceedings for land and improvements may be had for mining purposes, when 2456.
Contest to determine mineral or agricultural character of land in U. S. land office 2397.
Coowner, delinquent, may be deprived of interest in mine, how, 2432.
Conveyance of 1100-1102.
By minors 1103, 1104.
Conveyances of, not to be construed as conflicting with rules and regulations 1091.
State laws—continued.
Copies of certified mining records introduced in court, evidence 2467.
Corporate stock of company not to be assessed under power reserved in certificate of incorporation 1200.
Corporations for purposes of, may be formed 1105, et seq., 1203.
County clerk authorized to give order for admission to mine to stockholder, when 2495.
County clerk or justice of peace authorized give order to stockholder mining company to examine mine 2492.
County commissioners to equalize taxation of 3693.
To provide books mining recorders for records 2465.
County recorders, ex officio district mining recorders at county-seat 2463.
Fees for recording duplicate location notices 2472.
Courts, jurisdiction in actions concerning 321, 323.
Jurisdiction in tax suit against 3707.
Damages for extraction of ores from, how assessed 5509.
Day's labor, number of hours to constitute for assessment purposes 2430, 2382.
Defective or erroneous original certificate of location may be amended and an additional certificate filed 2427, 2382.
Delinquent coowner, given notice to contribute or forfeit interest 2432.
May contribute within what time proportionate share of expenses and retain interest 2432.
On contributing share of expenses may protect his title to interest 2432.
Department of mines in state university 356.
Description millsite must identify claim reasonable certainty 2439.
District attorneys to enforce statements of companies 1340.
District court's jurisdiction in cases involving title or possession 321.
District laws govern mining corporations 1201.
District mining recorders, represented by county recorders, when 2463.
To record mining claims, when 2424.
Duplicate copy location notice recorded, forwarded to county recorder, when 2471, 2464.
Duplicate notice evidence same as original, when 2473.
Duplicate notice location to be transmitted county recorder 2469, 2382, 2435.
Duties of mining recorders, certify and transmit copies of records quarterly to county recorders, how 2464.
Duties of mining recorders to record location notices 2469.
Duties of persons locating saline lands, what 2448.
Eight-hour law to govern work in cement and plaster mills 6559.
Smelters, quartz mills and ore reduction works 6555.
Underground workings 6554.

State laws—continued.
Eight hours deemed day's work, assessment purposes 2430, 2382.
For surface men 1941, 1942.
Eminent domain, right of, over land and water for work of and reduction of ores 5606.
Employers' liability act 1915.
Estate deceased person, property disposes, how 5982.
Examination books of assayer allowed, when ore stolen, by whom, how, when, where 2484.
Excessive number on cages, punished, how 4235.
Exemption of veins on mineral townsites 1918.
Expenditures made by mining company may be recovered from minority owners, when 2476.
Failure, refusal or neglect of assayer to keep record ore or bullion purchased, no defense for failure to keep 2486.
Failure to provide safety cages 6799.
False or fraudulent statements or transactions pertaining to ore, how punished 6710.
False record of bullion or ore purchased by assayer, punished, how 2485.
Fees for mining district recorders, what 2466, 2470.
Fees for recording certificates, proof of labor 2046.
Fees, proof of labor on claims 2046.
To be collected by mining recorders, what 2466, 2470.
To be paid county clerks or justices of peace for registering application or privilege stockholders to inspect mine, what, when 2493.
Fees of county recorders recording duplicate notices location, what 2472.
Form and posting notice of location mining claim 2422.
Grants of land made by United States to Nevada reserve mineral land 2456.
Grubstake contracts or prospectors' agreements, evidence, when 2475.
Must be acknowledged and recorded 2475.
Must be recorded or void, when 2475.
Homestead laws, miners to receive benefit of 3126.
Hoists to be operated by licensed engineers, when 3904.
Injunction to issue against purchase or removal of ore in dispute, how, when 2489.
Improvements on land may be condemned for mining purposes 2456, 5606-5629.
Inspection of mine by stockholder having certain amount stock allowed, how, when 2492, 2495.
Inspector act, noncompliance with 4238.
Inspector of mines, duties, qualifications, salary, elected, how 4198-4238.
Joint tenants and others interested in mining property, may be made defendants in suit, how, when 2478.
Justice of peace authorized to give order for admission to mine to stockholder, when 2495.
State laws—continued.
Justice of peace or county clerk authorized give permission stockholder to examine mine, when 2492.
Ladders and landings, regulations as to 4216.
Land and improvements may be condemned for mining purposes, when 2456, 5606-5629.
Lands cannot be taken for mining purposes unless full compensation made owner for improvements 2456.
Legislature to encourage improvements in 353.
Lien attaches to, for nonpayment of taxes 3688.
Lien, mining company has for expenditures on mining property against partners or interested parties 2481.
Liens for labor and material, when 2213.
Limitation of actions for recovery of 4951.
List of mining companies, delinquent, assessor to make 3699.
Location blind lode discovered in running tunnel, made how 2381, 2443.
Location certificate properly recorded or copy duly certified prima facie evidence, when 2435, 2469-2473.
Location notice, antedating prohibited 6675.
Claiming more than one claim, void, when 2433.
Contain, what 2424, 2422.
Millsite, contain, what 2437.
Millsite, to be recorded, when, where 2438.
Millsite, void, when 2439.
Must not attempt location more than one claim 2433.
Of tunnel, contain, what 2440, 2381.
Placer claim contain, what, recorded, where 2435, 2469-2473.
Recorded, where, when, with whom 2424.
Recorded, when and where 2442.
Location, or record of vein or lode claim, includes what ground 2425.
Out of district, recorded with county recorder 2472.
Placer claim made, how 2434, 2387, 2389.
Saline land made, how, acreage allowed 2447, 2392.
Saline land made prior 1865, ratified, how 2449.
Work on placer claim must be done, when, how much required 2435, 2469-2473.
Work required locate mining claim 2423.
Locator mining claim, number of days allowed to complete location work, what 2423.
Entitled receipt recorder for filing location certificate 2451.
May locate mineral deposit on private land and acquire title, proceedings 2459, 2460, 2461, 5606-5629.
Metal-bearing ores, specimens exempt from execution 5822-5824.
Method of proceeding to acquire title private lands for mining purposes 2459, 2460, 2461, 2462, 5606-5629.
Mill company to give assessor access to books 3694.

State laws—continued.
Mill locations, annual labor recorded 2435, 2438,2442,2446,2448,2451,2463,2469,2473.
Mill owner to keep account of ores, how 3694.
Millsite location notice, to be recorded, when, where 2438.
Void, when 2439.
Millsite, who may locate, dimensions thereof, what 2436, 2499.
Mill, tunnel locations, annual labor to record 2451,2463,2469,2473,2424,2431,2435,2438, 2442, 2446, 2448.
Mine owner liable death employee 5650-5652.
Mineral cabinets exempt from execution, when 5822-5824.
Mineral deposits on unfenced land and unoccupied land, held in private ownership, may be located and prospected, when 2459-2462, 5606-5629.
Mineral land commissioner, attorney-general ex officio commissioner 4146.
Mineral lands may be entered for prospecting by citizens of United States or person having declared intention to become such 2456.
Mineral lands not liable to entry under homestead act 3128.
Mineral townships, state lands in, to be advertised before sale 3219.
Mineral vein claimant on federal townsite not to claim surface ground 1978.
Miners to receive benefit of homestead laws 3126.
Mining claim, boundaries of, how and when defined 2423.
Character work required to locate 2423.
Validly located, possesses what ground and rights to veins and ledges 2425.
Who may locate 2422.
Mining company, may sue minority owners for expenditures, when 2476.
Report to assessor 3695.
Mining corporation, may become stockholder in tunnel company 1202.
May consolidate 1216-1218.
Report annually to attorney-general and county recorder 1330-1340.
Mining district recorders, duty to transmit copy records to county recorders quarterly 2464-2469.
Fees, what 2466, 2470.
Supplied books by county commissioners 2465.
Violating duties, penalized, how 2455.
Mining for certain minerals declared paramount interest and to be a public use 2456.
Mining inspector, duties, qualifications, salary, elected, how 4198-4238.
Mining recorders, duties defined 2469.
Fees 2466. 2470.
Forward duplicate copy location recorded to county recorder, when 2464, 2471.
Procure seal, contain what 2453.
Minors over 18 may convey mining property 1104.
Minority owners mining ground may be sued for expenditures, when 2476.
Mode of levying taxes on 3687.
State laws—continued.
Money expended or indebtedness assumed by corporation for mining purposes, how borne by those interested 2477.
Mortgage on claims, rights of mortgagee 1091.
Name, dimensions, date location mining claim made, how 2424.
Net proceeds, defined 3687.
Net proceeds of, taxed, how 3687-3689.
New boundaries relocating abandoned mining claims made, how 2428, 2382.
Notice location millsite, contain what 2437.
Void, when 2439.
Notice location, form of, contain what 2422-2424.
Must only claim one location else void, when 2433.
Placer claim recorded, how, when, where, what to contain 2435, 2469-2473.
Tunnel recorded, how, when, where 2442.
Notice to delinquent coowner, given, how, when, effect of, served, how 2432.
Must be filed when, where, served how 2432.
Notice to prospective purchaser of ore, puts purchaser at his peril 2489.
Oath must be made by stockholder that he is owner of stock certificate when applying to inspect mine 2494.
Oath to be taken by stockholder before county clerk or justice of peace for privilege inspect mine 2493.
Open cut, hours of labor in 6557, 6558.
Operators of companies furnish assessor with statement property 3690.
Order for admission to mine given stockholder by justice of peace or by county clerk, when 2495.
Order for underground survey 5511.
Ore on mining claim is deemed property of possessor thereof, when 2487.
Ore stolen, how recovered, procedure 2484.
Ores, assessed for taxes 3687.
False or fraudulent statements or transactions pertaining to, forbidden 6710.
Substituting or changing value of, forbidden 6710.
Owner of tunnel, rights of 2381.
Owner refusing inspection books to bullion tax agent 4246.
Owner vein, lode claim or mine, quartz mill or reduction works may locate millsite 2436, 2499.
Partition of mines 5576, et seq.
Patented and unpatented claims assessed, how, 352.
Payment of taxes on, receipted for by assessor 3701.
Penalty, coowner to deliver to delinquent acknowledgment of delinquent's paid-up share expenses, what 2432.
Failure to comply with recording mining records, what 2468.
Mining superintendent to refuse admission to mine or stockholder, what, when 2496.
Neglecting or refusing record location notice or mining records 2474.
Perjury mining company to furnish false statement to assessor 2424, 3690.

State laws—continued.
Possessor of mineral vein may receive patent for vein and surface ground on federal townsite 1978.
Possessor of mining claim deemed owner of ore 2487.
Possessory claim, mortgage on 1090.
Presumption, as to value of ore extracted from mine 5509.
Proceeds of, how taxed 3689, 3690, 4240-4248.
Proceeds of, taxes delinquent on, action for brought how, by whom 3707-3709.
Proof of labor, certificate of, fee for filing 2046.
Property, deceased person disposed of, how 5982.
Mining company sold for taxes, title vests, how and when 3700.
Of miner, exempt from execution, what 5288.
Sold for taxes 3700.
Prospecting agreements or grubstake contracts must be recorded 2475.
Prospector may enter state and upon private lands in search of minerals, when 3226, 2458, 2456, 5606-5629.
Prospector may enter and work mine on public lands 3226, 2456, 2458, 2459.
Prospector's tools, cabin, horses and certain other property exempt from execution 5288.
Public use, mining for certain minerals declared to be 2456.
Purchaser of ore in good faith deemed owner, when 2488.
Purchaser of ore responsible to real owner, how, when 2491.
Receipt recorder to locator of filing certificate location deemed prima facie evidence filing 2452.
Record, false, as to keeping account of ore or bullion purchased, punished, how 2485.
Location lode mining claim, must contain what 2424.
Must be kept by assayers of bullion and ore purchasers, contain what 2483.
Relocated abandoned lode mining claim, contain what, 2428, 2382.
Relocation work abandoned lode mining claim, contain what 2382, 2428.
Tunnel right or location void, when 2424.
Records, impart notice, evidence 1635, 1636.
Records or copies mining claim certified, introduced as evidence, when 2467.
Records or copies of U. S. land patent, when admissible in evidence 5415.
Recorder to give receipt for location certificate, when, contain what 2451.
Recording of location notice, where filed 2424.
Reduction works, ore sold at, works preferred lien upon bullion 5492.
Registration of application for and privilege granted stockholder to inspect mine to be kept by county clerk or justice of the peace, how, when 2493.
Relocation abandoned lode claim made, how 2382, 2428.
Relocation mining claim cannot interfere with existing rights 2382, 2427.
State laws—continued.
Relocation saline lands, when may be made 2450.
Right of eminent domain over land and water for, and reduction of ores 5606.
Right of way for ditches and canals 2401, 2417.
Right to follow vein or ledge matter, defined 2425.
Rules not affected by act 1091.
Safety appliances in 6799.
Sale of mining property resulting from judgment obtained by mining company for expenditures against interested parties absolute, when 2482.
Sale of property, assessor to receive mileage 3700, 3037.
Saline land, location of, made how and title perfected 2447-2450.
Must be surveyed by whom and plat recorded, when and where 2448.
Subject to location, when 2450.
Who may locate, how many acres 2447, 2392.
School established 356, 4639, 4656.
Seal mining recorder exempt from execution, contain what 2453.
Smelting company furnish assessor with statement 3694.
State bullion tax agent, may inspect books of company 4244, 4246.
State, disclaims interest in mineral lands 2457.
State lands, mines discovered in, may be worked 3226.
Stock certificate to be presented under oath to justice of peace or county clerk when applying privilege examine mine 2494.
Stockholder owning certain amount stock in mines entitled to inspect mine, how, when 2492, 2495.
Stolen ore, recovered, how, procedure 2484.
Substituting or changing value of ore 6710.
Suit against companies, collection of taxes, when, prosecuted, how 3700-3709.
Suit, where to be brought by mining company against partners for expenditure 2480.
Summons in suit by mining corporation against parties interested in mining property contain, what 2479.
Summons, service of, in suit by corporation against partners for expenditures, how served, where, when 2480.
Surface rights on federal townsites 1978.
Survey and certificate surveyor-general becomes part of record and evidence 2429.
Survey saline land must be made by whom, when, where filed 2448.
Survey, underground, application, how made, in action for trespass on mine 5511.
Tailings, eminent domain may be used for deposit of 5606.
Taxes on proceeds 3699.
Taxation of mining property, ore and mills. See Revenue.
Taxation of patented mines (Const. as amended) 352.
Timber for, and other purposes 2414.
Time annual work required to be done on unpatented claims 2430, 2382.

State laws—continued.
Time from date location when saline land must be surveyed 2448.
Time, period of, when saline land deemed abandoned and subject relocation 2450.
Time required within which notice delinquent coowner must be served and published 2432.
Time when stockholder owning certain amount stock in mine may inspect mine 2492.
Time within which action for injunction and recovery of ore in dispute may be commenced 2489.
Time, affidavit annual assessment work must be filed 2431, 2445.
Delinquent coowner may contribute share and redeem interest 2432.
Location notice, millsite must be recorded 2438.
Location notice must be filed 2424.
Location work must be done 2423.
Location work on placer claim must be done 2435.
Locator of tunnel right must record notice location 2442.
Mining corporation must notify parties interested in mining claim before, can sue for expenditures advanced 2478.
Title, acquired to private lands for mining purposes, proceedings 2459, 2460, 2461, 5606-5629.
Cannot be acquired under federal townsite law to 1965.
Mine must be obtained from United States under laws of Congress 2457, 2407.
Town lots on federal townsites subject to 1078.
Townsite lots subject to recognized veins 1960.
Townsites on mineral land 1978, 2392, 2418.
Tools and other property of miner, when exempt from execution 5288.
Transferred same as other real estate 1100-1102.
Trespass, measure of damages for extraction of ore from mine 5509.
Trespass, on mine, application for underground survey 5511.
Tunnel locations, annual labor to record 2442, 2446, 2448.
Tunnel right, boundary, how marked and made 2441.
How located 2440, 2381.
Size of claim allowed 2441.
Underground, hours of labor 6554, 6556.
Underground survey, application for when mining property trespassed 5511.
United States deputy mineral surveyor may establish boundaries or corners of claims, how, and when 2429.
United States laws relating to, schedule 3063.
United States laws relating to land schedule 3063.
Unpatented property exempt from taxation 3621.
Using metal tamping bar in 4212.
Value of private land taken for mining purposes based, how 2462, 5606-5629.
State laws—continued.
Vein or ledge cannot be followed beyond end lines, when 2425-2426.
Vein or ledge may be followed beyond side lines, how, when 2425, 2380.
Violation of duties by mining district recorder punished, how 2455.
Wages, miner has preferred claim for, when 5493, 5494.
Water for purposes of, right of way for ditches 2401, 3149, 3182.
Work required of relocator abandoned lode claims 2428, 2382.
Who may locate mining claim 2422, 2377.

Mining inspector 4198-4239.
Accident, deputy, report to make on 4207.
Inquests, to attend 4207.
Investigation 4207.
Mine owner or operator to notify 4207.
Statement to be furnished 4207.
Action, penalty recovered, commenced when 4205.
Attorney-general, inspector to notify, when 4205.
Bell signals, official code of 4236.
Boilers, examination and report 4228.
Bond required 4199.
Buildings over shaft or at mouth of tunnel, regulations 4224-4225.
Bulkhead, near collar of shaft 4217.
Cage, loaded, special signals 4215.
Number allowed on, notice of to be posted 4235.
Other safety appliances, to have 4222.
Overloading unlawful, penalty 4235.
To be encased 4222.
Certain mines, act not applicable to 4209.
Code of signals, to establish 4201.
Complainant may close workings, when 4204.
Complainant, not to be divulged, when 4204.
Complaints, copy to be served on owner 4204.
Dead timber to be taken away 4213.
Deputy, may appoint, salary 4206.
Qualifications 4200.
Double compartment shafts, when 4216.
Duties, entire time to be given to 4200.
Duty to visit and examine mines 4201.
Election of 4210.
Employment, solitary, regulated 4232.
Engineer on duty at all times, when 4233.
Exit, precautions in sinking shaft 4220.
Expenses, how paid 4199.
Explosives, regulations as to use of 4211.
Gasoline, forbidden underground 4219.
Governor to report to 4208.
Hoisting during repairs, prohibited, except 4229.
Hoisting machinery, indicator must be used 4214.
Hoisting ropes, factor of safety established 4226.
Iron or steel, when 4226.
Indicator, how placed 4214.
Inflammable material near shaft 4224.
Investigations, full power to make 4202.
Investigations of complaints, to make 4204.
Iron tamping bar, use forbidden, penalty 4212.
Ladders and landings, regulations as to 4216.

Mining inspector—continued.
Loaded cages or buckets, riding upon, prohibited, except 4215.
Metal tamping bar prohibited, penalty 4212.
Mine, exit, signboards, when 4218.
Mine owner, neglect of, attorney-general to be notified 4205.
Mine owner or operator to notify, in case of accident 4207.
Mine owner or operator to report to inspector 4203.
Neglect of mine owner to notify attorney-general 4205.
Noncompliance with act, penalty 4238.
Oath of inspector, form 4200.
Office created 4198.
Office to be provided at capitol 4203.
Penalty recovered, paid into school fund 4205.
Qualifications of 4200.
Records to be preserved 4203.
Regulations, tamping bars, wooden to be used 4212.
Report to governor, contents of 4208.
Reports to make 4200.
Riding on cable or bail unlawful 4234.
Ropes or cables, regulations 4227.
Saloons, wages of miners, not to be paid in 4230.
Shafts, bulkhead or trap-door near collar of, when 4217.
Shaft, exit from below, how 4217.
How equipped 4217.
Inflammable material to be kept 30 feet from 4224.
Stoping up to, or near prohibited until 4223.
Structure not to be erected over, except 4224.
To have two compartments, when 4216.
Signals, additional, may be used, when 4236.
Code of, to be posted 4236.
Smoke helmets, design and inspection of 4237.
Solitary employment, regulated 4232.
Special oath 4200.
Specimens, school of mines, to furnish to 4201.
Statistics and exhibits, to collect 4201.
Stations and winzes, guard rails, to have 4221.
Stoping near shaft, forbidden 4223.
Tamping bar, other than wood, penalty 4212.
Term of office 4199, 4229.
Trap-door, near collar of shaft 4217.
Tunnels, building at mouth of, door arranged 4225.
Exit to surface 4225.
Ventilation must be maintained 4231.
Wages, not to be paid in liquor houses 4230.
Warrants, how paid 4210.
Winzes to be protected 4221.
Ministers authorized to marry, record to keep, how 2340.
Ministers, chaplains of legislature 4119.
Ministers, services at prison to hold 7576.
Minor. See Children, Guardians, Adoption, Civil Practice.
Action for death or injury to 4996.
Allowing in pool or billiard rooms without consent 6506.
Minor—continued,
Application for townsite lot made by guardian 1983.
Apprentices 482-497.
Attorney for creditors and heirs 5990.
Certain employments or exhibitions of, unlawful 6505, 6823, 6824.
Children, rights under federal homestead law 3130, 3131.
Consent of parents required for marriage 2339.
Criminal proceedings against 741.
Decoying, enticing or inducing to go into or visit houses of prostitution 6445.
District court, jurisdiction of, and their estates 321, 4849, 4850.
District judge to permit employment of 6824.
Employing as barkeeper 6506.
Estate of, district court has jurisdiction over 321, 4849, 4850.
Executor may be, when 5888.
Exhibiting obscene literature, or permitting to sell same 6461.
Falsely representing age to procure liquor 6506.
Fines and taxes imposed on 4063.
Guardian of, general act concerning 6149-6201.
Named in will 6150.
Jurisdiction of estate 4840, 4849, 321.
Letters testamentary to 5888.
Limitation of time for conveyance townsite lot not to apply to 1987.
Limitations, disability effect on 4965-4966.
Local or special law for sale of real estate of, invalid 278.
Over eighteen may convey mining property, when 1104.
Parents' consent required for marriage 2339.
Permitting in saloon or resort where liquors are sold 6842, 6843.
Sale of tobacco to 6502.
Selling or giving cigarettes or papers to 3874, 3875.
Service of summons on 5023.
Use of firearms by 6610.
Minutes of court, when motion for new trial may be made upon 5321.
Misapplication of funds, how punished 648.
Misappropriation of funds or securities, or other malfeasance or misfeasance in office, city treasurer punished, how 6660, 648.
Misbranding of foods, drugs or liquors, prohibited 3486. See Pure Food Law, Board of Pharmacy.
Miscarriage, selling drugs to produce, penalty 6448, 6449.
Woman attempting to produce, penalty 6405.
Miscegenation prohibited, penalty 6512, 6515.
Misconduct, commissioner of deeds, penalty 2029.
Misconduct of officer drawing or in charge of jury, penalty 6325, 6327.
Misdemeanor, defined 6266.
Punishment, when not fixed 6285, 6286.
In office, for refusal to obey writ of mandamus 5707.
Justice's court, jurisdiction 4851.
To perform prohibited act 6288.
Trial of 7470, et seq.
Violation of fee act 2023.

Misprision of treason, what, penalty 6310.
Misrepresentation, if workmen caused to change place of employment by, may have action for damages 1938.
Mistakes in pleadings 5080-5086, 5742. See Civil Practice.
Mistress, proceedings against, to determine whether breach of contract of apprenticeship 491.
Mob or unlawful assemblage dispersed by militia, when 4058.
Modification, of judgment, order or proceeding in district court not to be made unless upon notice within six months, rule xlv, p. 1431.
Money, and interest 2497-2501. See Civil Practice.
Accounts not vitiated 2498.
Bank notes, except federal currency, not to circulate as 343.
Bonds, official, and obligations of debt payable in legal money, what 2501.
Interest and money 2497-2500.
Interest, legal rate defined 2499.
Interest, rate may be agreed to, how 2500.
Legal interest rate seven per cent 2499.
Money of account, what 2497.
Official bonds and obligations of debt payable in legal money 2501.
Principal only to draw interest after judgment 2500, 5271.
Public, statement of, to be published 277.
Rate of interest may be agreed to between parties 2500.
Rate of legal interest, what 2499.
State not to coin 137.
State treasury, not to be drawn from except on appropriation 277.
Mongolian labor on reclamation lands forbidden, when 3101. See Chinese.
Mongolians, act relating to adoption of children does not apply 5834.
Mongolians or Chinese not to be employed on public works, when 3483-3485.
Monte, game of prohibited, penalty 6518.
"Month" means calendar month unless otherwise expressed 5475.
Moral improvement to be encouraged by legislature 353.
Mortality tables. See Appendix, p. 2114.
Mother, consent of on adoption of children 5828.
Mother, may be witness in action to determine paternity of illegitimate child 765.
Mother, when entitled to damages for death by wrongful act 5648.
Mother, when may sue for seduction of danghter 4995.
Mortgage. See Civil Practice, Revenue.
Assessed how 3786, 3790. [These sections repealed by special session of 1912.]
Chattel, statute of frauds affects, how 1080.
Claim against estate, when 5967.
Conveyance not deemed, whatever terms 5518.
Debts and mortgages assessed, how 3788.
Discharged, how 1049-1052.
Estate, how mortgaged 6146.
Exemption of homestead from 288, 2143.
Failure to discharge, penalty 1052.
Mortgage—continued.
False swearing as to satisfaction of 3755, 3756.
Foreclosure of 5501-5503.
Growing crop on 1080.
Guardian not to mortgage property 6165.
Homestead, husband and wife to join in giving on 288.
Injury during foreclosure enjoined 5519, 5520.
Lien on property, form of claim for 5967.
Liens and mortgages discharged, how 1049-1051, 3756.
Lis pendens, in action regarding 5021.
Not a revocation, when 6214.
Owner of, for purposes of taxation 3787.
Payment of 6053.
Personal property, how 1080.
Selling or removing with intent to defraud 6697-6700.
Possession mortgaged property, who deemed owner 3631.
Possessory claim, mortgage on 1090.
Recorder, duties as to 3789.
To furnish list of, to board of equalization 3638.
Records of chattel mortgages, book of, recorder to keep 1080.
Report of, must be made to board of equalization 3638.
Satisfaction of, false affidavit 3755, 6014.
Tax law of 1911, sections 3786-3790 repealed by special session of 1912.
Motions and orders 4843, 5202, 5328, 5362-5366, 5702, 5757, rules vii, x, xi, xii, pp. 1427, 1430. See Civil Practice.
Motto of state 4402.
Mountain lion, bounty for 718-722.
Municipal corporations. See City, Town, Civil Practice.
Funds not to be used for sectarian purposes 362.
May be formed under special act 338.
Officers to make provision for support of 405.
Prohibitions against becoming stockholder or loaning credit 347.
Municipal courts 316-324. See Recorder's Court 4853-4860, Civil Practice.
Appeals from 837.
Court of justice 316, 4828.
Created by legislative act 324.
Dockets kept, how 835.
Establishment and jurisdiction 324.
Jurisdiction and powers 832, 835.
Legislature may establish 316.
Practice and procedure 832.
Police judge to preside over 831.
Warrants run to whom 838.
Municipal corporations, property exempt 3621.
Municipal funds not to be used for sectarian purposes 362.
Municipal improvements, bonds for 991-998.
Indebtedness, unlawful voting for 981.
Officers, refusing inspection of finances 983.
Tax, excessive, voting for 976.
Municipal fine, district court has jurisdiction of cases involving 321, 5721. See Civil Practice.
Municipality, may have contract declared void if public officer interested 2829.

Municipality, need not give undertaking on appeal 5346.
Murder, assault with intent to commit 6413.
Death by dueling deemed 6422.
Defined 6384, 6389.
Degrees of 6386.
Perpetrated by arson 6625.
Reward offered by governor, certain cases 2831, 3905-3907.
Statute of limitations does not run against 6921.
Trial, burden of proof 7174.
While attempting to escape 6819.
Music teachers, libraries and certain property of, exempt from execution 5288.
Mutual fire insurance company, violation of act, punished, how 1290, 1295, 1298. See Corporations.

N

Names and emblems 2502-2505.
Changing names of individuals, procedure 5335-5337.
Corporation, society, association first acquiring name entitled to 2502.
Emblems and names 2502-2505.
Injunction may issue restraining parties attempting use or acquire society name 2504.
Insignia or badge society or corporation illegal, when 2503.
Name acquired first by corporation, society, association, belongs to it, when 2502.
Name of incorporated society or association, unlawful to use without authority, when 2502, 6716-6717.
Name of individual changed, procedure 5335-5337.
Penalty for using name or wearing insignia of society or corporation, illegal, when 2505, 6716-6717.
Special or local law for change of names, invalid 278.
Unlawful to use name of incorporated society or association without authority 2502, 6716-6717.
Wearing insignia society or corporation illegal, when 2503.
Names of individuals changed, how 5835-5837. See Civil Practice.
Special or local law for changing of, invalid 278.
Narcotic drug, physician or surgeon under influence of, causing death 6410.
Sale of without prescription 6543, 6544. See Board of Pharmacy.
Narrow-gage railroads. See Railroads, Railroad Commission.
National bank, may become state bank, how 652.
National convention, delegates to, when and where elected 1737, 1760, 1834. See Elections, and see Statutes 1883, p. 28, Cutting's Compiled Laws, secs. 1678-1692, continued in force by Revised Laws, sec. 1737.
Natural gas wells, bounties for 702-717.
National guard 3965-4086. See State Militia.
Naturalization 2506-2544.
Affidavit to petition for naturalization, form of 2540.
Affidavit, witnesses to petition for naturalization, form of 2540.
Naturalization—continued.
Alien arriving entitled certificate registration from secretary commerce and labor, when 2514.
Alien desiring to become admitted to citizenship, procedure 2517.
Alien enemies not allowed to become naturalized, when 2508.
Alien enemies prohibited, when 2508.
Alien enlisted armies United States, honorably discharged exempt, certain formalities to become naturalized 2506.
Alien honorably discharged from service in navy or marine corps admitted to citizenship, how, when 2511.
Alien of African nativity and descent, honorably discharged, entitled same naturalization privileges as others 2507.
Alien seaman of merchant vessel United States accorded certain privileges to become naturalized, what 2509.
Anarchists and polygamists disqualified to become citizens 2520.
Appropriation carrying out naturalization laws, what 2542.
Bureau of immigration and naturalization established, purposes defined 2514-2544.
Certificate of naturalization defective, deemed valid, when 2512.
Certificate of naturalization, form of 2540.
Certificate of registration given aliens by secretary commerce and labor, contain what 2514.
Certificates defective, validated, how 2512.
Chinese cannot be naturalized, when 2510.
Citizenship procedure to acquire, what 2517, 2506-2544.
Clerk of court, duty in naturalization proceeding, what 2525.
Congress to regulate 114.
Copies of certified naturalization records admissible in evidence, when 2541.
Counterfeiting certificates of citizenship punishable, how 2530.
Courts having jurisdiction to naturalize, what 2516.
Declaration of intention and naturalization certificates, kept where 2525.
Declaration of intention and petition to become citizen, bound and indexed 2527.
Declaration of intention, become citizen, form of, contain what 2540.
Declaration of intention, become citizen, not required of honorably discharged soldier, when 2506.
Decrees set aside, procedure 2528.
Defective naturalization certificate validated, how, when 2512.
Deposition, when may be used as proof, proceedings 2523.
Duty, secretary commerce and labor toward data on aliens arriving 2514.
Evidence, certified copy records, when 2541.
Exempt from certain formalities, honorably discharged soldiers, when 2506.
False certificates of citizenship issued, punishable, how 2529.
False certification records, punished, how, proceedings 2535.
Federal laws pertaining to, defined 2506-2544.

Naturalization—continued.
Fees, chargeable and disposed of, proceeding 2526.
Fees, illegal, punishment for receiving, proceeding 2533.
Form, declaration of intention become citizen, and other forms 2540.
Grounds to vitiate certificate, what 2528.
Government United States may oppose applications, when 2524.
Hearings in courts, proceedings must be public 2522.
Honorably discharged soldiers exempt, certain formalities 2506.
Illegally issuing certificates citizenship, punished, how 2531.
Illinois defective naturalization certificates, validated, how 2513.
Immigration and naturalization bureau established, for what purposes 2514-2544.
Immigration bureau established, purposes of 2514-2544.
Immigration stations throughout United States supplied data on aliens, by whom, when 2514.
Jurisdiction over naturalization given what courts 2516.
Limitation when prosecutions for violation of act must be commenced 2537.
Naval or marine soldiers after five years service entitled citizenship 2511.
Notice of intention become citizen filed and published, by whom, when, where 2518-2519.
Oath required aliens desiring become citizens, what 2517.
Penalty for clerks failing comply provisions of act, what 2525.
Perjury and aiding unauthorized person to become citizen, defined 2536.
Persons who owe allegiance to United States may become citizens, how 2543.
Petition, contain what, form of 2540.
Filed, when, where 2518-2519.
Polygamists and anarchists disqualified to become citizens 2520.
Possession blank certificates citizenship unlawful, punished, how 2532.
Procedure for alien to become citizen United States, what 2517-2520.
Proceeding to set aside naturalization, defined 2528.
Proof by deposition, when permitted 2523.
Prosecutions for violation of act must be commenced within what time 2537.
Punishment, false certificates, proceedings, defined 2535.
Issuing false certificates, proceedings 2529.
Neglect render accounts, proceedings 2533.
Perjury and aiding person not authorized to become citizen 2536.
Receiving illegal fees, proceedings, what 2533.
Unlawful possession certificates, defined 2532.
Records declaration intention certificates kept, where 2525.
Residence required of honorably discharged soldiers when applying for certificates 2506.
Rules, secretary commerce and labor, power to make 2541.
Naturalization—continued.
Seamen aliens on U. S. merchant vessels deemed American citizens and granted privileges, what, when 2509.
Secretary commerce and labor allowed additional employees 2515.
Have charge all naturalization matters 2514.
Power to make rules 2541.
Soldiers honorably discharged exempt from certain formalities, what, when 2506.
Speak English, prerequisite to naturalization, when 2521.
Time required for aliens to declare intention and acquire residence before becoming citizens 2517.
Time required for alien seamen on U. S. merchant vessels declare intention become citizens 2509.
Time required of honorably discharged soldiers to prove residence become citizens 2506.
Unlawful, naturalization thirty days before election 2519.
United States district attorney, duty set aside decrees, when 2528. See Civil Practice.
Naturalized citizen, must produce certificate before registration for election 1711.
Naval service, persons in to enjoy suffrage 252.
Necessaries furnished wife, when reasonable value may be recovered from husband 2176.
"Neglect," "negligence," etc., defined 6294(1).
Neglect of husband to provide common necessaries, when ground for divorce 5838(7).
Neglect to perform official act, ground for removal from office 2851.
Neglected child, defined 728.
Negligence, criminal, when element of crime 6271.
Injury caused by gross negligence of common carrier, mill or mine operator, damages recoverable notwithstanding slight negligence of employee 5651.
Questions relating to, for jury in action for death or personal injury against common carrier, mine or mill operator 5651.
When common carrier, mill or mine operator liable for death or injury of employee 5650.
Negligent fire, penalty 6633.
Negligent or reckless operation of steamboat or boiler causing death 6408.
Negotiable instruments (in general) 2548-2672.
Absence or failure of consideration, defense, when 2575.
Accommodation party, who, liable, when, 2576.
Actions on, parties who may be made 5002.
Agent dishonoring may notify principal 2641.
Ambiguous language in instrument construed, how 2564.
Assignment before due cuts out equities 4988.
Bankrupt or insolvent, notice of dishonor, given to whom 2648.
Blank indorsement convertible, how, by whom 2582.
Blank indorsement, defined 2581.
Broker or agent, when liable 2616.
Conditional indorsement, effect of 2586.
Consideration presumed, when 2571.

Negotiable instruments—continued.
Corporation or infant, indorsement or assignment passes property, when 2569.
Date deemed prima facie true, when 2558.
Defense in hands of other holders, what 2605.
Delay in giving notice of dishonor, excused, when 2660.
Delivery essential to validity, when 2563.
Delivery presumed, when 2563.
Delivery prima facie authority to holder to fill blanks, when 2561.
Discharged, how 2666.
Dishonored, may be protested for nonpayment or nonacceptance, when 2665.
Drawer admits existence of payee, when 2608.
Drawer may limit personal liability, how 2608.
Equivalent to order to pay, when 2634.
Every holder deemed holder in due course, exception 2606.
Exhibited and delivered when payment demanded 2621.
Foreign bills exchange may be protested, when 2665.
Forged or unauthorized signature void, payment enforced, when 2570.
Holder entitled to lien, when 2574.
Holder for value, who 2573.
Holder in due course, who 2599.
Having knowledge of defect, liable, when 2601.
May enforce payment, when 2604.
When not considered 2599.
Holder may fill blanks in, when, effect 2561.
Holder may properly date, when 2560.
Holder may renounce right, how 2669.
Holder may sue, how 2598.
Holidays regarded 2744.
Immediate right of recourse accrues, when 2631.
Incomplete, not valid, when 2562.
Infant or corporation indorsement or assignment, effect of 2569.
Indorsed to bank officer, effect of 2589.
Indorser in blank, liable, when, to whom 2611.
Indorser in representative capacity may avoid personal liability, how 2591.
Indorser, liabilities, defined 2614-2615.
When so deemed 2610.
Indorsers, joint and several, liability 2615.
Liable in sequence, exception 2615.
Indorsement, conditional, effect of 2586.
In blank, what 2581.
In blank, convertible by whom, how 2582.
May be canceled, when, effect 2595.
May be special or in blank or qualified or conditional 2580.
Must be for entire amount 2579.
Presumed at place executed 2593.
Qualified, defined 2585.
Indorsement restrictive, rights conferred 2584.
When 2583.
Indorsement, special effect of 2587.
Special or in blank, qualified or conditional, when 2580.
Special, defined 2581.
Sufficient, when 2578.
Negotiable instruments—continued.
Without qualification warrants, what 2613.
Instrument containing provisions otherwise than as to payment, negotiable, when 2552.
Instrument continues negotiable, how long 2594.
Instrument, how negotiated 2577.
Need not follow language of act 2557.
Negotiable, must contain what essentials 2548.
Not negotiable, when 2552.
Payable at certain time 2551.
Payable to order, vests title where 2596.
Reissued, effect of 2597.
Joint and several indorsers, liable, how 2615.
Joint parties not partners, notice dishonor, given how 2647.
Language, ambiguous, how construed 2564.
Larceny of, penalty 6645.
Liable for indorsement in blank, when, to whom 2611.
Liabilities of indorser, what 2614-2615.
Liability of maker 2607.
Liability of person signing for another 2567.
Mailing notice in postoffice deemed notice dishonor, when 2652-2653.
Material alteration avoids liability, exception 2671.
Material alteration, defined 2672.
Maturity, day of, construed 2632.
May cancel indorsement, when, effect 2595.
Misdescription does not invalidate, when 2642.
Misspelled or wrong name, how indorsed by payee 2590.
Negotiability, what constitutes 2548.
Negotiation presumed before maturity, when 2592.
Negotiator warrants what 2612.
Not invalid when wrongly dated 2559.
Notice, dishonor given, when 2649.
For benefit of all parties given, how 2639-2640.
Need not be signed, when 2642.
Of dishonor by agent, given, how 2641.
Of dishonor, dispensed with, when 2659.
Given antecedent parties, how, when 2654.
Given how, when 2636-2638.
Not required to be given by indorser, when 2662.
To drawer not required, when 2861.
To whom given, 2644, 2636-2638.
Unnecessary, when 2663.
Waived, when 2656.
When partners, given, how 2646.
Notice of infirmity, when deemed 2603.
Notice of nonacceptance or dishonor may be written or oral 2643.
Notice to addressee given, when 2655.
Notice, to whom given 2644, 2636-2638.
Order or promise to pay when not unconditional 2550.
Omission to give notice dishonor does not prejudice whom 2664.
Parties to actions on 5002, 2548.
Payable at certain future time, defined 2551.
Payable on demand, when 2554.
Payable to bearer, when 2556.
Payable to order, when 2555.
Payable, when 2632.

Negotiable instruments—continued.
Payment in due course deemed made, when 2635.
Persons liable on instrument. when 2565.
Presentment for payment, delay in, excused, when 2628.
Presentment for payment, dispensed with, when 2629.
Made how, when 2620.
Must be made, where 2619.
Must be made, when 2618.
Necessary, when 2617.
Not necessary, when 2617.
Not required of indorser, when 2627.
When sufficient 2619.
Presentment, made to persons not partners, how 2625.
Must be made during business hours to banks 2622.
Must be made with reasonable diligence 2628.
Not required for payment 2626.
To partners liable, made how, when 2624.
To representatives of deceased person, made, how 2623.
Principal liable for instrument signed by agent, when 2567.
Principal liable for signature by "procuration" 2568.
Qualified indorsement, what 2585.
Recourse, right of, immediate 2631.
Renunciation of rights of holder affects others, how 2669.
Restrictive indorsement, what 2583.
Rights conferred on indorsee by restrictive indorsement 2583.
Rights of persons secondarily liable 2668.
Secondary liability, discharged, how 2667.
Signature by procuration operates, how 2568.
Signature in blank, liable as indorser, when 2611.
Signature may be made by agent, when 2566.
Special indorsement, effect of 2587.
Defined 2581.
Subsequent indorsers relieved by cancelation, how, when 2595.
Sum payable, defined 2549.
Time allowed giving notice dishonor 2650, 2651.
Time of payment determined, how 2633.
Title deemed defective, when 2602.
Title to vest in holder, date of delivery 2559.
Transfer without indorsement, effect on title 2596.
Unauthorized or forged instrument void 2570.
Unconditional order or promise, defined 2550.
Unintentional cancelation of, inoperative, when 2670.
Unqualified order or promise, defined 2550.
Validity not affected by certain omissions or defects 2553.
Value defined 2572.
Waiver of protest deemed sufficient, when 2658.
What acceptance engages and admits 2609.
What constitutes indorsement 2610.
What constitutes negotiability 2548.
What negotiator warrants 2612.
When all must indorse 2588.
Negotiable instruments—continued.
When dishonored by nonpayment 2630.
When not holder in due course 2600.
When party is dead, notice dishonor given, who 2645.
When person liable is dead, presentment made to whom, how 2623.
When waiver notice dishonor binding, exception 2657.
Negotiable instruments (Bills of Exchange) 2673-2730.
Acceptance deemed complete, when 2684.
Acceptance for honor deemed an acceptance 2710.
Acceptance, general or qualified, defined 2686.
May be made, when 2685.
Must be in writing 2679.
Notary public may demand 2747, 2748.
On one part only, made how 2728.
On separate paper does not bind, exception 2681.
Qualified, defined 2688.
Supra protest, what 2708.
Must be in writing 2709.
Acceptor for honor, liable, when 2711-2712.
Acceptor liable for payment, when 2729.
Actual acceptance, defined 2682.
Bankrupt or insolvent served with protest, how 2705.
Bills in a set one bill, when 2725.
Certain acts constitute acceptance, when 2684.
Defined 2673.
Dishonor of foreign, protest 2699.
Dishonored by acceptor, protest 2717.
Dishonored by nonacceptance, when 2696.
Does not operate as assignment 2674.
Drawer and all indorsers, discharged for want of presentment, when 2691.
Drawers and indorsers released from liability, when 2691.
Effect of refusal to write acceptance on paper 2680.
Effect of qualified acceptance, what 2689.
Foreign, defined 2676.
Foreign, protested, how 2699.
General acceptance, defined 2686.
General acceptance at particular place, when 2687.
Holder by indorsement liable on all parts, when 2727.
Holder may refuse qualified acceptance, when 2689.
Holder may require acceptance written on bill, when 2680.
Holder may treat as dishonored, unless accepted in writing, when 2680.
Holder may treat as promissory note, when 2677.
Inland, defined 2676.
Lost or destroyed, protested, how 2707.
May be addressed to two or more drawees, how, when 2675.
Maturity calculated, how 2713.
Notarial act founded on declaration of payer, how 2720.
Notaries public may protest 2665, 2699-2707, 2747, 2748, 2755.
Otherwise than foreign, not necessary to protest in case of dishonor, when 2699.

Negotiable instruments—continued.
Payer entitled to documents, when 2724.
Payment for honor may be attested, how 2719.
Payments, notary public may demand 2747, 2748.
Preference to payers, given when 2721.
Presentment to bankrupt or insolvent, made to whom 2692.
Presentment to drawers who are partners, made, how 2692.
Presentment for acceptance must be made, when 2690.
Presentment for acceptance must be made at reasonable hour 2692.
Presentment for payment to acceptor for honor made, how 2715.
Presentment or negotiation must be made within reasonable time 2691.
Presentment where drawee is dead, made how, to whom 2692.
Protest dispensed with, when 2706.
Protest made, by whom 2701.
Protest made on copy, when 2707.
Protest must be made when dishonored by acceptor for honor 2717.
Protest must specify what 2700.
Protest on day of dishonor 2702.
Protest subsequent to nonacceptance made, how 2704.
Protest to precede presentment to acceptor for honor or referee in need 2714.
Protest, where acceptor is bankrupt or insolvent, made to whom, how 2705.
Protested, when 2703.
Qualified acceptance defined, effect 2688.
Qualified acceptance, what 2686.
Reasonable delay, excused in presenting for acceptance 2694.
Referee resorted to in case of dishonor, nonacceptance or nonpayment 2678.
Right of recourse accrues when dishonored by nonacceptance 2698.
Right of recourse on payment for honor, lost, when 2723.
Right of recourse on presentment for acceptance lost, when 2697.
Subsequent protest may be made, when 2704.
Subrogation of payer 2722.
Time allowed drawee after presentment 2683.
True owner of bill when divided in parts 2726.
When may be presented for acceptance 2693.
When presentment for acceptance is excused 2695.
Where protested 2703.
Who may pay for honor 2718.
Whole bill discharged, when 2739.
Negotiable instruments (Promissory Notes and Checks) 2731-2736.
Certification by bank deemed acceptance 2734.
Check not assignment of funds of drawer, when 2736.
Check is bill of exchange, when 2732.
Drawer discharged, when 2735.
Presentation for payment, made, when 2733.
Negotiable instruments—continued.
Promissory note, defined 2731.
General provisions 2737-2743.
Acceptance, defined 2738.
Action, defined 2738.
Bank, defined 2738.
Bearer, defined 2738.
Bill, defined 2738.
Delivery, defined 2738.
Holder, defined 2738.
Holidays, recognized 2744.
Indorsement, defined 2738.
Instrument, defined 2735.
Issue, defined 2738.
Performance, following holiday 2741.
Person, defined 2738.
Person primarily liable, defined 2739.
Person secondarily liable, defined 2739.
Provisions not retroactive 2742.
Reasonable time, defined 2740.
Rules of law-merchant govern, when 2743.
Terms defined 2738-2740.
Unreasonable time, defined 2740.
Value, defined 2738.
Written, defined 2738.
Negotiable or other instruments, larceny of 6645.
Neuter gender, included in the masculine 5475.
Nevada, act of Congress enabling state 209-220.
Nevada historical society 2545-2547.
Biennial report 2546.
Created how 2545.
Duty of officers 2546.
Officers of, who 2545.
Powers and duties 2545-2547.
Recognized as state institution 2545.
Report biennially 2546.
Reports, distributed 2547.
Published, how, when 2547.
State institution 2545.
Nevada national guard 3965-4086.
Name of, state militia 3981. See State Militia.
Nevada, proclamation of President Lincoln announcing admission 430.
Nevada, reports of supreme court decisions, clerk of supreme court, powers and duties 2947-2950.
Compilation of 4897-4899.
Secretary of state to distribute and sell 2951.
State printer to print 2948.
Supreme court to appoint attorney to assist in compilation 4899.
Nevada state banking board 664. See Banks and Banking.
Nevada state flag 3353.
Nevada, territorial organization 192-208.
New certificate of stock of corporation, district court may order in lieu of one lost 1165.
New election on tie vote, when ordered 1796. See Elections.
New matter, when and how pleaded. See Civil Practice.
New townships created, effect 2783, 2784.
New trials. See Civil Practice, Criminal Practice.
District court, civil 5319-5324.
Criminal 7232-7237, 7286, 7469.
Justice's court, criminal 7494-7495.
Supreme court, may direct 4835.

Newspapers, abstracting from recorder's office or defacing, penalty 1642.
Bankruptcy proceedings, certain, to publish 570.
County recorder to purchase and preserve 1639-1642.
Decisions of supreme court, published in 4481.
Elections, publications for. See Elections.
Freedom of press guaranteed 171, 238.
Publication of notice in, of taking testimony for perpetuation 5466.
State advertising in 4481.
State library, certain, preserved in 2933.
Statutes and journals of legislature, certain, to receive 2933.
Night watchman of capitol building, treasurer to designate, salary 4401, 4420.
Nighttime, defined 6294(19).
Nomination for office, contest under primary law 1764.
Nomination papers, primary elections, filing 1737-1742.
Failure to file, penalty 1765. See Elections.
Nonjudicial days, enumerated, powers of courts on 4870.
How time computed 5482.
Nonresidents, except Chinese, may own property 3602.
Nonresidents, service in actions and proceedings. See Civil Practice.
Nonsuit, in what cases granted and how entered 5237, 5592. See Civil Practice.
Normal schools. See Public Schools, University of Nevada.
County normal schools 3425-3430.
Legislature may establish 357.
State normal school 4639-4645.
Notary public. See Conveyances, Negotiable Instruments.
Acceptance of foreign and domestic bills of exchange, may demand 2747.
Acknowledgments, form of 1025, 1026.
May take and certify 1020, 2749.
Acts legal in any part of state 2764.
Affidavits, may take 2750.
Appointive office 2762, 2765.
Bills of exchange, acceptance, may demand 2747, 2748.
Payment, may demand 2747, 2748.
Protest of 2665, 2699-2707, 2747, 2748, 2755.
Bond of, amount, district judge to approve 2745.
Bond and oath filed with county clerk 2746.
Certified copy of record to give on demand, prima facie evidence 2754, 2759.
Commercial paper, powers and duties concerning 2665, 2669-2717, 2747, 2748, 2755.
Commission, fee for 2745.
County clerk, oath and bond filed with 2746.
County recorder, records delivered to, when 2757.
Records of delivered to for successor 2757.
Depositions, may take 2750.
District judge, bond of, to approve 2745.
Duty, neglect of, penalty 2756.
Evidence, certified copy of record to be prima facie 2754, 2755, 2759.
Fees allowed 2004, 2018, 2760.
Fees for commission, amount to go to library fund 2745.
Notary public—continued.
Female, proposed constitutional amendment allowing to become 371.
Governor may appoint unlimited number 2762.
Instruments, records concerning to keep 1098, 1099, 2751, 2752.
May act in any part of state 2764.
Neglect of duty, penalty 2756.
Number of, unlimited 2762.
Oath and bond filed with county clerk 2746.
Oaths, may administer 2750, 5483.
Official, to take, endorsed on commission 2745.
Office, term of 2763.
Official acts, record of, to keep 1098, 1099, 2751, 2752.
Penalty for neglect of duty 2756.
Predecessor, records of certified copies, may deliver 2759.
Protest of bill of exchange 2665, 2699-2707, 2747, 2748, 2755.
Powers generally 2747.
Records delivered to county recorder on death, resignation or removal 2757.
Record of official acts, to keep 1098, 1099, 2751, 2752.
Seal to have and keep, form of 2753, 5288.
State, any part of may act in 2764.
Successor, records to be delivered to 2758.
Term of office 2763.
Unlimited number may be appointed 2762.
Note, copy of as complaint in justice's court 5736.
Note, promissory, or other instrument, when admitted in justice's court unless denied by verified answer 5770. See Negotiable Instruments.
Notice of location of mining claim, form and posting 2422. See Mines and Mining.
Notice of record, conveyance recorded, when 1038, 1040.
Notices, civil practice 5367-5375. See Civil Practice.
Noxious animals, bounties for 718-727. See Bounties.
Noxious vermin, extermination of 455.
Nuisance, abatement by cities 794(18-31, 53).
By counties 1562.
By towns 877, 919-921.
Action for damages for and abatement 5504-5513. See Civil Practice.
Constable to abate, when 920.
County commissioners to abate, when 1562.
Defined in action to abate 921, 1562, 4853, 5504.
District attorney to abate, when 1562, 5504.
Horticultural commissioners to abate, when 447, 448.
Officers, failure to abate, penalty 1562.
Penalty for maintaining 6546.
Sheriff to abate, when 920.
Number, singular includes plural 5475.
Numerals, permissible in court proceedings 4885.
Nuncupative will 6204, 6206-6208. See Wills, Estates of Deceased Persons.
Nursery stock, transporting without certificate of inspection, penalty 6776, 6777.
Nye County, creation, boundaries and seat 390, 1451, 1468, 1472, 1481, 1482, 1487.

O

Oath, constitutional, teachers public schools must take 357.
Deputy assessor, what 3635. See Revenue.
Election officers, elections, and electors. See Elections.
Fence viewers, what 3607.
Includes affirmation 6353.
Legislature may prescribe as test of electoral qualification 255.
Military, form of 3972, 3969.
Official 370.
Of office, no fees for 2039.
Of officers elected, where taken 2788-2790.
Pertaining to assessor and assessment of property 3626, 3680. See Revenue.
Pertaining to election officers and elections. See Elections.
Who may administer 5483. See Civil Practice, Elections.
Oaths and affirmations, bankruptcy 562.
Objections. See Civil Practice.
Obscene, indecent or immoral show, act or performance 6461.
Letters or writing, sending or delivering 6438.
Literature, offenses concerning 6461.
Literature or publications, indictment for 7069.
Obstetrics. See Medicine, Surgery and Obstetrics 2358-2374.
Obstructing railways, penalty 6586, 6748.
Obtaining license, diploma, permit or other writing by false representation 6719.
Obtaining or seeking to obtain money or value on promise of influence of legislator 6318.
Occupancy. See Civil Practice.
Odd Fellows, incorporated 1418. See Corporations.
Offer, to allow judgment in justice's court not admissible in evidence, when further costs not recoverable 5777.
Offering false evidence, punished, how 6357.
Committed prior to act taking effect 6832, 6833.
Offenses, bail to be allowed for except in certain capital cases 236.
Office, appointee to vacancy to hold until next election 301. See Constitution, Elections, Officers Generally.
Exercising functions of without authority 6332.
Wrongful exercise of 6804.
Office-holding and suffrage, color or previous condition of servitude, not bar to 411.
Officer. See Constitution, Elections, Officers Generally, Civil Practice.
Officers generally 2765-2767. See State Constitution.
Accounts, affidavit of auditing officer 2844.
Accounts of submitted to grand jury, when 4924, 4925, 7004.
Accounts of to be examined 2855-2860.
Acknowledgments, keep record, when 1098, 1099.
Action for unlawful holding 1814.
Additional force of bond 2876.
Advertising, official 2867.
Age of required to be eligible for certain office 2766.

Officers generally—continued.
Appointees to fill vacancies, duty to qualify 2806.
Asking or receiving bribe 6331.
Asking or receiving excessive fee or compensation or where none is allowed 6738.
Attachment fees and salaries 2864-2866.
Blackmail of 6739.
Bond, breach of condition cause of vacancy 2802.
Failure to furnish new, vacancy 2882.
Bonds, 2780-2786.
Civil actions not required, when 5487.
General provisions concerning 2868-2890. See Bonds, Official.
Surety companies may furnish 695-701.
Charge certain fees, when 2019.
Chosen, as prescribed by law 378.
Civil officers subject to, penalties 4079.
Claims or warrants, personal, may sell or assign 2846.
Commission or certificate of election, to receive 2796.
Commissions, how issued 2794.
Computation of mileage 2040.
Contracts, interest in forbidden, penalty 2827-2830, 6331.
Conviction forfeits trust 6287.
Conviction of felony, or malfeasance, vacancy 2802.
Deputies, may appoint 2848-2850.
Deputies to take oath 2792.
District judge to charge grand juries, duties of certain officers 4924, 4925, 7004.
District court official reporter 4908-4913.
Drunkenness in office, removal, penalty 2861-2863.
Duel, failure to prevent 2823.
Duties of certain officers, district judge to give in charge to jury 4924, 4925, 7014.
Duties, failure to discharge cause of vacancy 2799.
Granting to other than deputy right to discharge, penalty 2822, 6317, 6331.
Election, commission or certificate of to receive 2796.
Contests, limitation of actions 4972, 4973.
Officers violating duty 2814-2816.
Reported to secretary of state 2795.
Time of 2768, 2773.
Eligibility (Const.) 371.
Embezzlement of money or property 6345, 6653, 6656-6660.
Employees, leave of absence, when 4109.
Employing or paying clerks or assistants without appropriation therefor, misdemeanor 6662.
Examination of accounts 2855-2860.
Execution for fees, to have, when 2027.
Failing in duty to pay over money 6658, 6659.
Failure of duty, misdemeanor 6289.
Failure to furnish report, statement or information to 6805.
False account, keeping or making false entry 6658.
Falsely personating 4291, 6734.
Fee book, to keep 2020.
Fees, liable to attachment 2864-2866.
Table of, to post 2025.
Forfeiture of office for accepting passes 4573.
Forging or counterfeiting signature of 6685.

Officers generally—continued.
Granting to person other than deputy authority to discharge duties, penalty 2822, 6317, 6331.
Impeachment of 334, 335, 6878-6893.
Impeachment, removal or suspension, other laws not affected 6298.
Insanity, cause of vacancy 2799.
Insufficient bonds of 2873, 2875.
Interference with duty of 6329, 6804, 6828.
Irrigation district, who, how chosen 4725. See Water.
Judgment, removal from office 6905.
Knowingly making false or misleading statement in official report or statement 6349.
Keep tax books open for inspection 3752.
Legislative act not to apply, when 2042.
Legislative power to remove 336.
Making false certificate 6375.
Malfeasance or misfeasance, removal for 2851-2853, 6877-6907.
Misappropriation of public funds, felony 3751.
Misconduct of 6331.
Money, failing in duty to pay over 6658, 6659.
New bond required, when 2882, 2884.
Not compelled to make publication unless cost tendered 2026.
Oath, before whom taken, when taken 2790, 2791.
Federal and state, to support (Const.) 169.
Form of 370, 2891.
Of deputy 2792.
Of officer 370, 2786, 2891.
Refusal or neglect to take, causes vacancy 2799.
Obstruction of 6805.
Officer, bribe, asking or receiving 6331.
Official advertising 2867.
Official reporter supreme court 4889-4890.
Official reports examined by board of examiners 4316.
Penalty for charging fees on returns 2041.
Penalties, state militia subject to 4079.
Power to remove (Const.) 336.
Proceedings in district court to remove 2851-2854.
"Public officer" or "officer," terms include what 6294(24).
Public officers interested in contract for public 815, 1522, 6331.
Purchasing or selling warrants, claims or scrip 2824-2826.
Records and documents, stealing, altering or defacing 2817, 6344-6349.
Records of proof of in courts 5409.
Records in public office, may be inspected and copied 3232.
Records, refusal to deliver to successor or on abolition of office, penalty 2819.
Refusing or neglecting to receive person in custody 2820, 6360.
Refusing to aid on command 2823, 4290, 6361, 6606, 6863, 6956.
Removal, cause of vacancy 2799, 336.
From office for misfeasance or malfeasance 2851-2853, 6877-6907.
Notice of, to be given to whom 2801.
Of 337.
Otherwise than by impeachment 6894-6907.
Officers generally—continued.
Reporter, official district court 4908-4913.
Reports, when to be prepared 2929.
Residence, change of place of causes vacancy 2799.
Resign at liberty 2797.
Resignation, how made 2798.
Right to make 2797.
To governor, filed, where 2795.
Resisting, delaying or obstructing 4291, 6362.
Returns, not to charge on 2041.
Riotous assemblage, duties concerning 2836-2843.
Salaries, liable to attachment 2864-2866.
Payable, when 4399-4400.
Increase or diminish 377.
Soldier's pension, fees, not to charge 3914.
Successors in office, refusal to deliver records to, penalty 2819.
Surety company may furnish bonds 695-701.
Tampering with public records 6345.
Tenure of office 379.
Term, when begins 2786.
To post table of fees 2025.
Turn over property to successor, when 3754.
Vacancies, appointees to fill, duty to qualify 2806.
Existence and cause, certified to whom 2803.
Governor, may fill 301.
How filled, term 2812, 2813.
How occasioned 2799.
How supplied 2804-2805.
When, governor to fill 2810.
Vacancy, failure to furnish sufficient bond 2802, 2803, 2874.
Failure to furnish new bond 2882.
When may be declared 2802.
Violation of duty 6828.
Warrants or scrip, when redemption may be refused 2845.
Warrants, scrip or claims, purchasing or selling 2824-2826.
What fees may demand 2005.
When not to charge fees on returns 2041.
Who eligible to office 371.
Who may demand fees 1994.
Official bonds 2868-2890. See Bonds and Undertakings.
Additional, when may be required 2873, 2875.
Approval, record and filing 2872.
Auditor liable, when 3685.
Bonds, official 2868-2890.
Condition expressed 2869.
County treasurer liability on, what 3672. See Revenue.
Defect in, not material, how remedied 2871.
Form of 2868.
Justification of sureties 2878.
Laws applicable to 2869.
New, penalty of 2884.
Number of sureties 2877, 2888.
Subscriptions to, how taken 2885.
Surety company may furnish 2888-2890.
Surety, liability, ratable 2886.
Sureties, death, removal or insufficiency 2873, 2874.
Justification of 2878.
Liability, amount may assume 2879.
Number of 2877, 2888.

Official bonds—continued.
Sureties, released, how 2880, 2881.
Suit on, who may bring 2870.
Time in force 2869.
Official court reporter 5472.
Official oath 370, 2891.
Official reporter of district court 4908-4913.
Official reporter of supreme court, appointed how, by whom, compensation 4889-4990.
Oil lands, annual labor required thereon, what 2395. See Mines and Mining.
Oil lands patented to assignee 3178.
Oil pipe lines and tanks or reservoirs, right of eminent domain may be used for 5606.
Oil tanks for, eminent domain may be used for purposes of 5606.
Oil wells, bounty for sinking 702-706, 712-717.
Oleomargarine, sale of, when unlawful 6526-6528.
Omission or error, in primary election may be ordered corrected, when, by whom 1763. See Elections.
Omission, performance by another 6281.
Open account, limitation of action on 4967-4969.
Operator. See Telegraph 4603-4630.
Open-pit mines, hours of labor in 6557, 6558. See Eight-Hour Laws.
Opinion, copy of to be furnished appellate court on appeal 5356.
Opinions of supreme court, not effective until filed with clerk 376.
To be forwarded with remittitur, S. C. rule xvi, p. 1424.
To be in writing and recorded 4839, S. C. rule xiv, 1424.
Opium, control of 794(78).
Leasing house or room for resort, prohibited 6490-6492.
Selling or smoking 6485-6493.
Oppression by officer or one pretending to be, prohibited 6806.
Optometry act, persons excepted from provisions of 2895.
License fee for practice of 2894.
Qualifications for practice of 2892, 2893.
Violation of act, penalty for 2896.
Oral evidence of loss and contents of writing 5417.
Oral, what pleadings may be in civil action in justice's court 5734.
Order. See Civil Practice.
Ordinance (Nev. Const.) 228, 414-427.
Ores, damages for extraction of from mine, how assessed 5509.
Eminent domain may be used for supplying water for reduction 5606.
False or fraudulent statements or transactions concerning 6710.
Metal-bearing, specimens exempt from execution 5822-5824.
Sold at reduction works, preferred lien upon bullion 5492.
Substituting or changing value of, forbidden 6710.
Original exhibit, when may be brought up on appeal 5344.
Original jurisdiction 319, 321, 4840.
Supreme court has, in contest for state office 1823.
Original horses, not to run at large, taken up and sold, when 2252.
Original writs, what, supreme court and justices thereof may issue 319, 4834.
Ormsby County, action may be brought in, against state for services or advances authorized by law 5653.
Creation, boundaries and seat 390, 1443, 1450.
Orphans, amount of property exempt 3621. See Revenue.
Orphans' home, property exempt, when 3621. See State Orphans' Home.
Superintendent of, may be appointed guardian of inmates, when 735.
Supervision of, conducted how 4094.
Water supply, how provided 4424.
Overloading passenger vessel, death caused by, penalty 6406.
Ouster, judgment for in quo warranto 5657.
"Owner," who included in term 6294(16).

P

Package, defined, under pure food law 3495.
Packing-houses, city may control location of 794(54).
Paleontological remains, exempt from execution 5822-5823.
Panama-Pacific Exposition, bureau of industry, agriculture and irrigation to aid in exhibit at 4489.
Paper to circulate as money, issuance of, when unlawful, penalty 6688.
Paper and papers, as applied to pleading and filing. See Civil Practice.
Panel of trial jurors, how, where and when drawn 4930. See Jury.
Pardons and parole, board of 7623-7634. See Board of Pardons and Parole.
Parent, children taken from custody of, when 734.
Duty to support child 751.
Entitled to guardianship of child 6153. See Guardians, Juvenile Court Law.
May give bond for appearance of child in juvenile court 742.
Notice to on proceeding before justice of the peace to set aside apprenticeship, costs 493.
On adoption of child, relieved of responsibility and rights over 5830.
Person adopting child sustains legal relation of 5830.
Parks, eminent domain may be exercised for 5606.
Parole. See Board of Pardons, Board of Parole Commissioners.
Commissioners, board of, created, powers and duties 7631-7634.
Peace officer, duty concerning prisoner on 7631.
Prisoner on, leaving state without permission deemed escape, penalty 7631.
Prisoner on duty, to report, when 7633.
Prisoners, who and when entitled to 7631.
Rules of, see note to 7634.
Partial partition, actions for, who may bring 5527.
Parties to crimes, classified 6273.
Parties to various actions and pleadings affecting 4986-5010. See Civil Practice.

Partition, actions in and pleading affecting 5527-5583. See Civil Practice.
District court may order 4849.
Estates of decedents in common 6075-6091. See Estates of Deceased Persons.
Fences, expense of erecting and maintaining, divided how, viewers, when appointed, proceedings 3604-3608.
Partner in practice of law, justice of supreme court, district judge and justice of the peace, not to have 4867.
District attorney, restrictions concerning 1610, 1611.
Partnership 2897-2914.
Act to authorize the formation of limited partnerships 2897-2909.
Act requiring partners transacting business to file certificates of partnership 2910-2914.
Assignment of property, publication of, made, how, when, where 2906.
Banking and insurance, not authorized under 2897.
Bankruptcy act (federal), rights under 547.
Capital stock, shall not be reduced or withdrawn 2904.
Certificate, form of, published, when, penalty for failure 2911.
Certificate of, acknowledged and recorded, where, by whom 2900.
Certificate of, contain what 2899.
Doing business without filing, showing names, penalty for 6730, 6731.
Published, how 2910.
To show names 6730.
Change of partners causes new certificate to be filed and published 2912.
Copies, entries, made by county clerk evidence of fact 2914.
County clerk to keep register of, how 2913.
Creditors affected by assignment, how 2905-2906.
Debts of, affect capital stock, how 2904.
Dissolution of, advertised, how, when, where 2908.
Dissolution of limited, effected how 2908.
District attorney, partner not to oppose in same action 1610.
Doing business without filing certificate showing names, penalty 6730, 6731.
Estates of decedents, surviving partner, rights and liabilities 6025.
Evidence of fact, what 2914.
Fees, county clerk keeping register, designated 2914.
Form of certificate signed by partners 2911.
General assignment, not allowed, when 2905.
General assignment, not valid, when 2905.
General partners deemed special partners, when 2907.
General partners liable for debts, when 2907.
General, special partners, who 2903.
Insolvency of, affects general assignment, how 2905.
Liability of partners 2909.
Limited, formed for what purposes 2897.
Limited, dissolved, how 2908.
Limited, renewed, how 2902.
New certificate of change of partners filed and published, how, where 2912.
Partnership—continued.
Number of partners designated 2898.
Partners responsible for debts, when 2904.
Penalty, failure, file and publish certificate of, what 2911.
Pleadings in actions affecting partners and partnership. See Civil Practice.
Publication assignment, made how, when, where 2906.
Publication, certificate of, where 2901.
Renewal of, limited, how 2902.
Responsibilities of partners 2898.
Special, general partners, who 2903.
Special partners deemed general, when 2907.
Special partners not responsible for debts, when 2907.
Surviving partner, rights and liabilities 6025.
Suits against general partners only, exceptions 2907.
Terms of business, designated 2899.
Party and parties to actions. See Civil Practice.
Passenger injured on platform of car in violation of regulations of railroad company not to recover damages 3560.
Passenger may recover from railroad company for refusal to transport 3559.
Passenger rates, may be regulated by legislature 278.
Passengers, on railroads, conductors may eject 3561.
Passes on railroads to state officers and other persons prohibited, exception 4490, 4556, 4573.
To be reported to railroad commission 4567(a).
Patent, application for mining claim to be shown in adverse action 5526. See Mines and Mining.
For mines, application for, suit on adverse claim 2384.
Of United States on state for land, when record or copy admissible in evidence 5415.
Patent rights, Congress to secure 118.
Patents to land entitled to record 1035.
Patents to mineral lands, how obtained 2383. See Mines and Mining.
Patents to state lands to be signed by governor and secretary of state (Nev. Const. 309) 3211.
Patents, when actions cannot be brought upon by grantee from the state 4948.
On mortgage or debt, county recorder to certify copy as evidence 3789.
Record of, admissible as evidence 5415.
Patented lands, assessment of 3838-3846. See Revenue.
Patented mines, assessment of 352, 1578. See Mines and Mining.
Paupers. See Poor and Poor Laws.
Bringing into state, penalty 2928.
Bringing or leaving in county, penalty 2925.
Commissioners to remove from county when 2922.
Residence of, commissioners to require satisfactory proof of 2921.
Pawnbroker, bailments, duties and powers 536.
Defined 6471.

Pawnbroker—continued.
Duties, violation of, penalty 6465-6471.
Failure to record transactions or report to police, penalty 6465-6467.
Rate of interest, charging excessive, penalty 6470.
Records subject to inspection 6466.
Payment, for property or easement in proceedings in eminent domain 5622.
Peace, bond to keep, forfeiture and recovery 6874-6876.
Breach of, when punishable as contempt in justice's court 5795.
Surety to keep, procedure 6864-6877. See Criminal Practice.
Peace officer, duty to serve subpenas requiring attendance before public service commission 4532.
Peace officers, defined 6937, 7462.
Duty on making arrest 6940, 6944-6950.
Firearms, duty to enforce law concerning 6570.
In towns 888.
Justifiable homicide by 6396.
Not absolved from any duty by reason of state police act 4288.
Paroled prisoners, duties concerning 7631.
Person refusing to aid on command, penalty 2833, 4290, 6361, 6606, 6863, 6956.
Rewards, not eligible for, when 3905.
Who are 6937.
Peddling without license, prohibited 3735.
Penalty and penalties. See Crimes and Punishments, Civil Practice.
Pensions to soldiers, officers not to charge fees concerning 3914.
Percentage games, gambling, penalty for playing or conducting 6518.
Per diem, for one day may be demanded by witness, when served with subpena 5433.
Of jurors, in counties polling over 425 votes 2013.
Of jurors, to be paid each day by party demanding jury, on recovery, reimbursed from losing party 2013.
Peremptory challenge, defined 7143.
Peremptory challenges, number of 5205.
Perishable property, attached, to be sold 5157.
Sale of, not to be stayed by appeal 5355.
Perjury, before grand jury, evidence of juror 7032.
Before registry agent 1719.
By bank officer 660.
By grand juror 7033.
Chapter concerning 6350-6356.
Conviction of, excludes from jury, unless restored to civil rights 285.
False affidavit as to taxes or satisfaction of mortgage 3755.
False affidavit of loss of receipts received from controller 4187.
False affidavit to insurance company relative to death or disability 1317.
False affirmation or declaration, deemed 5448.
False oath as to proceeds of mines 3690.
False oath by official of public utility 4513.
False oath or affirmation before board of pardons 7627.
False oath or list of taxable property 3630.
Perjury—continued.
False oath to report to railroad commission 4543.
False statement to annual report of insurance company 1328.
Indictment for 7066.
Irregularities no defense 6354.
Witness testifying before public service commission not exempt from punishment for 4536.
Permanent limitation of taxes for county purposes, what 3826.
Permitting use of premises for assemblage of anarchists 6616.
Perpetuating testimony 5464-5473.
Manner of taking deposition for 5468.
Perpetuities not allowed except for eleemosynary purposes 372.
Person authorized to determine any question or proceeding asking or receiving bribe 6320.
"Person" defined 6294(14).
Person includes company, partnership, association or corporation 5475-5479.
Persons liable to punishment 6267.
Persons not liable to punishment 6278.
Persons not molested because of religious sentiment 228.
Persons over 21 years of age and not party may serve summons in civil action in justice's court 5732.
Persons shall not be deprived of life, liberty, or property without due process of law 237.
Personal injuries, actions for 5649-5652. See Civil Practice.
Personal property, defined 6294(11).
Suits affecting, procedure. See Civil Practice.
Suits under revenue act 3622.
Personating another 6735.
Personating officer or another falsely, penalty 4291, 6734, 6735, 7179.
Personating physician 2372.
Petit larceny, by lodger 6646.
Defined 6639.
Realty, conversion into personalty 6644.
Petition authorized by law, signing name of another or of fictitious person, penalty 6670.
Petition, for changing name of person, what to state, verification 5835.
For redress of grievances, right of, guaranteed to people 171, 239.
For revival of judgment, when purchaser fails to recover property sold under execution 5306.
To juvenile court, what to state 731.
Verified, for determination of life estate 5584.
Writ, rule or order made to one district judge not to be made to another unless upon written consent, rule xii, p. 1431.
Pharmacy 4495-4514. See Board of Pharmacy.
Physical disability, voter allowed assistance, when 1855.
Physician. See Medicine, Surgery and Obstetrics 2358-2374, Contagious Diseases 2996-3003, Public Health 2952-3003.
Births, duties and liabilities as to 2963-2965, 2972, 2975, 2983-2987, 6450. See Birth.
Certificate of birth, to file, when, penalty for failure 2964, 2972, 2986, 2987.
Coroner may summon 7547.

Physician—continued.
Dental examiners' act not applicable to 4444.
Failing to issue death certificate, penalty 2972.
False impersonation of, penalty 2372.
Giving or prescribing narcotic, when unlawful 6544.
Insane person, to examine, when 2204.
Issuing false death certificate, penalty 2972, 2986, 2987, 6551.
Library and certain property exempt 5288.
Must register with local health officer 2967.
Pharmacy act not applicable to 4512.
Piers, eminent domain may be exercised for 5606.
Pimping, penalty for 6445, 6460.
Pipe and pipe lines for manufacture of sugar beet, eminent domain may be exercised for 5606.
Place of trial, civil action 5011-5015. See Civil Practice.
Criminal action 6393, 6421, 6431, 6908-6920, 7115-7120. See Criminal Practice.
Placer claims, containing lode, how patented 2391.
How located 2387-2389, 2434, 2435.
Patents for, how obtained 2383. See Mines and Mining.
Placing female in house of prostitution, forbidden 6445.
Plaintiff, rights and procedure affecting. See Civil Practice.
Plaster or cement mills, hours of labor in 6559, 6560.
Plat, lost or destroyed, validated, how 5639.
Platforms of political parties, when and how adopted 1759, 1760. See Elections.
Plea to indictment 7089, 7106-7114. See Criminal Practice.
Pleadings, civil action 5035-5086. See Civil Practice.
In bankruptcy proceedings 560.
In tax suit 3665-3679.
Plural number, includes the singular 5475.
Plover, closed season for 2089.
Plumbing trade, city may regulate 794 (44).
Plume birds, unlawful to kill, or destroy eggs 6812.
Plurality of votes cast at election constitutes choice where not otherwise provided by constitution 382.
Pocket gopher, bounty for 723-727.
Poison, administering with intent to kill, penalty 6404.
Poison, sale of, by pharmacists, regulations 4512, 4513.
Poisoning dog, penalty 6775.
Poisoning food, water or medicine, penalty 6541.
Poker, gambling game, penalty for playing 6518.
Police court, appeal may be taken from to district court 837.
Jurisdiction of 832-835.
Police force. See Cities, Towns.
Police, public meeting, may be ordered to attend, when 2832.
Police magistrates, criminal proceedings against minors, duties 741.
Policemen for cities and towns, provisions for 839, 840, 888, 903, 908-919.
Political and historical data concerning State of Nevada 428-430.
Political party, candidates of, how voted for 1753. See Elections.
Political power, inherent in people 231.
Poll books for election, how furnished and distributed 1769.
Poll lists, compared by inspectors of elections 1787. See Elections.
Polls, elections, opening and closing 1776, 1872. See Elections.
Poll tax 3718. See Revenue.
County assessor, ex officio collector 3713. See County Assessor.
Issuing fraudulent receipt for 3714-3717.
Legislature to provide for payment 256.
Roads for benefit of 256, 3841.
Soldiers and sailors, not to pay 252.
Pollution of streams, penalty for 2047, 4716, 4718, 6547.
Pools on horse races, selling or dealing in, penalty for 6518.
Poor and poor laws 2915-2928.
Action by county, against kindred for support of poor 2916-2917.
Counties to support (Const.) 367, 2918-2926.
County commissioners to provide for 1508, 2915-2926.
County, bringing or leaving pauper in, penalty 2925.
County workhouses may be established 2924.
Intemperance, bar to support, when 2916.
Minors, commissioners to apprentice 2919.
Pauper, bringing into state, penalty 2928.
Bringing or leaving in county, penalty 2925.
Entitled to relief, when 2922.
Relief, county where resident, liable for 2922.
Relief, when not entitled to 2923.
Residence, satisfactory evidence of 2921.
To be removed, when 2922.
Transporting of, unlawful, penalty 2925.
Relatives to support in certain cases 2916, 2917.
Sick paupers, death and burial, allowance, 2920.
State, bringing pauper into, penalty 2928.
Support of, commissioners to superintend 2915.
Support of, poor, act construed, terms defined 2927.
Temporary relief to paupers 2922.
When county may recover for relief furnished pauper of another county 2922.
Posse comitatus, refusal to join, penalty 6606.
Possessing or receiving counterfeit gold bars or other material 6687.
Possession, actions affecting, procedure. See Civil Practice.
Lands and tenements, legislature may confer power on justice's court in action where relation of landlord and tenant exists or where possession is unlawfully withheld or obtained 323.
Of real property presumed in legal owner 4955.
Property sold for taxes or obtained by tax deed, secured, how 3666.
Real estate or mining claims, supreme court has appellate jurisdiction of (Const.) 319.

Possession—continued.
Real property, district court has jurisdiction in cases involving 321.
What constitutes 4955-4963. See Civil Practice.
Possessory claim, action for, may be maintained or defended 5849-5856. See Civil Practice.
Conveyance of 1090.
Possessory right, to public lands, improvement required 5852.
Postage, papers and stationery for members of legislature, state to pay, when 291.
Posthumous children, effect of conveyance on 1058, 1059.
Rights of 6129.
Posting bills or advertisements unlawfully 6754.
Posting for not fighting duel, penalty 6425.
Postponement in actions, secured how, procedure affecting. See Civil Practice.
Powder. See Explosives.
Power company, may condemn for right of way 2138.
Power district judge in vacation 4850.
Power lines and plants, when eminent domain may be used for 5606.
Power of attorney. See Conveyances.
By wife 2187.
Form and requisites 1041.
Recorded in office of county recorder imparts notice 1093.
Revocation of 1042.
Power, political, inherent in the people 231.
Of county, sheriff may command, when 2833, 2840.
Powers of Congress 111-128.
Of government, distribution of, no person in one department exercises powers in another, exception (Const.) 258.
Reserved to states 180.
Practice. See Civil Practice, Criminal Practice.
Of courts of justice, local or special laws relating to, invalid 278.
Prairie wolf, bounty for 718-722.
Preamble constitution 229.
"Precept" issued in name of state, court or judicial officer is "writ," when 5475.
Precincts of election, how, when and where established 1768. See Elections.
Precinct officers, elected, by whom 2773. See Elections.
Preferred claim, procedure for recovery of wages as 5494.
To extent of wages for death or injury under employers' liability act 1926.
When wages are 5493, 5494.
Preferred stock of corporations, restrictions 1114. See Corporations.
Pregnancy, advertisements designed to prevent, penalty for 6451-6455.
Pregnancy of defendant, death sentence suspended 7276-7278.
Prejudice, exception to be disregarded unless prejudicial 5315.
Preliminary examination, after demurrer sustained 7101.
After discharge from indictment 7092.
Adjournment 6973, 6974.
Bail, minimum for felony 6989.
Preliminary examination—continued.
Bail on 7313, 7316.
Closed doors, when 6985.
Commitment of defendant, form of 6987-6992.
How executed 6991.
Counsel, right to have 6970-6972.
Defendant, informed of right to make statement 6978.
May become witness 6983.
Statement of, form and authentication 6983.
Statement, waiver of cannot use against 6979, 6983.
Discharge, form or order 6986.
Magistrate, inform defendant of rights 6970, 6978.
Return of proceedings 6998.
Of corporation 7406, 7407.
Statement of defendant 6978-6982.
Stenographer may be employed, compensation 6977.
Testimony, filed with clerk of district court 6977.
Used on trial or habeas corpus 6977.
Witnesses, examination of 6977.
Exclusion during examination of defendant or security for appearance 6993-6997.
Subpena for 6976.
Without surety, conditionally examined 6997.
Who may attend 6985.
Premises, occupancy of pending proceedings under eminent domain 5613.
Prepared copies, fee for certifying to same 2045.
Prescription for narcotic, making or presenting false or fraudulent 6545.
Presenting for audit or payment fraudulent claim against state, county, city, town or school district 6715.
Presentment or indictment (Const.) 237, 7021-7047. See Criminal Practice.
President of corporation, deposition may be taken 5454.
President of the senate, lieutenant-governor ex officio to be, when other person may be elected 291, 310, 2808, 2809, 4250.
President of state board of health, appointment and duties 2952, 2954. See Public Health.
President of United States, to appoint officers for land districts 2405.
President of university. See University of Nevada.
President pro tempore of senate to act as governor, when 310.
Presides over joint meeting of two houses on election of U. S. senator 1912.
Presiding officer of legislature to give notice of receipt of depositions and papers in election contest for member of legislature 1821.
Presidential electors, ballot for president and vice-president 2771.
Congressional control over 143.
Convene, where and when 2770.
Election of 141-143, 182, 2765, 2767-2769.
Federal constitution, provisions concerning 141-143, 182. See Elections.
Officers, certain not eligible for 141.

Presidential electors—continued.
Returns, how transmitted 2771.
Number and election 2767, 2769.
Vacancy in, how filled 2770.
Press, freedom of, guaranteed 171, 238.
Presumption of innocence 6277, 7163.
Presumption of value of ore extracted from mine, what 5509.
Pretended heir, production of 6370.
Prevention of procreation 6293.
Prevention of public offenses, duties and means 6862, 6863.
Primary election, direct nomination of candidates by 1736-1766. See Elections.
For delegates to convention to elect delegates to national convention 1737. See Statutes 1883, p. 28, Cutting's Compiled Laws, secs. 1678-1692, continued in force by Revised Laws 1737.
Principal, defined 6274.
Principal and accessory, defined 6275, 7071, 7072.
Principal of schools 3305(11), 3310, 3312. See Public Schools 3239-3478.
Principal office of corporations, where located 1118-1120. See Corporations.
Printed papers and transcripts. See Civil Practice.
Printed statutes, presumption of correctness 5413.
Printing commissioners, board of 4328. See State Printer.
Printing or furnishing imitation ballot paper, penalty 1859.
Printing, public, what may be done outside of state printing office 4320. See State Printer.
Printing taxpayers' list, to be paid, how 3632.
Private secretary to governor, clerk of board of assessors 4192.
Clerk, capitol commissioners 4192.
Compensation, duties, term of office 4190-4192, 4392, 7634.
Salary of 4392.
Secretary board of pardons 7623.
Secretary board of parole commissioners 7634.
Prior offenses, what law governs 6296.
Prior right to unappropriated water, how acquired 4678. See Water 4672-4791.
"Prison," word includes what 6294(27). See State Prison and Jails.
Prisoner, aiding to escape 6340.
As witness, how brought, deposition of 5442, 5443, 5444.
Custodian suffering escape 1657, 6341.
Escaped, concealing 6343.
Escaping from custody 6338.
Escaping from person or jail 6339.
Inhumanity to 2818.
Limitations of actions, disability of, how affects 4966, 4976.
Rescue of 6336.
Trial of other offenses pending term 6818.
Unlawful communication with 6373, 6817.
Witness may be, court order for 7349, 7363, 7459. See State Prison and Jails.
Word includes whom 6294(26).
Private books or accounts, failing to make entry or fraudulent entry with intent to defraud 6711.
Private statute, how pleaded in indictment 7063, 5072.
Private writings, how proved 5414, 5415.
Prize fight. See Glove Contest 3881-3889.
City may prevent 794(75).
Probate courts of territory, cases in, transferred to state district courts 407.
Probate practice and procedure 5857-6144. See Estates of Deceased Persons 5857-6148.
Probate register 6103.
Probation committee, powers and duties 734.
Probation officer 733, 763, 777.
Appointment, duties, who to recommend 733. See Juvenile Court Law 728-756.
Proceeds of mines, assessment of 352, 3687-3709. See Revenue, Mines and Mining.
Procedure in actions at law. See Civil Practice.
Proceedings supplementary to execution 5307-5314, 5787.
Proceeds of mines, delinquent taxes on, action for, district attorney to bring, when and where, damages, penalties, complaint and answer 3707-3709.
Process. See Civil Practice, Criminal Practice.
Bankruptcy proceedings 696.
Civil, electors and legislators, when not subject to 253, 269.
Criminal, how executed 7460.
Combination to resist 6605.
Obedience to, courts may compel 2833-2835, 4864.
Resistance of, contempt 2833, 2834.
Style of shall be "State of Nevada" 328.
Process of law, due, necessary to deprive of life, liberty or property 237.
Proclamation of governor for state organization 221-223.
Proclamation of President Lincoln on admission of Nevada 430.
Procreation, prevention of, prohibited 6293.
Prohibited act, commission of, misdemeanor 6288.
Prohibition, writ of procedure 5708-5713. See Civil Practice.
Supreme court may issue 319, 4834.
Promissory note, action by assignee before due, not right of set-off 4988. See Negotiable Instruments.
Or other instrument, when admitted in justice's court, unless denied by verified answer 5770.
Parties and liability of in actions on, schedule of sections 2548.
Promotion stock of corporations, defined 1334.
Proof. See Civil Practice.
Of annual labor on mining claims, need not be sworn to, filing and recording, fee for 2046, 2445. See Mines and Mining.
Property. See Real Estate.
Actions affecting, procedure. See Civil Practice.
Defined 6294(9).
Exempt from taxes, what 3621.
Foreigner who is bona fide resident has same rights to as native-born citizen 245.
Given or bequeathed to state, when pledged to educational purposes 355.
In custody of officer, taking of 6337.

Property—continued.
Malicious injury to 6760-6762.
Not to be molested on account of religious sentiment 228.
Of corporations subject to taxation same as that of individuals, of corporations formed for municipal, charitable, religious or educational purposes may be exempted by law 339.
Of debtor, reasonable amount to be exempt from execution 243.
Of Territory of Nevada vested in state 388.
Person shall not be deprived of without due process of law 237.
Restored to owner 6650, 6651, 7448.
Right of acquiring, possessing and protecting 230.
Shall not be taken for public use without just compensation having been first made or secured, exception 237.
Sold for taxes. See Revenue.
Subject to mortgage or lien sale, removal or destruction thereof 6700.
Value over $300, supreme court has appellate jurisdiction 319.
Prosecutions, to be conducted in name of "The State of Nevada" 328.
Prospector, cabin, tools, horses and certain other property of, exempt from execution 5288.
May enter state lands 3226.
May enter upon private land, when 2456, 2458, 5606-5629.
Prostitution, crimes in relation to 6445.
House of, habitually resorting in 6460.
House of, near schoolhouse 3457, 6510.
Trial for crimes concerning evidence 7178. See Houses of Prostitution.
Protest of bill of exchange 2665, 2699-2707, 2747, 2748, 2755. See Negotiable Instruments, Notary Public.
Protection, child adopted entitled to 5826, 5829.
Protestant Episcopal Church, incorporation of 1425-1433.
Provisional remedies, district court 5087-5194; justice's court 5744-5753.
Provoking assault 6415.
Public, administrators, actions affecting, procedure. See Civil Practice, Estates Deceased Persons.
Buildings, doors to swing outward 6581.
Buildings and grounds, eminent domain may be exercised for 5606.
Buildings, malicious injury to 6752.
Conveyance, disturbance upon 6611.
Conveyance, failure to pay fare 6611.
Health, crimes against 6529-6560.
Interest, when officer not required to disclose or testify regarding 5428.
Nuisance, defined 6561.
Nuisance, maintaining or permitting 6561, 6564.
Officer, unlawful intrusion into or refusal to surrender 6332.
Publication, accurate statement of receipts and disbursements of public money to be made, how 277.
Constitutional debates, provided for, how 410.
Publication—continued.
Proposed amendments to constitution, when to be made 383.
Statutes and decisions of supreme court, legislature to provide 376.
Public, or corporate seal, counterfeiting 6685.
Record, failure to make true entry or making false entry 6664.
Records, removal, destruction or injury to 2817, 6344, 6345.
School, disturbance of 3452, 3453, 6599, 6600.
Service companies, certain acts against to injure or defraud 6732, 6733, 6735.
Service companies, injuring or defrauding, penalty 6732, 6733, 6735.
Public administrator. See Officers Generally.
Actions, may institute 1622.
Administration, letters of, entitled to, when 1626, 5894.
Bond, oath and qualifications 1616, 2786.
Bond, new may be required, when 1616.
Civil officers and others to furnish information to 1622.
District judge to report to 1618, 1620.
Duties and powers 1617.
Election of (Const.) 290, 1615, 2765, 2773, 2781.
Escheats, disposition of 1619, 1625.
Estates, law of governs 1623.
Estates, settlement of 1619, 5857-6147.
Expenditures, not to be interested in 1620.
Expiration of office, books and records, to surrender 1627.
Letters of administration, entitled to, when, what rank 1626, 5894.
Malfeasance or misfeasance in office 1621.
Monthly statement of fees, to render 2021.
New bond of, may be required, when 1616.
Qualify, when 1624.
Records and documents, altering or stealing 2817.
Records, refusal to surrender at end of term 2819.
Resignation and vacancy 2787, 2801, 2813.
Reports to district judge 1618, 1620.
Term, when begins 2786.
Public arms, legislature to provide for safekeeping 363.
Public defense, no limit to debt which state may incur for 350.
Public documents and reports 2929-2951.
Books to be stamped 2936.
Decisions, reporter of, clerk of supreme court to be, compensation 2950.
Furnished to whom 2932.
Law books, distribution of 2934.
Law books, price of 2937.
Legislature, Nevada reports for use of 2938.
Legislative session laws, journals and appendix, distribution of 4335-4338.
Newspapers, to receive statutes and journal 2933.
Receipts, secretary of state to demand and receive for all delivered 2935-2939.
Register of university, regents to submit to governor, when 2929.
Report, board of control, experiment station, to send to governor, when 2929.
Reports, board of examiners to examine, edit and revise 2930.

Public documents and reports—continued.
Controller, to send original draft to governor, when 2929.
Governor to submit same to board of examiners 2930.
Number to be printed 2930.
State printer to print 2931.
Treasurer to send original draft of to governor, when 2929.
When prepared and filed 2929.
Return of, copies, when made 2940.
Revised Laws, distribution of 1015.
Session laws, journals and appendix, distribution of 4335-4338.
Supreme court reports, by whom and in what manner published 2941.
Citation of points and authorities to contain except 2946.
Distributed, to be turned over to successor in office 2945.
Extra copies of 2948.
Free copies, distribution 2951.
Price per volume 2942.
Secretary of state to sell, price of 2951.
Size of volumes 2947.
Title of volumes 2949.
Volumes retained 2943.
Who entitled to receive 2944.
Township officers to receive 2934.
Public funds of any character not to be used for sectarian purposes 362.
Public health 2952-3003.
Act providing recording births and deaths 2983-2987.
Appropriation for carrying into effect provisions public health act 2977.
Article or animal diseased or unhealthy forfeited, how 2993.
Attorney-general, duties under public health act, what 2973.
Birth certificate, duties of local health officer regarding 2970.
What to contain 2965.
Birth, registered how, by whom, where 2963, 2983-2987.
Still, recorded how, by whom 2975, 2983-2987.
Body not to be interred without proper permit, when 2962, 2983-2987.
Burial certificate must issue, when, proviso, what 2974.
Burial permit, what to contain 2961.
Calf, age limit before sale 2991.
Certificate, birth made out by whom, when 2964.
Birth, what to contain 2965.
Death, regulations regarding 2958.
Death, where no medical attendance, how issued, contain what, investigation, how conducted 2959, 2960.
Must be procured state board of health to bring live stock into state, how, when 2988.
Certificates birth and death filed, recorded, when, where 2985.
Certified copies certificates births or deaths issued by state board of health to whom, when, fee 2971.
Cities under general act, power of control 794(56).
Contagious diseases, act preventing same 2996-3003. See Contagious Diseases.
Public health—continued.
County board of health created, who to constitute 2981.
County board of health, duties, what 2982.
County commissioners, appoint quarantine officers, when 2997.
Duties prevent contagious diseases, must act, when 2996.
Diseased animal, not to be sold, when 2989, 2990.
Poultry, fish, game, not allowed, penalty 2988-3003.
Prohibited from entering state 2988-3003.
Diseased meat not to be exposed for sale 2989-2990.
District attorney, duties under public health act 2973.
Duties and salary state board health, designated 2954.
Duties county board of health, what 2982.
Duties physician or midwife relative certificate of birth, what 2964.
Duties secretary board of health, what 2955, 2969.
Duties third member board of health, salary, what 2956.
Failure to obey quarantine regulations, what 2990-3000.
False certificates issued, penalty for, what 2987.
Fee for certifying to certificate death or birth by state board of health, what 2971.
Form of record of birth, what, made by whom 2983.
Form of record of death, made by whom 2984.
Live stock not to be brought into state until complying with public health act 2988.
Local health officers, duties 2973, 2970.
Duties regarding birth certificates 2970, 2973.
Salaries 2957.
To issue burial permits, when 2970.
To supply blanks to whom, when 2970.
Meeting state board of health, held, when 2953.
Name of child given birth certificate, special blank given for, when 2966.
Object act prevent spread contagious diseases 2998.
Offered for sale, defined 2992.
Patients suffering contagious diseases, lawful to confine, when 3001.
Penalty issuing false certificates, what 2987.
Penalties failing comply recording birth and death certificates 2986, 2987.
Penalties for physician, health officer or undertaker violating provisions public health act 2972, 2986, 2987.
Penalties violation act prevent contagious diseases, what 3003.
Penalties violation livestock health provisions, what 2995.
Physician or midwife, duties toward certificates birth 2964.
Physicians, midwives and undertakers must register with local health officers, when 2967.

Public health—continued.
President board of health, duties, salary 2954.
Printing, state board of health, material furnished by whom, when 2980.
Public health 2952-3003.
Qualifications members state board of health, what 2952.
Quarantine officers to be appointed by county commissioners, when 2997.
Quarantine regulations to be made by state board of health, how, when 3002.
Quarantine regulations violated, penalized, how, when 2999-3000.
Record, all interments to be recorded by whom, kept where 2962, 2983-2987.
Birth, form of, made by whom 2983.
Complete, of births to be kept by local health officers, how, when 2970.
Of death, form of, made by whom 2984.
Of deaths and births, where filed 2985.
Salary secretary state board of health 2976.
State board of health created, constituted, how 2952.
State board of health, duties 2973.
Secretary board of health, duties, salary, what 2955-2969, 2976.
State board of health, furnish necessary blanks local health officers, when 2969.
Issue livestock certificates to whom, how, when 2994.
Make quarantine regulations, when 3002.
Supreme in health matters, when 2978.
Still birth recorded, how 2975, 2983-2987.
Stock, live, not to be brought into state until complying with public health act 2988.
Superintendent of hospitals record statistics of inmates 2968.
Undertaker, duties of, pertaining to certificates of death 2960.
Veterinary surgeon, to be employed by board of health, when 2994.
Public highways 3004-3062.
Action may be commenced by aggrieved parties on failure to open 3015.
Bridges and culverts, duties of district attorney 3024.
Money collected, by suit, disposal of 3025.
Persons conducting water across highways, to maintain 3022.
Bridges, character and necessity of, commissioners to decide 3021.
Construction, county commissioners to advertise, when 3019-3020.
Control of 3017.
Freeholders may petition for construction of 3020.
Maintenance of 3017.
Maintenance of, from general fund or special tax, when 3018.
Notice to be given commissioners to have work done 3023.
Charter of toll road, provisions on expiration of 3056.
County commissioners, to cause to be opened 3004.
To control bridges and highways 1508.
To furnish guideboards for 3026.
Public highways—continued.
Crossing on 3530.
Crossings, powers of commissioners to regulate 4555.
Depositing or keeping unwholesome substance near 6546.
Exorbitant toll, how remedied 3057.
Franchises granted on 2129.
Franchises heretofore granted, located under this act 3058.
Guideboards, defacing of, misdemeanor 3028.
Style of 3026.
Toll road, owners erect 3027.
Highways, county commissioners to open 3004.
Eminent domain 3052.
What are 3004.
Oath, supervisor to take 3044.
"Person," defined 3062.
Petition to open road, procedure 3008, 3015.
Private lands, appraised value, tender of, appeal 3052.
Value, how ascertained 3052.
Who may enter upon 3052.
Prisoners, work on by 7601.
Public roads and streets, damage to by water to be prevented 3045.
Receipts of toll road, proportion of to county 3055.
Repairs of toll road, failure to make, quo warranto 3053.
Right of way, limit to 3060.
Roads and streets, damage by water, penalty 3046.
Road and street work, how let 3005.
To be advertised, when 3005.
Road districts, county commissioners to disorganize, when 3011.
Established in certain counties 3037.
Funds, poll taxes for 3841.
How created 3011.
To remain until disorganized 3011.
Road fund, amount of tax, may be worked out, compensation 3014.
Created 3006.
Disbursement of 3007.
How created and maintained 3014.
Money, how expended 3013.
Tax may be levied for 3014.
Taxes for, board of county commissioners to levy 3006.
Transfer of money from, how made 3012.
Road inspector, compensation, Elko County rate 3026.
Compensation fixed by county commissioners 3033.
Compensation, when given, paid from 3032.
County commissioners may appoint 3030.
Duties of 3029.
Relative to compensation of 3031.
Road opened, action, parties aggrieved may commence 3015.
Road, opening of, damages 3008.
Opening of, duty of county commissioners 3008.
Opening of, viewers to be appointed 3008.
Petition to open 3015.

Public highways—continued.
Road supervisors, compensation, how fixed 3037, 3039.
Duty of 3043.
In certain counties, county commissioners to appoint, when 3042.
In certain counties, how determined 3041-3044.
Office of, abolished 3010.
To appoint, duty of county commissioners 3040.
To be elected, when 3038.
Road, when opened, viewers, how selected 3015.
Width of, county commissioners to establish 3016.
Width of, not to exceed 3016.
Road work by convicts, part expense to pay, skilled labor to employ, bridges and structures to build 7601.
State engineer, supervision of work by convicts 7601.
Street improvement bonds 991-998.
Streets and alleys 877.
Improvement of 922-839.
Obstruction of, fine 3009.
Stream diverted to flow across unlawful, penalty 3009.
Toll bridges 3059.
Toll-road certificate, contents of 3050.
Toll-road franchise, deemed, rights and privileges 3051.
Toll-road keepers, military not to charge 3047.
Toll road, military not to charge, penalty 3048.
Not to interfere with road now in use 3061.
Rights of, not abridged by act 3004.
Right to maintain forfeited, when 3049.
To be constructed, certificate to make, sign and record 3050.
Work to be commenced, when 3050.
Using road without paying toll, punishment 3054.
Work on public roads, day's work to be 3035.
Work on public roads, payment for 3034.
Public institutions for insane, blind, deaf and dumb to be fostered and supported by state 365.
Public instruction, superintendent of, legislature to make provision for election of, term 353.
Public lands, 3062-3226. Carey act 3063-3097.
Federal act 3063: Liens in favor of state, created, when—Lands may be temporarily withdrawn—Must be reclaimed and settled, when—State may make contract—State must file maps and plans of lands to be reclaimed—Secretary of interior with approval of president authorized to contract and patent to State of Nevada 1,000,000 acres of desert lands for reclamation purposes—160 acres limitation to each settler—Additional 1,000,000-acre grant to Nevada—Patents to issue to state, when—United States limitation to commence to run, when—United States not liable for lien. (State act 3064-3097.)
Public lands—continued.
Actions affecting public lands, procedure. See Civil Practice.
Act of March 23, 1911, certain sections repealed 3097.
Applicants for land, qualifications of 3080.
Applications, assignment for withdrawal or segregation, recognized, when 3075.
Covered by this act 3096.
Final segregation may be filed 3070.
Pending the temporary withdrawal of a segregation, not to be made public 3092.
Settler, to be accompanied by a contract for perpetual water right 3080.
Temporary withdrawal, procedure 3066.
Temporary withdrawal reported on by state engineer 3068.
Temporary withdrawal must be approved by commission 3068.
Temporary withdrawal filed in United States land office, when 3068.
Bonds, amount 3071.
Forfeiture 3078.
Bureau of industry, agriculture and irrigation, to have control of 4489.
Carey act trust fund 3093.
Conditions of Carey act accepted 3064.
Commission, name of 3091.
Suits at law 3091.
To enter into contract, when 3071.
To make and enforce rules 3087.
Construction, limitation of time for 3078.
Of works must be completed, when 3072.
Works, state not obligated to pay for 3074.
Contracts, certain, subject to these provisions 3095.
For water rights to be recorded, where 3083.
Modified, when 3073.
Control of by bureau of industry, agriculture and irrigation 4489.
County clerk entitled to retain fees in public land matters 1614.
Deferred payments on lands, default of 3084.
Department of Carey act lands established 3088.
Deposits to be returned, when 3069.
Disclaimer to all right of public lands by state (Const.) 228.
Extension of time, when 3071.
Fees, and price of land nonapplicable, when 3094.
And price of land under prior act applicable, when 3094.
Deposited, where 3089.
Filing, for temporary withdrawal 3067.
For final proof, where paid 3081.
Schedule of 3089.
U. S. land office and filing, for segregation 3070.
Land may be redeemed, when and by whom 3085.
Land open for entry by settler, how determined 3079.
Liens for deferred payments 3083.
Money, appropriated, how 3093.
From sales, how applied 3078.
To be deposited to cover fees and costs of surveys, when 3069.

Public lands—continued.
May relinquish and abandon project, when 3069.
Nevada bureau of industry, agriculture and irrigation to have control of 4489.
Notice, how given 3078.
Patents, applied for, when 3081.
To land, regulations concerning issuance of 3082.
Payment for land, made when 3080.
For water right, made when 3077.
Price, of land fixed by commission 3076.
Per acre of land and water right to be stipulated in contract 3071.
Proceeds of sale, how used 3071.
Reclamation, final proof made, how 3081.
Regulations, of the secretary of the interior 3097.
Of the state commission of industry, agriculture and irrigation 3097.
Relating to temporary withdrawal 3097.
Sale, of equity 3071.
Of land when under foreclosure, when 3084.
Of lands under control of commission 3093.
Selection, management and disposal of land, where vested 3065.
Settler, limited to 160 acres 3080.
Sheriff to record certificate of sale and issue deed, when 3086.
State engineer, selecting agent for the state 3090.
Services, how paid 3090.
State register of lands under the Carey act, to have charge of 3088.
To appoint deputy, compensation 3088.
To make annual report 3092.
Surveyor-general 3065.
Waiver of withdrawal 3070.
Water rights to attach to land 3083.
Desert land laws 3150-3162.
Acreage to be held limited, when 3159.
Additional proof required, when 3157.
Additional time allowed, when 3162.
Amount of land limited 3157.
Annual proofs made, how 3155.
Assignment of entry permitted, when 3161.
Contest, entries subject to 3157.
Desert land, act applies to certain states and territories 3152.
Definition of 3151.
Entries, who may make 3150.
Entryman, has preferred right, when 3160.
Must be actual resident of state or territory 3158.
Improvements and amount required 3155.
Maps to be filed, mode of irrigation must show construction of canal and ditches, may be associated with others, when 3154.
Patent, when issued 3150-3157.
Price of land 3150.
Prior valid rights not affected 3156.
Time lost by entrymen not to be computed, when 3159.
Unsurveyed lands not allowed 3160.
Water appropriation 3150.

Public lands—continued.
Federal townsites 1953-1993. See Federal Townsites.
Homestead laws 3115-3149.
Additional homestead entries 3133.
Affidavits of entrymen may be made before whom, and where taken 3121.
Agent, who may be, entered by 3132.
Commutation of homestead entry to cash entry no bar to subsequent entry 3137.
Enlarged homestead or "dry farming" act of 320 acres, provisions of 3139-3145.
Entrymen, qualifications for 3116.
Entry limited to one quarter-section of land 3124.
Fees for entries and final proof 3121.
Final proof notice, what to contain, how published 3149.
Homestead entry may be commuted to cash entry, when 3127.
Entry on forest reserve, and secretary of agriculture to list lands. See act of Congress of June 11, 1906, 34 U. S. Stats. L. p. 233 and National Forest Reserve Use Book.
Lands not subject to debt, when 3122.
Lands revert to government, when 3123.
Mode of procedure 3117.
Soldiers and sailors 3129.
Leave of absence, when granted 3147.
Military and naval service, deduction from time 3130.
Mineral lands not liable to entry under homestead act 3128.
Miners may receive benefits of, when 3126.
Patent, limitation of time for issue 3118.
Proof of residence and citizenship 3118.
To issue to insane persons 3146.
Who may secure 3118.
Persons in military and naval service, relating to 3120.
Placer claims not to affect, when 2388.
Poll tax to be expended on public roads, when 256.
Preemption rights not impaired 3125.
Preferred right in contest cases 3135.
Race or color, no distinction of 3128.
Reinstatement on forest reserves, application for 3134.
Rights inure in case of death 3119.
Reclamation act 3098-3114.
Beneficial use, the basis 3105.
Charges for water, how determined 3111.
Conveyance of land by secretary of interior, when 3114.
Contracts, for construction of works 3101.
For excess water 3111.
County commissioners, duties of 3110.
Entrymen, requirements of 3102.
Funds, how applied 3106.
Federal government to cooperate with private enterprises, when 3112.
Irrigation works, secretary of the interior to locate and construct 3099.

Public lands—continued.
Lands, not required for government use in irrigation projects, to be sold 3113.
Withdrawn from public entry except homesteads 3100.
Limit of acreage 3102.
Mongolian labor not employed 3101.
Ownership of works to pass to entrymen, when 3103.
Payments, how made 3102.
Public notice of irrigable lands, to contain, what 3101.
Reclamation fund, how established and appropriated 3098.
How used 3103.
Restrictions in the use of water 3112.
Rights, acquired by condemnation or purchase 3104.
Of way granted by state 3108.
Of widow and minor children 3130, 3131.
Sales of lands within irrigation projects 3109.
Second homestead and desert land entries made, when 3136.
Secretary of interior authorized to make rules and regulations 3107.
Settlers, forfeiting entry may make new entry, when 3148.
May transfer for public purposes, before patent issues 3115.
State laws not interfered with 3105.
State land patents must contain reservation of such right of way 3108.
Unperfected entry no bar to subsequent entry, provisos 3138.
Vested rights 3105.
Water right appurtenant to land 3105.
Water users' association 3110.
Timber and stone entries 3163-3167.
Lands valuable for building stone, how entered 3166.
Limited, acreage 3163.
To certain states 3163.
Mineral, coal or state lands not to apply to 3163.
Notice to be published, when 3165.
Patent to issue, when 3165.
Price of 3163.
Procedure to obtain land, penalty 3164.
Timber and stone lands defined 3163.
Water rights subject to 3163.
Townsites, Federal 1953-1993. See Federal Townsites.
Acreage, to be acquired under land laws 3169.
Land for reservoir sites restricted 3170.
Limitation of acreage not to include mineral lands 3170.
Offered and unoffered lands, distinction of to be abolished 3168.
Oil and gas lands may be patented to assignee, when 3178.
Penal provisions 3176.
Public lands, unlawful enclosure of 3173.
Public lands, entry of not to be interfered with 3175.
Rights of way for ditches and canals to be reserved 3169.
Public lands—continued.
Rights of way across public lands for certain purposes 3171, 3172.
Secretary of the interior, authority obtained to bring suit, when 3177.
U. S. district attorney, duties of and jurisdiction of court 3174.
State land grants from United States 3179-3195.
Colleges of agriculture and mechanic arts, support of 3182, 3186, 3191, 3192.
Five hundred thousand-acre 3179-3184.
Grants of land and script on certain conditions 3183.
In lieu of preemptions on 16th and 36th sections 3180.
Ninety thousand-acre 3181.
Railroad grant, state authorized to select certain sections 3190.
Two million-acre 3193-3195.
University 3185.
State land register 3196-3216. See Surveyor-General.
Bond 3196.
Contract for sale of land, terms of 3203.
Fees for selecting and advertising land 3219.
Irrigation districts, contracts affecting state lands, may make with 4787.
Member of board to determine conflicting applications to purchase land 3208.
Office, to keep at capital 3196.
Office hours 3196.
Papers, plats, etc., open to inspection, no fee 3197.
Seal, to use 3213.
Surveyor-general, ex officio 3196.
Township plats, register to procure, cost of, etc. 3197.
State land register, duties of, apply to U. S. land office for land 3200.
Cancel application, when 3200.
Certify application to controller 3200, 3201.
Certify conflicts for purchase to district court, when 3208.
Concerning application to purchase 3199, 3200, 3201, 3203.
Contracts, to make, conditions of, etc. 3203.
Contracts may be renewed 3204, 3222.
File treasurer's receipt 3200.
Keep record of contracts, sales, approvals, etc. 3197.
Must select land 3210.
Notify applicant to complete purchase, letter to register 3205.
Overdue interest on contract to receive, when 3203.
Plats, papers, etc., to keep open to inspection 3197.
Procure township plats 3197.
Patents to prepare, record of to keep 3211.
Regarding treasurer's receipts issued by E. Rhoades 3207.
Report of applications and sales to assessor, time for 3199.
Sales of land, how made, selected land, contracts for 3199, 3200, 3201, 3203.
Time of receipt to be endorsed on application 3200.

Public lands—continued.
Withdrawn selections when erroneously made 3212.
State lands 3196-3226.
Amount purchaser may buy 3209.
Advertised, when selected within six miles of mineral location 3202, 3219.
Applicants for state, affidavit 3200.
Applicant to have exclusive possession 3224, 3225.
Applications to purchase, in writing, what to state, etc. 3199.
Application for, to be canceled 3200.
Affidavit of occupancy to be filed in contest for purchase 3208.
Artesian well, sinking of, gives preferred right to purchase 3208.
Claims, how allowed 3215.
Conflicting applications to purchase, proceedings 3208.
Contest cases, how disposed of 3217, 3218.
Contract for purchase, sale of by estates of decedents 6010-6013.
Contract for purchase, terms, forfeiture, etc. 3203, 3204.
Contractor for, to have exclusive possession same as owner in fee 3224, 3225.
Erroneously listed, relinquishment of by state 3212.
Fees to be paid by applicant to purchase 3202, 3219.
In mineral township to be advertised, time, fee 3219.
Mining rights reserved on 2546, 2457, 3226.
Nonmineral affidavit required of purchaser, expense 3200.
Occupant has preferred right to purchase, who deemed occupant 3208.
Patent for, form of, signed by, record to be kept of, may be recorded 3211.
Patent rights inure, when 3222.
Patents issued to deceased applicants 3223.
Partial payments on, forfeited 3205.
Preferred right to purchase, what gives 3208.
Purchaser, how to proceed 3199-3203.
Price of 3198.
Proceeds of sales to be invested 3214.
Prospector may enter land 2456, 2457, 3226.
Seal of land office imparts verity to papers, maps, etc. 3213.
Selected land, how sold 3201.
Simultaneous applications for 3208, 3220, 3221.
Timber land, not sold on contract 3203.
Timber, unlawful cutting on, penalty 2116.
Title conveyed by patent 3211.
Township plats, cost of, register to procure 3197.
Unlocated warrant may be surrendered in payment for 3206.
Within limits of Central Pacific grant, price of 3198.
Within six miles of mineral location, fees for advertising 3202.
Public libraries. See District School Libraries indexed under Public Schools 3393-3397, State Library 3946-3964.
Act to establish free 3227-3231.
Cities may establish 794(61).
Claims against, how paid 3230.
Commissioners to levy tax for 3227.
Free, rooms to be 3231.
Petition to establish 3227.
Rooms to be free 3231.
State board of education to appoint trustees 3228.
Tax levy for limited 3227.
Trustees of, how appointed, term, no compensation 3228.
Trustees, powers of 3229.
Public moneys, bonds and securities, how kept by state treasurer, how paid out, not to be used by 4372.
Public meeting, police force may be ordered to attend 2832.
Public offenses, how prosecuted 6854.
Public officer. See Officers Generally.
Asking or receiving bribe 6331.
Asking or receiving excessive fee or compensation or where none is allowed 6738.
Blackmail of 6739.
Conviction forfeits trust 6287.
Failing in duty to pay over money 6658, 6659.
Failure of duty, misdemeanor 6289.
Falsely personating 4291, 6734.
Fees and salaries of, subject to attachment and execution 2864.
Forging or counterfeiting signature of 6685.
Interested in contract for public 812, 1522, 6331.
Knowingly making false or misleading statement in official report or statement 6349.
Making false certificate 6375.
May be recalled if sec. 8, art. ii, is amended as proposed 257.
Misconduct of 6331.
Obstruction of 6805.
Recalled, may be, if constitution is amended as proposed 257.
Removal of, otherwise than by impeachment 6894.
Resisting, delaying or obstructing 4291, 6362.
Unlawful to be interested in purchase at sale made officially 2828.
Violation of duty 6828.
When not required to testify as witness 5428.
When statute of limitations does not run during term 2866.
Public parks, eminent domain may be exercised for 5606.
Public printing. See State Printer.
Public prosecutor, district attorney designated as 1595, 1596.
Public record, of this state or the United States other than judicial in custody of public officer or certified or verified copy may be read in evidence, when 5409.
Public record, docket and papers must be delivered by justice of peace to successor 5803.

Public records open to inspection and copy 3232.
Public roads, poll tax to be expended upon when (Const.) 256.
Public safety. See Crimes and Punishments 6561-6591, Explosives 1946-1948.
Action against party failing to fence dangerous excavation 3235, 3237.
Excavations for mining and other purposes to be fenced, liability for failure, duty of county commissioners 3233-3238.
Writ of habeas corpus shall not be suspended unless necessary for in case of rebellion or invasion 234.
Public service commission, actions affecting, procedure. See Civil Practice.

PUBLIC SCHOOLS

Act construed 3460.
Acts repealed 3461.
Appeal. See Superintendent of Public Instruction.
Apportionment. See Funds, School.
Arbor day, observation of, governor to designate 3349, 3350.
Attorney-general, legal adviser of deputy superintendents 3355.
Legal adviser of superintendent of public instruction 4130.
Shall bring action for text-book commission, when 3406.
Board of regents of state university. See Constitutional Provisions and University of Nevada.
Bonds, school district, amount of to be determined by board of school trustees, when 3432.
Election to be held for issuance 3432, 3441.
Election notice for, must contain 3433.
Election for, how conducted 3433.
Issued for what purposes 3431, 3440.
Issuance of to be determined by voters of district 3432.
Maturity of, limited to twenty years 3433.
Registration of 3436.
Sale of 3434.
Signing of 3435.
Sinking fund for payment of, to be created 3437.
Security of, not affected by changes in boundaries of district 3438, 3442.
Tax for, to be levied by county commissioners 3437.
Tax levy for, lien on property 3439.
To be called in by county treasurer and paid at maturity 3437.
Bonds, school fund to be invested in state and United States 355.
Census marshals 3361-3372.
Appointed, how and when, eligibility 3361.
Appointment of special, for regular census, when 3370.
Appointment of special, in new districts 3319, 3331.
Blanks for 3362.
Compensation of, amount (maximum) of, determined by statute 3372.
Bill not to be paid until deputy superintendent has approved report 3372.
Bill to be made out against county 3372.
Bill to be paid by county, when 3372.
Census marshals—continued.
Duties of 3363.
Shall distinguish resident children from nonresident 3363.
Shall enumerate all resident children 3363.
Shall report to clerk of school board and deputy superintendent 3367, 3368.
Shall take school census in month of April 3363.
Shall visit each home and may administer oath 3364.
Report of, penalty for negligence of or fraud in 3371.
To be certified to and transmitted to deputy superintendent 3367.
To be completed, when 3368.
To be examined and corrected by deputy superintendent 3369.
To be examined by clerk of school board 3367.
To be separately made for joint districts 3366.
To contain what 3365.
Shall report to county clerk in general election years persons subject to military duty 3981.
Special census marshal for regular census, when 3370.
Special census to be taken in new districts 3319, 3331.
City superintendent, office created for districts of first class 3315.
Powers and duties of 3315, 3305(15).
Qualifications of 3315.
Term of office of 3315.
To administer oath in districts of first class, when 3305(15).
Classification of funds. See General Provisions.
Compulsory education, arrest of truant, when 3447.
Attendance officer, may be appointed by school board 3447.
Attendance officer or school officer may investigate 3449.
Children between ages of 8 and 16 years must attend school 3443.
Excused from attendance, when 3443 (1, 2, 3, 4, 5).
Child declared habitual truant, when 3444.
Child deemed truant, when 3444.
Fines collected, how disposed of 3451.
Habitual truants may be put in special schools 3448.
Punishment for encouraging truancy 3449.
Punishment for false statements concerning age 3450.
Punishment of parent of truant 3445.
School officer, peace officer or attendance officer may arrest, when 3447.
School officer or taxpayer may file criminal complaint 3446.
School trustees, authorized to provide specially for habitual truants 3448.
Clerk shall file complaint, when 3446.
May appoint and remove attendance officer 3447.
Shall direct attendance officer to make complaint, when 3446.

Compulsory education—continued.
School trustees to investigate 3446. See Contributory Dependency and Delinquency, and Dependent, Neglected or Delinquent Children.
Separate rooms for habitual truants, when 3448.
Truancy, defined 3444.
Truancy, habitual, when 3444.
Parent failing to prevent 3445.
Constitutional provisions, education encouraged 353.
Irreducible school fund, apportionment of interest on 354, 355.
Escheated estates appropriated to 355.
Fines appropriated to 355.
How created 355.
Interest on only apportioned to schools, how 355.
Interest on certain portions of, may be used for university 360.
Interest on, forfeited by school districts, when 354.
Investment of 355.
Lands (public) and funds dedicated to support of education 355.
Land warrants considered as belonging to 355.
Moneys and property of shall not be transferred 355.
Legislature, shall establish different grades of schools 357.
Shall establish normal school 357.
Shall establish state university 356.
Shall provide for apportionment of school money 352.
Shall provide special state school tax for university and common schools 358, 408.
Shall provide uniform school system 354.
No funds for sectarian purposes 362.
Normal school 357.
Oath of office, college professors and public school teachers must take 357.
Penalty for district not maintaining school six months 354.
Sectarian instruction prohibited 361.
Six months of school at least must be maintained 354.
State university established 356.
University regents provided for 359.
Women may serve as school trustees 371.
Contributory dependency and contributory delinquency 757-764. See Compulsory Education, and Dependent, Neglected or Delinquent Children.
Act construed 764.
Conditions of bond 760.
Conditions of suspended sentence 759.
Court may suspend sentence 758.
Definition of 757.
Declared a misdemeanor 757.
District court to have jurisdiction of 757.
Limitation of sentence 762.
Powers of officers as to 763.
Suspended sentence of, violated, when 761.
County auditor, shall add county school tax to assessment roll, when 3378.
Shall add special taxes to assessment roll, when 3305(13), 3330.
Shall add state school tax on assessment roll, when 3374.
County auditor—continued.
Shall draw warrant on county treasurer for official organ of state board of education, when 3241(7).
Shall draw warrant on order of deputy superintendent, when 3305(6, 8, 14).
Shall forfeit $100 from official compensation, when 3358.
Shall keep separate accounts with different funds 3357.
Shall not draw warrant, when 3250(1, 2), 3305(2), 3307, 3317.
Shall receive no fees for handling school moneys 3389.
Shall report to superintendent of public instruction, when 3392.
Shall transfer moneys when notified by deputy superintendent 3327.
County commissioners may consolidate or establish new districts 3316, 3326.
Tax levy, to make 3378.
County boards of education, are vested with same powers as school trustees 3313.
County commissioners temporary board, when 3417.
Election of 3418.
Powers and duties of, to employ and discharge janitors, etc. 3419.
To employ teachers holding Nevada high-school certificates 3419.
To enforce state courses of study 3419.
To furnish annual estimate 3419.
To pay salary and other expenses 3420.
To provide for dormitories and dining-hall, when 3424.
To take office, when 3418.
Term of office of 3418.
Vacancies on filled by appointment 3418.
County commissioners, abolish school districts, when 3336.
Act as temporary county board of education 3417.
Act on applications of deaf, dumb and blind 1703.
Appropriate money for county institute, when 3244(7).
Change boundaries of school districts, when 3316.
Control, rent, etc., property of abolished school districts 3338.
Create joint school districts, when 3320.
Create new school districts, when 3316.
Enlarge or consolidate school districts, when 3326.
Establish two county high schools, when 3415.
Join in action to establish county normal training school 3425.
Levy county school tax 3378.
Make levy for school district tax, when 3305(13), 3377, 3379.
Levy special tax for payment of interest-bearing warrants, when 3477.
Levy state school tax 3374.
Locate county high school, when 3415.
Make annual levy for county high schools 3420.
Make certain provisions for deaf, dumb and blind, when 1704.
Make levy for special bond tax, when 3437.

County commissioners—continued.
Make special tax levy for county high school, when 3416.
Not allow census marshal's bill, when 3372.
Provide certain funds for county normal training school, when 3429(3).
Submit question of establishing county high school to voters, when 3414.
Support children sent to state orphans' home 4099.
County high schools, control and management of in hands of county boards of education 3416, 3417, 3419, 3420, 3422, 3424.
County board of education for, at first temporary 3417.
County commissioners, to estimate cost of grounds, buildings, etc., when 3415.
To levy county tax for grounds, buildings, etc., when 3416.
Election to establish 3413.
Ballots for, to contain what 3414.
Officers of to serve without pay 3414.
Petition for to be signed by taxpayers 3414.
Eligibility of pupils for, how determined 3421.
In case levy by county commissioners is deferred 3416.
Location of, ballot for location to contain what 3415.
By commissioners, when 3415.
By election, when 3415.
Money for support of, to be drawn from the county high-school fund 3420.
To be drawn, how 3420.
Principals of may supervise district schools, when 3422.
Pupils for 3421.
State board of education has charge of entrance requirements and examinations for 3421.
Tax levy for, to be made annually by county commissioners 3420.
To be made on estimate of county board of education 3420.
Special, made, how and when 3416.
Temporary board for 3417.
Under state supervision 3423.
County normal training schools, action by county board of education and county commissioners required for 3425.
Action by state board of education necessary for 3425.
At least five bona fide applicants for instruction required for 3425.
County commissioners to provide certain funds for 3429(3).
Graduates of, to receive second-grade elementary certificates 3428.
May teach in rural schools 3428.
Normal training-school board is state board of education 3426.
Powers and duties of normal-training school board, to admit resident students on examination 3427(1).
To admit without examination certain resident students 3427(1).
To certify cost of maintenance to county commissioners, when 3429(3).
County normal training schools—continued.
To certify to state controller establishment of normal training school, etc., when 3429(2).
To designate in notice to state controller amount needed for salary of teacher 3429(2).
To determine qualifications of students for admission 3427(1).
To employ competent teacher 3429(2).
To estimate cost of maintenance of school, when 3429(3).
To formulate a course of study 3427(2).
To grant certificates of graduation, when 3427(3).
To make and put into effect necessary rules and regulations for management of school 3430.
Purpose of 3425.
Restrictions as to counties 3425.
Salary of teacher to be paid from general fund of state in usual manner 3429(2).
County treasurer, shall keep separate accounts with different funds 3357.
Shall notify superintendent of public instruction as to county school money, when 3388(2).
Shall pay over money only on warrants of county auditor, when 3388(3).
Shall receive and hold school moneys as a special deposit 3385, 3388(1).
Shall receive no fees for handling school moneys 3389.
Shall refuse payment of claims, when 3383(3).
Shall report to superintendent of public instruction, when 3388(4).
Shall transfer moneys when notified by deputy superintendent 3327.
To call in and pay district bonds at maturity 3437.
To forfeit one hundred dollars as penalty, when 3388(4).
Deaf, dumb and blind, application for support and education, how made 1703.
Certificate of superintendent of public instruction necessary 1703.
Expenses of, persons over 21 years of age 1704.
Portion of paid by county commissioners 1704.
Qualifications for state aid 1704.
Support, education and care of in charge of superintendent of public instruction 1702.
Support of provided by state, when 1704.
Dependent, neglected or delinquent children 728-756.
Deputy superintendents of public instruction, appeal from 3360.
Appointment and term of office of 3247.
Compensation of, office expenses of 3251.
Traveling expenses of 3251.
Salary of 3251.
County superintendent, office abolished 3245.
Duties of, to act as deputy examiner 3249.
To act as educational examiner 3249.
To advise with teachers 3249.

Deputy superintendents—continued.
To assist at state, district and county institutes 3249.
To assist state board of education in preparing courses of study 3249.
To attend meetings of state board of education 3249.
To confer with trustees and county officers 3249.
To devote entire time to supervision 3247.
To furnish state board of education information 3249.
To hold teachers' meetings 3249.
To inspect school buildings, libraries and apparatus 3249.
To make written report quarterly to superintendent of public instruction 3244(12).
To visit each school at least twice each year 3249.
Powers and duties of, may suspend teachers' certificates, when 3250(3, 4), 3359.
Shall cause district school levy to be made, when 3305(13).
Shall cause needed repairs to be made to school buildings, when 3305(8).
Shall cause privies to be built, when 3305(6).
Shall certify certain facts to school board clerks 3305(13).
Shall designate place for school in certain consolidated districts 3317.
Shall designate places for holding school in certain consolidated districts 3317, 3328.
Shall see that school is maintained eight months, when 3305(14)
Shall see that school is maintained six months 3305(13).
To act on appointment of probation officer by district judge, when 733.
To appoint census marshals, when 3361.
To appoint school trustees, when 3250 (8), 3302, 3328.
To appoint special census marshal, when 3370.
To approve transfer of school children 3305(20).
To determine suspension or expulsion of children, when 3305(18).
To enforce method of school board accounts 3250(5).
To examine, compare and revise census marshal's report 3369.
To file directory of teachers and school trustees with county auditor 3250(1).
To grade public schools, when 3250(7).
To inspect record books and accounts of school boards 3250(5).
To inspect school fund accounts of county auditor and report thereon 3250(6).
To investigate claim against any school fund, when 3250(2).
To notify county commissioners of approval of census reports 3372.
To provide flag of United States, when 3352.
To transfer funds, subject to restriction, when 3305(20).
Deputy superintendents—continued.
Qualifications of 3247, 3248.
Removal from office, when 3254.
Rules and regulations for 3253.
Salary and office and traveling expenses of. See Compensation.
District attorney, legal adviser of school boards 3354.
To cause arrest and prosecution in connection with school census, when 3371.
To enforce law against houses of ill-fame 3459.
District deputy superintendents. See Deputy Superintendents.
Districts. See School Districts, post.
Educational districts, five supervision 3246.
Elementary and high schools. See General Provisions.
Emergency school fund. See Funds, School.
Estray animals, proceeds of sale of, for county school fund 2281.
Exemptions from jury duty. See General Provisions.
Exemptions of school property. See General Provisions.
Fines, to go into state school fund (Const.) 355, 3760.
Fish and game 2047-2113.
Teachers must give instructions in monthly 3347.
Teachers not to receive public money as penalty, when 3348.
Flag, national 3352.
Flag of Nevada. See General Provisions.
Free text-books, action for to be submitted to voters in each district, when 3462.
Books, disposed of, how 3465.
District property 3464.
To be loaned and used as directed by school trustees 3463.
Credits for good care of by pupils 3467.
Existing contracts not to be violated 3471.
Material other than books may be supplied, when 3468.
Parents or guardians responsible for 3466.
Penalty for violating 3472.
Supplementary books for teachers, when 3469.
Tax levy by school trustees annually for 3470.
Trustees to levy tax for, when 3463.
Funds, school, apportionment of, for county 3391.
For emergency 3333.
For state 3375, 3390.
In consolidated districts 3327.
In joint districts 3321.
Restriction as to county school, in certain districts 3318.
Restriction as to state school, in certain districts 3318.
County, county treasurer to receive and pay out 3388.
Created 3388.
Estray animals, proceeds of sale of 2281.
Road funds may be applied to, when 3012.
To have two per cent of net profits from any county or municipal franchise 2135.

Funds, county—continued.
County treasurer to receive fees from grazing 3478.
Use of 3381.
County high school, estimate for 3415.
Custodian of 3416, 3420.
Expenditure of 3419.
Tax levy for 3416, 3420.
Unlawful stock, proceeds of sale of, to go into 2251.
Uses of 3416, 3420.
District library, how apportioned 3393.
How determined 3394.
Emergency, action creating 3329.
Amount of, semiannually set aside 3329.
Amount of, to district, when 3332.
Basis of distribution of 3332.
But one apportionment of 3333.
How used 3330.
Transfer of to county treasurer 3334.
Unused balance to revert 3335.
Free text-book, how expended 3463, 3468, 3469.
How obtained 3462, 3470.
Normal training school, set aside 3429(2).
Use of 3429(2).
Reversion not to apply to moneys derived from local sources 3392.
Reversion of district school surplus 3392.
State controller to keep separate account of 3382.
State distributive, county treasurer to receive and pay out 3388.
Created 3375.
How transferred to counties 3385.
Method of apportionment of 3390.
To be used only for payment of teachers' salaries 3376.
To receive one-half surplus from state library fund 3952.
Toll roads, penalties on go into 3758.
State permanent, certain salaries and expenses to be paid out of 3244, 4343, 4401.
Created (Nev. Const. art. xi, sec. 3)355.
Custody of securities for 3384.
Escheated estates go into 355, 6116.
Fines, all to go into (Const.) 355, 3760.
Investment of 3387.
Printing expenses of state land office to be paid out of state school fund 4356-4359.
Report on securities of state by state controller 3383.
Toll roads, penalties to go into 3758.
Transfer of funds restricted to apportionments for children 3305 (20).
Transfer of, to follow transfer of children 3305(20).
General provisions 3340-3360.
Appeal to superintendent of public instruction, when 3360.
Decision of superintendent of public instruction on, final 3360.
Arbor day to be designated each year by the governor 3349.
Arbor day to be observed by appropriate exercises 3349, 3350.
Birds, fish and game, instruction as to 3347.
General provisions—continued.
Classification of funds 3357, 3358.
County auditors and county treasurers must keep separate accounts with 3357.
How such accounts are to be started and kept 3357.
Penalty for failure of auditor or treasurer to comply 3358.
Flag of Nevada 3353.
Holidays, schools shall be kept open on, when 3351.
Schools shall not be kept open on, when 3351.
Houses, injury to 3455, 3456, 6760, 6761.
Houses of prostitution prohibited near 3457, 6510.
Jury duty, teachers and college professors exempt from, when 3356.
Legal advisers, attorney-general 3355.
District attorney 3354.
Penalty on teacher for nonfulfilment of contract 3359.
Public schools, defined 3340.
Elementary schools 3341.
High schools 3341.
Physiology and hygiene to be taught 3346.
Sectarian literature, prohibited 3344.
Schools not to be closed on election days, when 3351.
School property exempt from taxation or execution 3345.
School month 3342.
School year 3343.
Governor of state, member of state board of education 3239.
Member of state text-book commission 3398.
President of state board of education 3240.
President of text-book commission 3399.
To act on appointment of probation officer by district judge, when 733.
To act with superintendent of public instruction in making contracts for care of delinquents, when 756.
To appoint board of visitors for University of Nevada 4667.
To appoint text-book commission 3398.
To designate arbor day by proclamation 3349.
To fill vacancies in state text-book commission 3398.
Grazing fees, 10 per cent of apportioned to county school fund 3478.
Holidays. See General Provisions.
Hospital near schoolhouse unlawful 6534.
Houses of ill-fame, must not be located, where 3457, 6510.
Penalty on 3458.
Sheriff and district attorney to enforce, penalty 3459.
Interest-bearing school warrants, amount of, limited 3476.
How endorsed 3474.
Issued, how 3474.
Issued, when 3473.
Must be paid within three years 3477.
Order of payment of 3475.
Preliminaries as to issue 3477.
Tax levy for payment of 3477.
Irreducible school fund. See Constitutional Provisions.

Injury to school property, penalty 3455, 3456, 6760, 6761.
Juvenile court law. See Dependent, Neglected or Delinquent Children, Juvenile Court Law.
Legal advisers of school officers. See Constitutional Provisions.
Legislature and education. See Constitutional Provisions.
Libraries, district school, amount of money for, how determined 3393, 3394.
Apportionment of money to 3393.
Books for to be approved by 3395.
Books for to be purchased by 3396.
Money for, how expended 3395.
Rules and regulations for purchase of books, etc. 3397.
Misdemeanor to disturb school or interfere with school children. See Protection of School Children.
Normal school, county 3425-3430. See County Normal Training School, supra.
Normal school, state 357, 4639-4645. See University of Nevada.
Oath of office for college professors and teachers. See Constitutional Provisions.
Oath of office, when term of office begins, bond 2786.
Penalty for teachers for nonfulfilment of contract. See General Provisions.
Physiology and hygiene. See General Provisions.
President of university, member of state board of education 3239.
Member of state text-book commission 3398. See University of Nevada.
Principal of schools, has concurrent power with peace officers, when 3310.
May be vested with certain powers, when 3312.
Must hold certificate of highest grade taught 3305(11). See School Trustees, Teachers and Teachers' Certificates.
Protection of school children, misdemeanor to disturb school 3453.
Misdemeanor to interfere with pupils, when 3452, 6599.
Penalty for interference or disturbance 3454, 6599.
Protection of school property, misdemeanor to injure or deface 3455, 6760.
Penalty 3456, 6761.
Property, school, in charge of school trustees. See School Trustees.
Public schools defined. See General Provisions.
Records of documents, penalty for altering, defacing, forging or stealing 2817.
Regents. See Constitutional Provisions, and University of Nevada.
Resignations and vacancies 2797-2799, 2801-2806, 2812.
Schools and election days. See General Provisions.
School books, determined for elementary grades by text-book commission 3403. See Text-book Commission.
School districts, classes of 3315.
Consolidation of, allowable to enlarge or consolidate in certain cases 3326.
Compulsory in certain cases 3317.
School districts—continued.
Consolidated, disposition of funds and property of 3317, 3327.
Deputy superintendent to appoint first trustees for 3317, 3328.
Deputy superintendent to designate place for holding school in 3317.
Deputy superintendent to designate places to hold school 3328.
How accomplished 3326.
How property and funds are disposed of 3327.
Each town, village or city to constitute one district 3314.
First class may have city superintendent 3315.
Fraudulent claim, presenting, penalty 6715.
Joint school districts, apportionment of funds for 3321. See Funds, School.
Established, when and how 3320.
Formed of parts of two counties 3320.
Superintendent of public instruction to appoint first trustees for 3320.
New districts, but one district, when 3317.
By whom created 3316.
How created 3316.
How district may get in line for regular apportionment school funds 3333.
Petition for must be made 3316.
Petition for should show 3316.
Shall receive part of funds of old district, when 3319.
Size of, limited 3316.
When school in must be begun 3316.
Penalty for presenting fraudulent claim 6715.
Union school, how and when union may be dissolved 3325.
How established 3322.
How expenses are paid 3324.
How governed 3323.
How supported 3322.
In case of disagreement of joint board 3323.
What districts may unite 3322.
When presumed to be organized 3322. See note.
When may be abolished 3336.
Funds of abolished district revert 3337.
Proceeds of, how disposed of 3339.
Property of abolished district 3338.
When school shall not receive public moneys 3319.
School funds. See Funds, School.
School month, twenty days 3343.
School trustees, body corporate 3278.
District attorney adviser of 3354.
Duties of clerk of 3303.
Shall accompany orders with itemized bills 3308.
Shall draw all orders on county auditor, when 3307.
Shall hold records subject to inspection 3303.
Shall keep record of proceedings 3303.
Shall not issue order, when 3308.
Shall receive salary, when 3303.
Shall sign records 3303.
Election board, to file papers 3298.
To issue certificate of election showing 3299.
To summarize votes 3298.

School trustees—continued.
Election of 3281-3299.
Ballots must specify long-term and short-term candidates 3290.
Ballots to be printed in certain districts 3291.
Candidates in certain districts to file name, etc., with county clerk 3297.
Challenge of voter at, allowed 3296.
Election officers 3283.
How to vote at 3292.
Illegal voting, penalty 3296.
Instructions as to voting to be on ballots 3293.
Judge of election not authorized to administer oath of office to school trustee 3296.
List delivered to inspectors 3289.
List of voters 3287.
Not allowed at polls 3294.
Notice of to be posted 3284.
Pay for preparing list in certain districts 3288.
Penalty for showing ballot 3294.
Qualification for voting 3285.
Registration regulations 3286.
Two or more polling places in districts of first class 3283, 3284.
Voter may have assistance, when 3295.
Voting to be by ballot 3290.
What ballots shall be used, what they shall contain, etc., in certain districts 3291.
Female may be 371.
First meeting of new board 3303.
Fraudulent claim, presenting to, penalty 6715.
How board is organized 3303.
Majority vote of, to legalize action 3304.
Members liable for illegal order drawn by clerk of board 3308.
Monthly meetings of, required in certain districts 3304.
No discrimination against female teachers 3305(11).
Notice of board meeting necessary 3304.
Number of and how determined 3280.
Officers, president and clerk 3303.
Orders, drawn on county auditor, when 3307.
Forbidden in certain cases 3307.
Itemized statement of bills with order 3308.
Penalty for presenting fraudulent claims 6715.
Powers and duties of, may define powers and duties of city superintendent in schools of first class 3315.
May direct principals and teachers to exercise certain power 3312.
Must maintain all schools equal length of time 3306.
Shall not be pecuniarily interested in contracts made 3309.
Shall not erect school buildings without approval of plans, when 3305(2).
Shall not make repairs without election, when 3305(2).
Shall post in each schoolroom prices of text-books 3409.
To administer certain oaths 3305(15).
To build, purchase, rent or repair, when 3305(2).
To buy or sell property, when 3305(1).
To call meetings of heads of families, when 3305(4).
To cause official price lists of text-books to be kept posted 3409.
To cause two suitable privies to be erected 3305(6).
To change location of schools, when 3305(3).
To divide schools into departments, when 3305(17).
To employ legally qualified teachers 3305(11).
To employ teachers qualified for all grades 3305(11).
To enforce order and discipline, when 3310.
To enforce sanitary regulations 3305(24).
To enforce use of course of study and text-books 3305(19).
To enter into written contracts with teachers 3305(11).
To establish kindergarten department, when 3305(17).
To furnish certain supplies for pupils and school 3305(22).
To have custody of property 3305(9).
To hold property for district 3279.
To insure schoolhouses, etc. 3305(10).
To keep buildings in repair 3305(8).
To levy special tax for free text-books, when 3463.
To maintain departments in certain order 3305(17).
To maintain at least six months of school 3305(13).
To maintain school eight months, when 3305(14).
To maintain school in different places in district, when 3306(2), 3328.
To make arrangements with other districts for transfer of children 3305(20).
To make annual report 3305(23).
To manage and control school property 3305(5).
To notify county commissioners and deputy superintendents 3305(13).
To pay for children attending in other districts, when 3305(20).
To pay in all moneys collected 3305(5).
To pay salaries of teachers 3305(12).
To prescribe and enforce rules 3305(7).
To provide books for indigent children 3305(16).
To provide desk text-books for teachers 3305(16).
To provide free text-books for district, when 3463.
To provide record books for district 3305(16).
To submit question of free text-books to voters, when 3462.
To suspend or expel certain pupils from school, when 3305(18).
To suspend or expel pupils under 14 years of age, when 3305(18).
To visit schools 3305(21).

School trustees—continued.
Salary of clerk in certain districts 3303.
Terms of office begin when 3300.
Women may serve as. See Constitutional Provisions.
Vacancies, when filled by appointment 3302.
Vacancies, when filled by election 3301.
Vested with necessary power 3311.
School year, 3342. See General Provisions.
Sectarian instruction prohibited. See Constitutional Provisions.
Sectarian literature prohibited. See General Provisions.
Sheriff shall enforce laws against houses of ill-fame 3459.
State board of education, constitute county normal training-school board 3426. See County Normal Training School.
How composed 3239.
Members of state text-book commission 3398.
Officers of 3240.
Powers and duties of, shall have direction and control of Virginia City school of mines 4671.
Shall issue first-grade elementary certificates to graduates of Nevada state normal school, when 4645. See University of Nevada.
Shall issue high-school certificates to graduates of Nevada state normal school, when 4645. See University of Nevada.
To adopt courses of study and enforce use in schools 3242(1).
To adopt lists of books for district libraries 3242(2).
To adopt seal 3242(5).
To appoint deputy superintendents 3247.
To appoint public library trustees 3228.
To designate official organ 3242(7).
To direct state treasurer to negotiate for investment of funds 3387.
To draw order on state controller, when 3387.
To examine and certificate teachers 3255-3273.
To fix date of holding teachers' examinations 3256.
To have charge of county normal training schools 3426.
To have printing done by state printer 3242(4).
To investigate before directing investment of school funds 3387.
To keep record of proceedings 3242(6).
To remove deputy superintendents, when 3254.
To require opinion of attorney-general 3387.
To revoke or suspend teachers' certificates 3242(3).
State controller, to notify state board of education quarterly 3387.
To render statement to superintendent of public instruction, when 3383.
To report on securities to state board of education, when 3383.
To set aside money for salary of normal training school teacher, when 3429(2).
State controller—continued.
To draw warrants on state treasurer, when 3334, 3384, 3387.
State normal school 357, 4639-4645. See University of Nevada.
State orphans' home 4087-4108. See State Orphans' Home.
Children in, are wards of state 4092.
May be educated in Carson City schools, when 4106.
To be trained and educated for useful citizenship 4092.
Children mentally or physically deformed not admitted, when 4095.
County commissioners to send and support children, when 4099.
Money paid to Carson school district for education of orphans, when 4108.
Teachers in to be certificated by state 4090.
Text-books, etc., to be furnished by board of directors of home 4107.
What the children in shall be taught 4094.
State superintendent. See Superintendent of Public Instruction.
State treasurer, to be custodian of school securities 3384.
To cut off and pay coupons in presence of state board of education 3386.
To negotiate for investment of state school moneys, when 3387.
To pay over all public school moneys on warrant of state controller 3384.
To pay over state school moneys to county treasurers semiannually 3385.
State university. See Constitutional Provisions and University of Nevada.
Stimulants and narcotics. See General Provisions.
Superintendent of public instruction, curator of state museum 4345, 4346.
Delinquents, contracts with other states for care of 756.
Director of state orphans' home 4089.
Duties as curator of state museum, to collect specimens or ores, catalogue them and place them in museum 4346.
To include report on museum in biennial report 4346.
To inquire as to mining resources and inspect mines 4346.
Elected quadrennially 2765, 2773, 3243.
Ex officio duties no additional compensation 4343.
Member of state board of education 3239.
Member of state text-book commission 3398.
Powers and duties of, to act on appointment of probation officer by district judge, when 733.
To act with governor in making contracts for care of delinquents, when 756.
To address public assemblies 3244(1).
To appoint census marshals in new districts 3319, 3331.
To appoint school trustees in joint districts 3320.
To apportion county school fund 3244(3).
To apportion money from old district to new, when 3319.

State superintendent—continued.
To apportion state distributive school fund 3244(2).
To approve probation officer 733.
To call county institutes 3244(7).
To call meetings of state board of education 3244(8).
To call meetings of state text-book commission, when 3400.
To conduct institutes 3244(1).
To confer additional authority on deputy superintendents, when 3252.
To consult with school officers 3244(1).
To contract with other states for care of delinquents 756.
To convene and preside over state and district institutes 3244(6).
To decide appeals from teachers and school boards, when 3360.
To deliver to his successor property and effects of office 3244(14).
To determine county school tax, when 3378.
To determine amount of surplus district school funds to be reverted 3392.
To determine amount apportioned library fund 3952.
To draw order on county auditor 3241(7).
To employ stenographic clerk 4341, 4342, 4398.
To engage institute lecturers and teachers 3244(6).
To enter into contracts for care of deaf, dumb and blind, when 1702.
To fill vacancies on county boards of education 3418.
To have printing required done at state printing office 3244(11).
To make arrangements for care of deaf, dumb and blind 1702-1704.
To make rules and regulations for school libraries and for purchase of books 3397.
To nominate deputy superintendent of public instruction 3244(9).
To notify each county auditor and treasurer of deduction of surplus school funds, when 3392.
To notify state controller and state treasurer as to emergency school funds 3329.
To prepare blank forms, including school registers and teachers' contracts 3244(13).
To prepare pamphlet copies of school laws, when 3244(5).
To prescribe rules and regulations for reports 3244(5).
To promulgate prices of text-books 3409.
To report to governor biennially 3244(4).
To require teachers to attend institutes 3244(6, 7).
To require written reports from deputy superintendents quarterly 3244(12).
To set apart money for district libraries, when 3393.
To set aside money for emergency school fund, when 3329.
To visit schools, etc., in each county of the state, when 3244(1).
To visit state university quarterly and report to board of regents 4649.
Qualifications 2766.
Salary of, payable out of school fund 4343.
Secretary of state board of education 3240.
Secretary of state text-book commission 3399.
Stenographer for, appointment and salary 4341, 4398.
Term of office 2777.
Traveling expenses to be paid 3244(1).
Supervision districts 3246.
Surrender of records and property on expiration of term of office 2819.
Taxes, annual, county levy 3378.
Annual county, high school 3420.
Annual district for free text-books 3470.
Annual state school 3374.
Schoolhouses exempt from 3621.
Special county high school 3416.
Special, determined by election 3380.
Determined by school trustees or deputy superintendent 3305(13).
Determined by school trustees 3379.
District bond 3437.
District for redemption of interest-bearing school warrants 3477.
Teachers, certificates of may be suspended or revoked. See Teachers' Certificates.
Contracts for, form of to be prepared by superintendent of public instruction 3244(13).
To contain agreement as to salary, etc. 3305(11, 13, 14).
To be signed by 3305(11).
Oath of office of, before whom taken 3275, 3305(15).
Form of 3276.
Must be filed 3277.
Powers and duties of 3274-3277.
Shall attend teachers' institutes 3244 (6, 7), 3250 (3).
Shall be legally employed 3274.
Shall enforce course of study 3277(4).
Shall enforce rules and regulations 3277(4).
Shall enforce use of authorized text-books 3277(4).
Shall file legal certificate with deputy superintendent, when 3277(1).
Shall file official oath and letter with deputy superintendent, when 3276.
Shall fulfil contract under penalty 3359.
Shall give instruction as to effects of stimulants and narcotics 3346.
Shall give instruction in physiology and hygiene 3346.
Shall give oral instruction monthly as to birds, fish and game, under penalty 3347, 3348.
Shall have Nevada certificate in force 3274.
Shall hold certificate for highest grade taught 3305(11).
Shall keep complete record in school register 3277(3).
Shall make final reports 3277(2).
Shall make full and correct reports 3274.
Shall not suspend or expel any pupil under fourteen years of age 3277(5).

Teachers—continued.
Salary of cannot be paid unless on legal list 3250(1).
Vested by school trustees with certain powers, when 3312.
Vested with power to protect children going to and from school 3310.
Teachers' certificates, age requirements for 3262, 3263, 3273.
Experience required for, when 3263.
Examination questions for 3258.
How sent out 3258.
Penalty for unlawful use of 3259, 3260.
Examinations for, when given 3256.
Who conducts 3257.
Who examines papers 3270.
Elementary third grade, entitles holder to teach, where 3265.
Issued at discretion of state board of education, when 3265.
One only granted to same person 3265.
Time limit on 3265.
Grades of 3261-3272.
Granted, by whom 3255.
How granted, on credentials 3267-3269.
On examinations 3262-3265.
Percentages required for, first grade 3263.
High school 3262.
Second grade 3264.
Renewals of 3255, 3262, 3263.
Revocation and suspension of 3242(3).
Special, for what granted 3271.
On what granted 3271.
Suspension of 3250(3, 4).
Temporary, applicant must not be a near relative of any member of school board 3272.
Granted by deputy superintendent 3272.
But one can be granted to same person 3272.
Good in but one district 3272.
Time limit of 3272.
Teachers' institutes, allowance for county institutes 3244(7).
Allowance for state and district institutes 3244(6).
Called by superintendent of public instruction 3244 (6, 7).
County commissioners may appropriate for 3244.
Deputy superintendents to assist at 3249.
State controller shall draw warrants for 3244 (6).
State, district and county institutes 3244 (6, 7).
Teachers shall attend 3244(6, 7).
Text-book commission, appointment of 3398.
Appointee's eligibility 3398.
Contracts of, to contain what 3405.
Contracts of, in effect, when 3407.
Contracts of, void, when 3408.
Meetings of, where and when held 3400, 3401, 3403.
Meetings of to be public 3399.
Officers of 3399.
Overcharge for books by dealers, penalty for 3412.
Per diem and traveling expense of appointed members of 3411.
Powers and duties of, to adopt text-books 3401.
Text-book commission—continued.
To approve books for supplemental use 3401.
To exact penalty of publishers for violation of contract 3406.
To inform publishers as to changes in prescribed text-books 3401.
To inform publishers as to proposals, contents thereof, etc. 3401.
To make contracts 3405.
To make new adoptions, when 3401, 3408.
To notify publishers of termination of contract, when 3401, 3408.
To require bonds of publishers 3406.
To require publishers of geographies selected to incorporate special matter for Nevada 3402.
To vote on adoption of text-books by roll call 3399.
Prices of text-books to be posted in every schoolroom 3409.
Prices of text-books to be promulgated 3409.
Supplemental books approved by, purchased by district and used 3404, 3410.
Text-books adopted to be used exclusively in all schools 3404, 3410.
Text books adopted by to be in use four years 3404.
Vacancy on, how filled 3398.
Truants and truancy. See Compulsory Education.
Trustees. See School Trustees.
University of Nevada. See general index University of Nevada.
Unlawful stock, proceeds of sale for county school fund 2251.
Virginia School of Mines, created 4671.
Salary of principal 4671.
To be under direction and control of state board of education 4671.
Women as school trustees. See Constitutional Provisions.

Public squares, local or special laws for vacating are invalid 278.
Public supplies. See Board of Examiners.
For county, to be advertised for 1530.
For state officers, to be advertised for 4469-4475.
For state prison, to be advertised for 7568.
Local merchants preferred in furnishing 3479, 3480.
Officers not to be interested in purchase 1522, 2827-2829, 2830, 6331.
Secretary of state, certain to keep 4468-4475.
Public use, eminent domain may be exercised for, when 5606.
Mining declared to be 2456-2462.
Property shall not be taken for without just compensation having been first made or secured, exception 237. See Condemnation of Property under Civil Practice 5606-5629.
Public utility, action against for forfeiture of, penalty 4544.
Public work, convicts may be required to labor on 7581, 7619.
Mongolians not to be employed upon 3483.
Wage of unskilled labor, penalty for violation 3481, 3482.

Punishments. See Crimes and Punishments, Elections.
Barbarous, forbidden at state prison 7579.
Cruel or unusual, not to be inflicted 235.
May be commuted by board of pardons, how, when 307.
Public service commission, accidents, investigation of by commission 4541.
Serious, notice of given commission 4541.
Act, commission to enforce 4538.
Actions, to have precedence in district court 4540.
Annual report, commission to make 4523.
Of public utilities 4521(b).
Apparatus, testing, commission may procure 4524.
Appeal, may be taken from decision of district court by either party, when 4540(d).
To district court, when 4540.
Assistants, other, may be employed 4530.
Attorney-general, to represent commission in suits at law 4544.
Attorney-general and district attorney, to prosecute under act 4538.
Books and papers, commission may require production of 4529.
Failure to comply 4529.
Penalty 4529.
Burden of proof, in court proceedings 4540(e).
Charges, for utilities must be reasonable and just 4519.
Commission, all rates and regulations fixed by, prima facie lawful 4539.
All reports must be sworn to, false oath perjury 4543.
Attorney-general to represent in suits at law 4544.
May compel compliance with act by mandamus 4545.
May adopt rules regarding inspection and its proceedings 4528.
May classify service of public utilities 4527.
May investigate accidents 4541.
May investigate all public utilities 4520.
May lower rates, when 4533.
May proceed on own motion 4533.
May rescind or modify order, when 4540(c).
May require production of books and papers 4529.
Failure to comply 4529.
Penalty 4529.
Printing for, where done 4546.
Right of, to examine books and accounts of public utilities 4521(c).
Shall be given notice of serious accidents 4541.
Tests may be made by 4524.
To enforce act 4538.
To fix standards for service 4524.
To make annual report 4523.
Contradictory evidence, how treated by court 4540(e).
Contracts, existing not disturbed 4526.
Constitutionality, each section of act independent of all others as regards 4548.
Court, contradictory evidence, how treated by 4540(b).
Public service commission—continued.
Court, commission may apply to, for summons 4532.
Injunction by only after notice and hearing 4540(a).
Court proceeding, burden of proof 4540(e).
Depositions of witnesses 4534.
Discrimination or rebates, in rates charged illegal 4526.
Dismissals 4533.
District attorneys and attorney-general, to prosecute under act 4538.
District court, actions to have precedence in 4540.
Appeal may be taken from decision of by either party, when 4540(d).
Appeal to, when 4540.
Procedure 4540.
Engineer, expert may be employed 4530.
Powers 4530.
Salary 4530.
Evidence, contradictory, how treated by court 4540(b).
Expenses, traveling and other of commission 4547.
Hearings, public 4528.
Hearings, public, notice of 4531(a).
Separate, when 4533.
Injunction, by court only after notice and hearing 4540(a).
Inspection, commission may adopt rules regarding, and its proceedings 4528.
Investigation, of accidents by commission 4541.
Of rates, public utilities to have notice of 4531.
Of unreasonable charges, by commission, when 4531.
Law, suits at 4544.
Mandamus, commission may compel compliance with act by 4545.
Order, may rescind or modify by commission, when 4540(c).
Penalty, for failure to make report 4522.
Penalties, for public utilities violating act 4542.
Powers of board 4517.
Printing for commission, where done 4546.
Procedure, in district court 4540.
Proceedings, record to be taken by stenographer 4535.
Public service commission, created 4515.
Public utilities, all must report to commission 4521(a).
Annual reports of 4521(b).
Books kept in approved form 4521(a).
Commission may investigate all 4520.
Right of commission to examine books and accounts of 4521(c).
Schedules not to be changed without legal notice to commission 4525.
To have notice of investigations of rates 4531(b).
Public utility companies, must file schedules with commission 4525.
Must post schedules for public inspection 4525.
Term defined 4517.
Railroad commission, ex officio public service commission 4516.

Public service commission—continued.
Rates, commission may lower, when 4533.
Unreasonable, investigation of by commission, when 4531.
Rates and regulations, all, fixed by commission prima facie lawful 4539.
Rebates or discrimination, in rates charged illegal 4526.
Record of all proceedings to be taken by stenographer 4535.
Refusal to make reports or to exhibit books and papers, penalty 4537.
Reports, to commission must be sworn to, false oath perjury 4543.
Blanks for 4521(a).
Or to exhibit books or papers, refusal to make 4537.
Penalty 4537.
Penalty for failure to make 4522.
Rules of procedure, commission may prescribe, proviso 4518.
Schedules, of public utilities must be posted for public inspection 4525.
Of public utilities not to be changed without legal notice to commission 4525.
Public utility companies must file with commission 4525.
Secretary, duty of as to keeping records 4516.
Self-incrimination, no one excused from testifying on grounds of, proviso 4536.
Service of public utilities, commission may classify 4527.
Special counsel in suits at law 4544.
Standards for service, commission to fix 4524.
Suits at law, attorney-general to represent commission in 4544.
Special counsel in 4544.
Summons, commission may apply to court for 4532.
Disobedience of, contempt 4532.
Testifying, no one excused from, on grounds of self-incrimination, proviso 4536.
Testing apparatus, commission may procure 4524.
Tests made by commission 4524.
Traveling and other expenses of commission 4547.
Utilities, charge for must be reasonable and just 4519. See Public Utilities.
Violating act, penalties for public utilities 4542.
Witnesses, depositions of 4534.
Witness, fees and mileage 4531(b).
Public to have access to all tax books and assessment rolls, when 3752.
Public use, action for property taken for (Const.) 237, 5606-5629. See Civil Practice.
Private property taken for, compensation (U. S. Const.) 175; (Nev. Const.) 237.
Public utilities, public service commission to control 4515-4548. See Public Service Commission.
Towns, provisions for 940-953.
Towns, may issue bonds for 940-944, 984-990. See Town Government.
Public utility, books and papers, witness refusing to exhibit 4537.
Public utility—continued.
Books, failure to produce 4529.
Cities, establishment of in 794(5).
Use of streets, alleys and public places by 794(30). See Cities.
Failure to report to commission 4522.
False oath by official 4513.
Maliciously removing, damaging or destroying 6752.
Refusing to connect pipes or wires 6844-6846.
Violation of general act concerning 4542.
Public works, employment over eight hours 6778.
Labor on, violation of act regulating 3482.
Public writings, how proved 5408-5413.
Publication of libel, what deemed 6429.
Publication of summons 5026-5030, 5732. See Civil Practice.
Publication of various notices, processes. See Civil Practice.
Publishing or circulating book or paper advocating or inciting crime 6617.
Punishment, cruel or ususual, forbidden 235, 307.
Purchase money, recoverable notwithstanding homestead lien 2143.
Purchaser of personal property under execution sale to have delivery and certificate 5296.
Purchasers, subsequent deemed to take with notice of conveyance acknowledged and recorded 1039.
Pure food and drug law, adulterating or misbranding food, drugs, liquors, import or sale of 3486, 6816.
Adulterating or misbranding food, drugs, liquors, misdemeanor 3486.
Adulteration defined 3489, 3492.
Agent, how appointed, compensation 3507.
Analyses contested, hearings on, publication, chemist, duties concerning 3503.
District attorney, duties concerning 3505, 3509.
Drug, adulterated, defined 3492.
Defined 3490.
Standard of purity, defined 3491.
Employer responsible for act of employee, when 3510.
Experiment station, director of to report to district attorney 3504.
May buy samples and procure information, when 3502.
Records to keep and publish 3506.
To analyze and examine samples 3498, 3499.
To make rules 3497.
Food, defined 3487.
Food seized, destroyed, when 3508.
Liquor adulterated or impure, sale of 3486, 6816.
"Misbranded," drugs, liquors, food, defined 3493.
"Mislabeled" or "misbranded" food, liquor, drugs, when deemed 3494.
"Package," defined 3495.
Purity of food, drugs, liquor, standard of, defined 3488.
Purity, retailer not punishable when wholesaler guarantees 3509.
Possession prima facie evidence 3496.

Pure food and drug law—continued.
Retailer not punishable when wholesaler guarantees purity 3509.
Rules, experiment station to make 3497.
Samples, analyses and examination of, experiment station to make 3498, 3499.
Divided and sealed, when 3499.
Experiment station may buy, when, refusal to sell to, or give information, penalty 3502.
Suspected food, drug, liquor, when 3500.
Sheriff, fees 3501.
Sheriff to obtain samples of suspected food, drug, liquor, when 3500.
Violation of act, misdemeanor, penalty 3508.

Q

Quail, valley, closed season for 2090. See Game.
Quakers' form of marriage rite, valid 2353.
Qualifications for office. See titles of the several officers.
Qualifications of bail on arrest in civil action 5103.
Qualifications of state engineer 4679. See Water.
Qualifications of successor of officer removed for malfeasance 2853.
Qualifications of voters and candidates for office. See elections.
Quarantine, contagious diseases among live stock, against other states, when 2269-2271.
Bureau of animal industry, powers 4390.
Enclosed or herded, when 2267.
Governor, power to act 2269-2270.
Highways, unlawful to drive diseased on 2266-2268.
Nursery stock regulations 6776, 6777.
Sheriff to enforce, when 4380.
Sheep, inspection required 2298-2312.
Sheep, powers of commission 4588, 4591, 4595.
State veterinarian, power to declare 4380.
See State Veterinarian 4376-4389.
Quarantine, contagious diseases of humans, boards of health, duties 3000, 3002.
County commissioners, powers 2996-3003.
County physician, consulted, when 3000.
Misdemeanor to violate act, penalty 2999, 3000, 3003.
Officers for, may be appointed 2997.
Patient may be confined, when 3001.
Regulations, commissioners may adopt 2997.
Regulations, state board of health may adopt 3002.
Quartz mills, ore reduction works, owner entitled to patent for millsite, when, how 2399.
Quartz mills, smelters, eight hours day's work in, when 6555. See Eight-Hour Law.
Question of fact, fraudulent intent is 1086.
Quick child, killing unborn prohibited, punished, how 6403.
Quiet title, action for 5514-5526. See Civil Practice.
Quorum of medical board, what 2363.
Quorum of supreme court 317.
Quo warranto 5656-5682, 4840. See Civil Practice, Usurpation of Office.
Attorney-general to commence action, when 5658.
District court or judge may issue 4840-4843.
Dissolution of corporation, when, remedy 5657.
Remedy to secure forfeiture telegraph franchise 4630.
Remedy to secure forfeiture toll-road franchise 3757, 3049.
Remedy usurpation of office 5660.
Writ, justices supreme court or supreme court may issue 4834.
Writ, may issue, when 319, 321, 4834, 4840, 4843.

R

Race or color no distinction under homestead laws 3128.
Races, certain, marriage forbidden between 6514-6515.
Rafts, setting adrift, punished, how 6756.
Railroads, acts of unlawful omission and commission, who liable, penalty 3582.
Abandonment of way, land reverts 3531.
Agents of, making illegal charge 6737.
Annual reports, failure of secretary of state to furnish forms, penalty 3556.
To be verified, what to contain 3555.
Articles of association, certified copies to be evidence 3513.
What may be signed by proxy 3512.
What they shall set forth 3512.
Articles of incorporation to be filed in each county 3574.
Assessment, form of notice 3524.
Of property 3838, 3840, 3814.
Baggage, checks on, refusal to issue, penalty 3553.
Failure to deliver, damages, evidence 3553.
Wilfully or carelessly breaking or injuring 6755.
Bell, to be rung at crossings, penalty for neglect 3552, 6584.
Board, who to constitute 4549.
By-laws, proviso 3520.
Carrier, shipping without death certificate 2972.
Charter, when void 3566.
Cities, may make grants, not to apply to street railroads 3532.
Commission created 4549.
Ex officio public service commission 4516.
Companies may consolidate, notice 3551.
Compensation of officers 3519.
Condemnation proceedings, adverse claims 3541.
Commissioner to file report 3541.
Compensation of commissioners 3541.
Confirmation of reports 3543.
Costs 3544.
Court to order payment to party entitled 3548.
Defective titles 3545.
Definition of "person" 3549.
Duties of clerk of court 3550.
Hearing of petition 3537.

Railroads—continued.
Condemnation proceedings, meeting of commissioners 3540.
New trial 3542.
Passage of title 3546.
Payment into court 3545.
Payment or tender 3547.
Procedure 3544.
Proceedings instituted 3545.
Publication of notice 3538.
Record of reports 3544.
Report set aside 3542.
Rights of defendants 3536.
To appoint commissioners 3539.
To notify owners 3538.
Vacancy 3539.
Conductor, and other officers to wear badge, authority 3562.
May eject passengers 3561.
Construction, kind of rails to be used, not to apply to street railroads 3575.
Contracts in writing 3521.
Control of 794(30, 33).
Conveyance of land by cities 3531.
Corporation debts, record of 3521.
Corporations 1105, 1106.
File articles of, with secretary of state 3513.
Foreign 3574.
Foreign, to file articles with recorder 3531.
Powers and rights of 3513.
County, city or town may aid railroad corporation (Const.) 347.
Credit, county not to loan except for 347.
Crew, act, violation of 3591, 3594.
Crossing, railroads or highways 3530.
Debts, record of corporation 3521.
Depots 3531.
Directors, delay of election of 3519.
Duty of 3514.
Election of 3515.
Powers of 3520.
Qualifications of 3515.
Terms of office 3515.
Discrimination, what constitutes 3575.
Disturbance upon 6611.
Dividends, when insolvent, payment of, liability, existing companies may take advantage of act, acceptance to be filed in the office of secretary of state 3568.
Eight-hour law, block system, defined 3597.
Penalty for violation 3598.
Penalty, how recoverable 3599.
Eminent domain, power of 3574.
Employees, intoxication of 3564, 6583.
Violating duty 6585.
Engineer who cannot read, unlawful to employ 6582.
Excavating under 3565.
Exceptions to full-crew law supplementary to certain act 3596.
Explosives placed near, penalty 6751.
Failure to make returns or exhibit books and papers 4575.
Failure to pay 6611.
False notice or report, liability for disqualification for company office 3567.
Fares and freight, maximum rate for 3563.
Fence, companies to maintain 3551.
Flagman, experience 3589.
Railroads—continued.
Foreign corporations, to file articles with recorder 3531, 3574.
Franchise and property, may sell 3574.
Freight, and fares, maximum rate for 3563.
Unclaimed, disposed of, how 537, 542.
Full crew, defined 3588.
Applied to railroads longer than 95 miles 3595.
Exceptions to 3596.
Supplementary to certain act 3596.
Fund, sinking, penalty 3526.
General provisions concerning 3581, 4576.
Grants, cities may make, not to apply to street railroads 3532.
Guardians, executors or administrators may convey real estate to company, judge to approve 3534.
Highways or railroads, crossing 3530.
Illegal charges 6737.
Incorporation, articles of, to be filed in each county 3574.
Injuries to works of company, penalty 3565.
Injury to property 3565.
Insolvent, payment of dividends, when, liability, existing companies may take advantage of act, acceptance to be filed with secretary of state 3568.
Intoxication, penalty for 3564, 6583.
Lands acquired 3533.
Lands and materials, may take and use 3530.
Land, conveyance of by cities 3531.
Reversion 3533.
Legislature, may change fares and freight rates on narrow-gage railroads 3517.
May regulate freight and passenger rates (Const.) 278.
Livestock act, penalty for violation of 3587.
Live stock, duties of railroad companies in transporting, time for confinement 3572.
Injuring railroad, owners' liability 3551.
Killed or injured, company not liable in certain cases 3551.
Killed, railroad must give notice of 3600.
Lien for expenses 3586.
May charge expense of feeding to owners in certain cases 3573.
Penalty for noncompliance 3601.
Permitting animal on enclosed right of way 6753.
To be watered and fed 3586.
Unlawful to confine longer than 36 hours 3572, 3585.
Long-and-short-haul clause 3578.
Maliciously damaging, destroying or removing property 6752, 6749.
Map to be filed with secretary of state 3554.
Map to be filed with surveyor-general 4353.
Materials and lands, may take and use 3530.
Maximum rate for freight and fares, proviso 3563.
Mode of assessing property 3816.
Money, may borrow 3526.
Narrow-gage railroads, legislature may change fares and freight rates 3517.
Obstructing, hindering or delaying 6586.
Officers, compensation of 3519.
Election of 3514.
Making false report 3567.
Removal of 3518.
Removal of, notice to be given 3518.

Railroads—continued.
Operation, time granted for 3566.
Passengers, conductor may eject 3561, 6611.
Passes, issuance or acceptance of 4556, 4573, 4490.
Penalty, for noncompliance with full-crew law 3594.
Penalties for violation of railroad commission law 3581.
Penalties for violation of livestock act 3587.
Permitting animal to go on enclosed right of way 6753.
Person or persons, meaning of 3584.
Plat transmitted to surveyor-general, controller and recorder 3531.
Property and franchise, may sell 3574.
Certain, may be transported free or at reduced rates 3582.
Classified for purposes of taxation 3815.
Injury to 6749.
Provisions of act, to apply to all 3580.
Railroad, in cases of petition excluded from computation 3571.
Proceedings, record of 3522.
Provisions of act to apply to all property 3580.
Rail, kind of, to be used in construction, not to apply to street railroads 3569.
Railroads and rolling stock to have uniform valuation 3897.
All, to fix their own rates 3580.
Narrow-gage, legislature may change fares and freight rates 3517.
Street, may operate under act 3570.
Railroad commission act, full-crew law not to repeal or affect 3590.
Not to conflict with 3557.
Railroad company, general powers and rights of 3528.
Railroad corporations, formation of, conditions 3511.
Railroads or highways, crossing 3530.
Railroad property, in cases of petition, excluded from computation 3571.
"Railway" and "railroad," terms defined 6294(22).
Rates, all railroads to fix their own 3580.
Free or reduced, certain property may be transported at 3583.
Real estate, conveyance of, by guardians, executors or administrators to company, judge to approve 3534.
Special proceedings to acquire 3535.
Rebates 4570, 4572.
Drawbacks or other advantage, unlawful to allow 3576, 3581.
Or discrimination in rates charged illegal 4526.
Regulation of time and accommodations 3588.
Company not liable, when 3560.
Damages for violation 3599.
Negligence of passenger 3560.
Reports, annual, failure of secretary of state to furnish forms, penalty 3556.
Annual, to be verified, what to contain 3555.
Report or notice, false, liability for disqualification for company office 3567.
Right of way granted, width 3531.
Railroads—continued,
Road, may change line of 3529.
Schedule, to adopt, what shall state, where posted 3579.
Secretary, duties of 3521, 3522.
Secretary of state, capital stock paid in, certificates of filed with 3527.
Failure of, to furnish forms of annual report, penalty 3556.
Map, to be filed with 3554.
To file articles of association with 3513.
Shipment of fish 2113, 2064.
Signals of, interference with, penalty 6750.
Sinking fund 3526.
Statement furnished assessor, contain what 3814.
Stocks 3523.
Stock, affidavit of amount of 3512.
Calls 3523.
Capital paid in, certificates of, filed with secretary of state 3527.
Certificate of 3525.
Certificate of, how issued 3525.
Denomination of shares of 3512.
How transferred 3523.
May be reduced, when and how, proviso 3516.
Personal estate of stockholders 3523.
Sale of shares 3524.
Subscription to 3514.
Stockholders, book of 3522.
Called meetings of 3516.
Meeting of 3515.
Street railroads may operate under act 3570.
Subscription, payment of 3524.
Surveys, general rights and powers 3533.
Term defined 4550.
Telegraph operators and dispatchers, eight-hour law 3957.
Tracks, unlawful to excavate under, without consent 3565, 3597.
Train crew, full, defined 3588.
Train crew of five, when 3953.
Train crew of four, when 3592.
Transfer book 3522.
Transport members state police, when 4289.
Transportation facilities furnished 3575.
Transportation may be accepted by Nevada bureau industry and irrigation, when 4490.
Transportation of sheep without certificate 2309, 4597.
Transporting nursery stock without inspection 6776, 6777.
Unlawful to allow rebates, drawbacks, or other advantage 3576.
Unlawful to confine live stock longer than 36 hours 3585.
Unlawful to excavate under tracks without consent 3565.
Unlawful to make combinations to prevent continuous carriage 3577.
Use of highways and streets, when 3532.
Vacancies 3519.
Vice-president 3519.
Violation of full-crew law a misdemeanor 3591.
Way, abandonment of, land reverts 3531.
Whistle, failure to blow or ring bell at crossing 3552, 6584.
Wilfully or maliciously obstructing 6748.

Railroad commission, accidents, duty of railroads to notify commission relative to 4578.
Investigations of, evidence kept, expenses of, notice of 4578.
Act, each section of, independent 4585.
Not to affect other rights of action 4582.
Substantial compliance with 4581.
What provisions of apply to 4550(a).
Actions, act not to affect other rights of 4582.
For forfeiture 4579.
Acts of omission and commission, penalty 4576.
Adequate service required for reasonable charge 4551.
Annual reports, railroads to make to commission 4568.
Commission to make to governor 4580.
Appeal from order of court 4564(d).
Appointment of commissioners 4549.
Associate commissioners, equal voice and vote 4549(a).
Attendants in charge of live stock allowed free transportation on stock trains, no discrimination 4556(a).
Attorney-general, commission to report violations to 4579.
Duty of, to aid commission in prosecutions 4579.
Member of railroad board 4549.
Authority of commission to make inquiries 4566.
Board, who to constitute 4549.
Books and papers of railroads, inspection of 4566(b).
Failure to fill out blanks, make returns, give information or exhibit 4575.
Penalty 4576.
Buildings and depots, duty of carrier to maintain adequate 4557.
Commission may enforce maintenance of 4557.
Burden of proof, court proceedings 4564(e).
Cars, distribution of, powers of commission to regulate 4558(a).
Duty of railroad to furnish suitable 4558.
No discrimination in furnishing, proviso 4558.
Carson City, office of commission kept at 4549(k).
Chief commissioner 4549(a).
Claims for damages or overcharges not acted on by railroad to be investigated by commission 4580.
Commission, all remedies available to 4583.
Authority to make inquiries 4566.
Duty of railroads to notify, relative to accidents 4578.
Expenses of 4549(k).
Hearings before 4560.
May act on own motion 4560(b).
May investigate violations of interstate commerce law 4569.
May issue subpenas, penalty for disobedience 4566(c).
May rescind or amend orders 4562(a).
Office kept at Carson City 4549(k).
Official title of 4549(j).
Orders of, prima facie reasonable and lawful 4563.
Railroad commission—continued.
Other powers of, to regulate 4577.
Political complexion of 4549(a).
Present, not to be disturbed 4549(n).
Railroads may institute action against to set aside orders 4564.
Railroads to make annual reports to 4568.
Rules of procedure of 4549(l).
Sessions of, held at any place 4549(k).
To act on complaints 4560.
To confer with commissions of other states and attend conventions 4549(m).
To inquire into neglect 4579.
To make annual reports to governor 4580.
To report violations to attorney-general 4579.
Commissioners, chief and first associate 4549(a).
Chief and first associate to give entire time to work 4549(e).
How appointed 4549.
May administer oaths 4561.
May be removed for cause 4549(b).
May issue subpenas 4561.
Not to be interested in railroads 4549(c).
Oaths to be taken 4549(f).
Salaries of 4549(g).
Terms of office 4549.
Commodity rates 4554.
Complainant, railroad may be 4560(c).
Complaints, commission to act on 4560.
To be investigated within reasonable time, effect of failure 4549(d).
Connecting lines, duties to each other 4559.
Contracts, joint traffic, to be furnished on request 4567.
Conventions, commission to confer with commissions of other states and attend 4549(m).
Court, appeal from orders of 4564(d).
Certified copies of commission orders prima facie evidence in 4565(b).
Immunity of witnesses in 4565(a).
Injunction 4564(a).
Judgment of 4564(c).
Precedence of cases in 4564.
Procedure 4564.
Proceedings, burden of proof in 4564(e).
Rules of procedure in 4565.
Trial 4564(b).
Witnesses 4565(a).
Crossings, powers of commission to regulate 4555.
Damages, or overcharges, claims for not acted on by railroad to be investigated by commission 4580.
Treble allowed, when, proviso 4574.
Depositions, of witnesses 4561(b).
Depots and buildings, duty of carrier to maintain adequate 4557.
Commission may enforce maintenance of 4557.
Devices, false, misdemeanor, penalty 4572.
Discrimination, penalty for unjust 4570.
District court, may enforce subpenas issued by commission 4561.
Evidence of investigations of accidents kept 4578.
Expenses of commission 4549(k).
Of investigations of accidents 4578.

Railroad commission—continued.
False devices, misdemeanor, penalty 4572.
Fares and freights, powers of commission to regulate 4555.
Fees, witness 4561(a).
Forfeiture, actions for 4579.
Freight, certain, may be carried free 4556.
Freights and fares, powers of commission to regulate 4555.
Governor, commission to make annual report to 4580.
Member of railroad board 4549.
Hearings before commission 4560.
Commission may order separate 4560(a).
Immunity of witnesses in court 4565(a).
Injunction, court 4564(a).
Inspection of books and papers of railroads 4566(b).
Interstate commerce law, commission may investigate violations of 4569.
Interstate tariff schedules, to be filed with commission 4569.
Investigations, of accidents, evidence kept, expenses of, notice of 4578.
Of complaints to be made within reasonable time, effect of failure 4549(d).
Joint rate schedules, to be filed and posted in same manner as local rates 4552.
Joint rates, may be less than combination of local rates 4553.
Powers of commission to regulate 4555.
To be just and reasonable 4553.
Joint traffic contracts, to be furnished on request 4567.
Judgment, of court 4564(c).
Lieutenant-governor, member of railroad board 4549.
Live stock and perishable freight, precedence of 4559.
Attendants, allowed free transportation on stock trains, no discrimination 4556(a).
Mileage books or passes issued, to be reported 4567(a).
Neglect, commission to inquire into 4579.
Oaths, commissioners may administer 4561.
To be taken by commissioners 4549(f).
Office, of commission, kept at Carson City 4549(k).
Official title of commission 4549(j).
Omission and commission, acts of, penalty 4576.
Orders, certified copies of in court prima facie evidence 4565(b).
Commission may rescind or amend 4562(a).
Of commission prima facie reasonable and lawful 4563.
Railroad may institute action against commission to set aside 4564.
Railroads to comply with 4562.
When take effect 4562.
Overcharges or damages, claims for, not acted on by railroad to be investigated by commission 4580.
Passes, forfeiture of office for state officials accepting 4573.
Or mileage books issued to be reported 4567(a).
Or reduced rates allowed to certain persons 4556.
Railroad commission—continued.
Passes, to state officials and other persons prohibited, exception 4573.
Penalty, for omission or commission 4576.
For failure to fill out blanks, make returns, give information or exhibit books or papers 4575.
For unjust discrimination 4570.
For using false devices 4572.
Perishable freight, and live stock, precedence of 4559.
Physical condition, powers of commission to regulate 4555.
Political complexion of commission 4549(a).
Powers of commission, changes in service 4555.
Crossings 4555.
Joint rates 4555.
Other, to regulate 4577.
Physical condition of railroads 4555.
Safety appliances 4555.
To fix reasonable rates and service 4562.
To regulate freights and fares 4555.
To remedy 4555.
Transfer tracks 4555.
Transmission of telegraph and telephone messages 4555.
Precedence of cases in court 4564.
Preferences unlawful 4571.
Procedure, court 4564.
Proceedings, before commission, record of 4561(c).
Process for witnesses 4560.
Prosecutions, duty of attorney-general to aid commission in 4579.
Provisions of act to apply to, what 4550(a).
Printing of commission, where done 4580(a).
Private tracks, when commission may control 4559(a).
Railroad, duty of, to furnish information 4566(b).
May be complainant 4560(c).
Meaning of term 4550.
Railroad board, created, who constitute 4549.
Railroad commission, created 4549.
Railroads, all, to file copies of schedules of rates 4584.
Commissioner not to be interested in 4549(c).
Duty of, to notify commission relative to accidents 4578.
Inspection of books and papers of 4566(b).
May institute action against commission to set aside orders 4564.
To comply with orders of commission 4562.
To furnish schedules 4552.
Rates. See also Joint Rates and Schedules.
Changes in, not to be made without notice to commission 4552(a).
Concentration, commodity, transit and other special contract 4554.
Lower 4570(a).
Notice of changes in, to be given public 4552(b).
Powers of commission to regulate 4555.
Reduced, or passes, allowed to certain persons 4556.
Service, reasonable, power of commission to fix 4562.

Railroad commission—continued.
Reasonable charge, adequate service required for 4551.
Rebates 4570-4572.
Record, of proceedings before commission 4561(c).
Regulate other powers of commission 4577.
Regulations and rules 4581.
Of commission prima facie reasonable and lawful 4563.
Remedies, all available to commission 4583.
Remedy, power of commission to 4560.
Removal of commissioners for cause 4549(b).
Report blanks, forms of 4566(a).
Reports, annual, railroads to make to commission 4568.
Rules and regulations 4581.
Of procedure in court 4565.
Of procedure of commission 4549(l).
Safety appliances, powers of commission to regulate 4555.
Salaries named, to be only compensation 4549(n).
Of commissioners 4549(g).
Salary and appointment of secretary 4549(h).
Schedules. See also Rates and Joint Rates.
Commission may prescribe forms of 4552(d).
Copies to be kept on file in depots and offices 4552.
Forms of 4552(d).
Interstate tariff, to be filed with commission 4569.
Joint rate, to be filed and posted in same manner as local rates 4552.
Of rates, all railroads to file copies of 4584.
Open to public inspection 4552.
Railroad to furnish 4552.
Unlawful to make greater or less charge than named in 4552(c).
What to state and include 4552.
Secretary, appointment and salary, qualifications 4549(h).
Duties 4549(i).
Separate hearings, commission may order 4560(a).
Service, changes in, powers of commission to regulate 4555.
And rates, reasonable, power of commission to fix 4562.
Sessions, of commission held at any place 4549(k).
State officials, forfeiture of office for accepting passes 4573.
And other persons, passes to, prohibited, exception 4573.
Subpenas, commissioners may issue, district court may enforce 4561.
May be issued by commission, penalty for disobedience 4566(c).
Telegraph and telephone messages, transmission of, powers of commission to regulate 4555.
Terms of office of commissioners 4549.
Tracks, private, when commission may control 4559(a).
Transcripts, to be furnished, when 4561(c).
Transfer tracks, powers of commission to regulate 4555.
Railroad commission—continued.
Transportation, to attendants with livestock free on livestock trains, no discrimination 4556(a).
Trial, court 4564 (b).
Unlawful to make greater or less charge than named in schedules 4452(c).
Vacancies, how filled 4549.
Violations, commission to report to attorney-general 4579.
Of interstate commerce law, commission may investigate 4569.
Witness, depositions of, fees 4561(b).
Witnessess, immunity of, in court, 4565(a).
Process for 4560.
Railroads and railway companies, action for and against, procedure. See Civil Practice, Railroads, Railroad Commission.
Ranchman, has lien upon animals for charges 5499.
Ranch owner may file lien, when 2232.
Rape, assault with intent to commit, death penalty may be inflicted, when 6413.
Defined 6442, 6443.
Proof of necessary 7171.
Trial, evidence 7171.
Rates fixed by public service commission prima facie lawful 4539, 4540.
Rate of imprisonment for unpaid fine 7257.
Rate of legal interest, what 2499. See Money and Interest.
Rates of railroad commission are prima facie lawful 4563, 4564.
Rates of railroads, toll roads, ditch, flume and tunnel companies may be regulated by legislature 278.
Rates of telegraph and telephone company 355, 4555, 4627.
Real estate 3602-3608.
Act authorize and empower aliens and nonresident persons and incorporations to take, hold, enjoy and acquire real estate in the State of Nevada 3602-3603.
Act provide for erection and maintenance partition fences 3604-3608.
Actions affecting procedure in. See Civil Practice.
Banks, assessed, when 3822. See Revenue.
Belonging to minor or person under legal disability, local or special law of, invalid (as amended 1889) 278.
Belonging to religious organizations sold, how 1369. See Corporations.
Chinese prohibited from holding 3602.
Defined 3622. See Revenue.
District court has jurisdiction of cases involving title or possession 321.
Expense erecting, maintaining partition fences, divided, how 3604.
Fees of fence viewers, paid how, by whom 3606.
Fees justices of peace proceedings fence partition 3606.
Fence partition erected joint expense 3604.
Fence viewers, appointed how, report of 3605.
Fence viewers, oath, what 3607.
Fence viewers, paid, how 3606.
Improved lands, defined 3608.
Justice court no jurisdiction in actions involving trial of title to 323.

Real estate—continued.
Justices of peace appoint fence viewers, how, when 3605.
Limitations of actions concerning 4948-4966.
May be owned by whom 3602.
Nonresidents, except Chinese, may own 3602.
Oath of fence viewers, what 3607.
Partition fences, defined 3608.
Partition fences erected joint expense, how 3604.
Persons who may hold 3603.
Procedure in actions affecting. See Civil Practice.
Regulations 656.
Statutes of limitations restricted as to holders, how 3603.
Supreme court has appellate jurisdiction of actions involving title or possession 321.
Real property, actions affecting, procedure. See Civil Practice.
Real property, defined 6294(10).
Lost records of, action to restore 5630-5646.
Procedure affecting actions in. See Civil Practice.
Sale of, estates deceased persons 5985-6020.
Realty, conversion into personalty with intent to steal 6643, 6644.
Reargument, if two justices of supreme court do not agree 4837.
Reasonable doubt, acquittal 7163.
Reasonable doubt as to degree, conviction of lowest 6277.
Reasonable doubt, defined 6941.
Rebates 4570.
Drawbacks or other advantage, unlawful to allow 3576.
Or discrimination in rates charged, illegal 4526.
Rebellion, in case of, writ of habeas corpus may be suspended if public safety requires 234.
Recall, amendment proposed to sec. 8, art. ii, of the constitution, passed at legislative sessions 1909, 1911, subject to ratification by people at general election of 1912, 257.
Receipt, of district attorney or tax receiver for taxes and costs in action for delinquent taxes, prima facie evidence 3665.
Receipt, to be filed with clerk by referees in action for partition 5568.
Receivers 5193.
Actions for or against and concerning, procedure. See Civil Practice.
Appointed take charge mutual fire insurance company 1301. See Corporations.
Bond 1302.
Compensation, how determined 1199.
Decree appointing, publication 1196.
Duties relation to affairs disabled company 1301.
For corporations 1194-1199.
General provisions relating to 5193, 5194. See Civil Practice, Corporations.
Receiving stolen goods, prohibited 6648.
Reception or assent to reception of deposit in insolvent bank 634, 635.
Reclamation act. See Public Lands.
Reclamation, eminent domain may be used for purposes of 5606.
Recognizance, attorney not to be received as surety in district court, rule xiv, p. 1428.
Recognizance—continued.
Bail, form of 6941.
Forfeited, district attorney to prosecute action 1598.
Record of official acts, to keep 1098, 1099, 2751, 2752, 2757.
Record, supreme and district courts and such other courts as legislature may name, are courts of 323. See Civil Practice.
Records, archives of Territory of Nevada vested in state 388.
Authentication of 526-529. See Authentication of Records.
Lost, restoration of, action for 5630-5646.
Of mining locations, contain what 2382. See Mines and Mining.
Of patents to townsite property, proof of payment of taxes not required 1992.
Papers and documents, stealing, altering, defacing or concealing, penalty 2817, 6344-6349.
Proof of 5408-5413.
Refusal to deliver to proper custodian 2819.
Stealing, altering or defacing 2817.
Recorder or deputy filing map or plat unlawfully 965.
In suits affecting, procedure. See Civil Practice.
Recorder's office, newspapers, abstracting or defacing 1642.
Recorders' courts. See Municipal Courts, Criminal Practice.
Always open 4860.
Cities, incorporated, may have 316, 324, 4853.
Committing magistrates 4858.
Compensation of recorder 4857.
Established 316, 4828.
Establishment and jurisdiction 324.
Fees and perquisites, may receive 325.
Held, where 4872.
Incorporated cities may have 316, 324, 4853.
Judge, how designated 4855.
Jurisdiction 324, 4853, 4854.
Not to conflict with courts of record 324.
Legislature may establish 316.
Magistrates 4858.
Place of holding changed, when 4873, 4874,
Process, writs and warrants, may issue 4859.
Recorders, committing magistrate 4858.
Election and oath 4856.
May receive fees and perquisites 325.
Where held 4855.
Recount, demanded in elections, when 1895. See Elections.
Recruiting officer. See State Militia.
Redemption bonds irrigation district 4754. See Water.
Redemption of property, actions affecting. See Civil Practice.
Redemption of property made, how and when 3667. See Revenue.
Reduction plants, smelters, quartz mills, eight hours, day's work in 6555.
Reduction works or quartz mills, owner entitled to patent for millsite, how, when 2399.
Reduction works, preferred lien on ore sold to 5492. See Mines and Mining.
Reenactment, reference in statutes to provisions reenacted in civil practice act to be construed as applying to such provisions as reenacted 5817.

Referee, and references 5230-5235.
Asking or receiving bribe 6320.
Bankruptcy 575-585.
Influencing or attempting to influence 6323.
Oaths, may administer 5483.
Or commissioner, proceedings before supreme court may enforce order 4864.
Power to enforce order before district court 4864.
Promise or agreement of, unlawful 6324.
Receiving communication unlawfully 6324.
References and referees, district court 5230-5235.
Unlawful promise or agreement of 6324.
See Civil Practice.
References and referees 5230-5235. See Civil Practice.
Referendum, article on 412, 413.
Referendum or other lawful petition, filing false or fictitious 6670.
Referendum or other lawful petition, subscribing to false oath thereto 6670.
Referendum or petition authorized by law, signing fictitious name or name of other person thereto or withdrawing therefrom for reward 6670.
Referendum proceedings 1882. See Elections.
Referendum, questions, how put to voters 1885. See Elections.
Reformatories, agents of, duties and compensation 743.
Refunding money paid into state or county treasury, local or special law, invalid 278.
Refusal inspection or examination of bank to examiner or deputy, revocation 654.
Refusal to join posse, prevent offense, or assist officer 6606.
Refusal to make arrest or aid officer 2833, 4290, 6361, 6606, 6863, 6956.
Refusal to plead 7114.
Register of actions, to be kept by clerk 5480.
Registration, elector may apply to district court for writ of mandamus to compel 1710, 1712.
Regents, board of. See University of Nevada (Const.) 356, 359, 360.
From accruing interest to maintain mining department at university 360.
To appoint director and assistant, hygienic laboratory 3943.
To invest in separate fund, to be irri-ducible, proceeds from land granted by Congress in 1862, for benefit of agriculture, mechanic arts and military tactics 360.
University of Nevada controlled by, duties 356, 359.
Regiment. See State Militia.
Register applicants and those admitted practice medicine, surgery and obstetrics 2367.
Register land office, duty to publish application for patent 2383. See Mines and Mining.
Registration. See Registration under Elections.
Elector may apply to district court for writ of mandamus to compel 1710, 1712.
Fee imposed, when 2364-2365.
Not required of those in military service 252.
Of births and deaths 794 (58).
Of electors, to provide for 255.
Registration—continued.
Of wife's separate property 289.
Provision to be made by legislature for 255.
Soldiers and sailors, what, not to pay poll tax 252.
Registry agent, refusal to perform duties 1712, 1719.
Registry agents, justice of the peace ex officio 1705. See Elections, Justice of the Peace.
Reports to make 3981. See State Militia.
When one may act for another 4926.
Regulations concerning location of lode claims. 2421. See Mines and Mining.
Rehearing, petitions for, S. C. rule xv, p. 1424.
Rejected claims against the state for services or advances authorized by law, when action may be brought 280.
Release of indebtedness or liability of corporation or person to state, county or municipality, local or special law, invalid 278.
Relief, how pleaded. See Civil Practice.
Religion, laws affecting, Congress prohibited from passing 171.
Religious beliefs, respected 748, 233.
Witnesses not disqualified because of 5420.
Religious, charitable, literary societies 1365-1372.
Religious freedom guaranteed 171, 233.
Religious meeting, disturbance of 6478, 6597, 6607.
Religious or camp meeting, selling or disposing of liquor at 6598.
Religious or charitable corporation, sale of property, may allow 1369.
Religious sentiment, toleration of, secured 228.
Religious test not to be required as qualification of office 169.
Relocation abandoned lode claims 2428, 2382. See Mines and Mining.
Remainders and contingent remainder, to be alleged in complaint for partition 5528.
Remainders and reversions, defined 1057-1060.
Remittitur, costs endorsed on, rule vi, sec. 4, p. 1423.
From appellate court 7306, 7307.
In supreme court, when to issue, rule xv, p. 1424.
Opinion to accompany, when, rule xvi, p. 1424.
When filed in lower court, execution for costs to issue 5361.
When to issue, rule xv, p. 1424.
Removal of, action before trial 7115-7120.
Assessor, from office 3684. See Revenue.
Civil officers without impeachment 6894-6907, 7000, 7001.
Directors or officers from corporations 1179, 1182. See Corporations.
Officers, otherwise than by impeachment, schedule of sections 6894.
Officers, proceedings 2851-2854.
Town or city officer 983.
Vacancy, caused by, filled, how 334-336, 2801.
Removal of landmark 6676.
Removal from office for malfeasance or misfeasance, provision for 337.
Removal from one county or precinct to another, effect on residence 3612. See Elections.

Removal from state with intent to remain, residence lost 3613. See Residence.
Renewal of execution in justice's court 5785.
Rent and profits of real property sold under execution during period of redemption, how disposed of 5305.
Rent may be paid and tenant remain in possession in action for forcible entry or unlawful detainer 5599.
Repeal, by civil practice act, limitations continue to run as if former act had not been repealed 5819.
Not allowed if law providing revenue to pay loan made to state 350.
Of certain provisions relating to civil practice, schedule of acts 5817, 5821.
Replevin, action in, verdict, form of 5224.
District court 5124-5135, 5194.
Judgment in, may be for return of property of defendant 5269.
Judgment, to be in, alternative and with damages 5269.
Justice's court 5753. See Civil Practice.
Reply, civil action, district court 5057-5059. See Civil Practice.
Reporter, fees, when taxed as costs 4913.
Official supreme court, appointment and compensation 4889, 4890.
When testimony stenographically taken by may be used on subsequent trial 5472.
Report of referees and proceedings connected therewith. See Civil Practice.
Reports of decisions of supreme court, compilation of 4897-4899.
Reports of state engineer, to make to whom 4684. See Water.
Reports filed by paroled prisoners with secretary board of parole commissioners 7633.
Representative in Congress, elected, how 2765, 2772, 2773. See Elections.
Election of, Congress may regulate 100.
How chosen, qualifications 88, 89.
Not eligible as elector 141.
Representatives, apportioned, how 186, 242.
People have right to instruct 239.
Representation, in Congress, when state's quota may be reduced 186.
In legislature, when census to serve as basis 381.
To be apportioned according to population 242.
Reprieve may be granted by governor, when 306.
Republican form of government guaranteed states 165.
Requisition, person suspected of bringing stolen goods into state, detained for 6649.
Rescue of prisoner 6336.
Reservation of powers by states 180.
Reservoirs, eminent domain may be exercised for 5606.
Reservoir sites and locations restricted, how 2419. See Mines and Mining.
Reservoir sites under timber and stone act restricted 3170. See Water.
Residence, actual, deemed to constitute 3609-3616.
Defined for registration purposes 1714, 1867.
Defined for purpose of voting (Const.) 250, 251, 252.
Determined, fixed how 3609, 3610.
Residence—continued.
Elector, defined 1710.
Family abode, effect on 3615.
Gained or lost, when not deemed 251, 3611.
Legal, defined (Const.) 250, 251, 252, 3609.
Lost, when 2927, 3613, 3616.
Necessary for naturalization 2517.
Officers at seat of government, who (Const.) 380, 2774, 4128, 4249.
Parties, when determined, place of trial 5014.
Pauper, defined 2607, 2921.
Pauper, satisfactory evidence to require 2921.
Permanent habitation, intent 3610.
Presumption abandonment of, when raised 3614.
Removal from one county or precinct to another 3612.
Removal from state with intent to remain, lost 3613.
Required, to constitute elector 250, 251.
Soldiers and sailors for voting purposes, where (Const.) 252.
Students, not to gain or lose 251.
Transferred by elector, when 1714.
Voting purposes defined (Const.) 251.
When not deemed gained or lost (Const.) 251, 3611.
Resident, bona fide, although foreigner, has same property rights as native-born citizens 245.
Resident agent, duties when appointed 1304. See Corporations.
Resident agent, foreign corporation may appoint 1178, 5024. See Corporations.
Resident agent may be for other corporations 1119. See Corporations.
Resignations filed in office of secretary of state 2795.
Resignations of justices supreme court made to governor 2798.
Resignations of officers allowable 2797-2798. See Elections.
Resistance of process, contempt 2833, 2834.
Resisting, delaying or obstructing public officer 4291, 6362.
Resisting or interfering with water officers 4704.
Restaurant. See Hotels.
Respondent and appellant, defined 5327.
Restitution, form of writ in action for forcible entry and detainer 5605.
Restitution, judgment in action for forcible entry and detainer, form 5599.
Restoration of lost records 5630-5646. See Civi Practice.
Restoration to citizenship, prisoner 7625.
Restoration to civil rights, certain convicts excluded from juries unless restored 285.
Retailer not punishable when wholesaler guarantees purity of food and drugs 3509.
Restoration of lands and records, proceedings affecting, procedure. See Civil Practice.
Restraining orders, procedure in. See Civil Practice.
Retaxing costs in district court, procedure, rule xxxiv, p. 1430.
Returns of election. See Elections.
Returns of election for state officers, how and when canvassed by justices of supreme court 297.

Returns on writs and other processes, procedure. See Civil Practice.

REVENUE

Constitutional References on Revenue—
Amendment proposed to constitution, art. ii, sec. 3, passed at legislative sessions 1909, 1911, subject to ratification by the people at general election 1912, provides for the investment of school moneys in bonds of any county in the State of Nevada 355.
Appropriation of taxes required for payment of loan to state not to be repealed or diminished 350.
How moneys pledged to school purposes to be invested and income apportioned 355.
Law must provide for tax levy to pay within 20 years loans made to state 350.
Legislature shall provide for annual tax to defray expenses of state for fiscal year, ensuing two years, and deficiencies 349.
Legislature to provide equal assessment and taxation except mines, the proceeds of which shall be assessed and taxed, and when mines patented shall be assessed at not less than $500 unless $100 annual labor performed, exemption for municipal, educational, literary, scientific or charitable purposes (as amended 1906) 352.
Legislature to provide special tax for maintenance of university and schools (as amended 1889) 358.
Proceeds from land granted state by act of Congress of July 2, 1862, for college for benefit of agriculture, mechanic arts and military tactics to be invested by board of regents of state university in separate fund, to be irreducible 360.

Licenses—
And fees collected from insurance to go to general fund, when 3761.
And fees paid into general fund from gaming restrictions, what 3761.
All settled by sheriff before claim allowed 3740.
Amount for theater, opera or concert singers, circus, wire-dancers, sleight-of-hand performances or other exhibitions 3727.
Amount of, for keeper of intelligence office 3727.
Amount of for pawnbroker 3727.
Amount of per quarter for billiard tables, nine or ten pins and bowling alleys 3727.
Amount to be collected, when 954, 1279, 1280, 1356, 3727, 3735-3754, 3768-3774, 3777-3785, 3872-3904, 4240-4248, 6809, 6810.
Attachment to issue in suit for license, how and when 3737.
Auctioneer, defined for purposes of 3891.
To secure license, when 3892.
To sell liquor without, when 3893.
Auditor, charge treasurer with license blanks, how and when 3739.
Charge treasurer with license money received 3741.
Credit sheriff with, how and when 3741.
File and cancel licenses returned by sheriff, how and when 3740.
File treasurer's receipt to sheriff for license paid 3741.
Licenses—continued.
Auditor, furnish sheriff with license, how and when 3740.
Have license blanks printed 3739.
Issue peddler's license to sheriff, how and when 3735.
Make entries on stub of license book 3740.
Make out licenses in full, how and when 3740.
Open monthly license account with sheriff 3741.
Possessing or issuing fraudulent 3744.
Receive countersigned license blanks from treasurer 3739.
Sign all licenses before delivery to sheriff 3740.
Authorized party to do what 3737.
Automobile, business of hiring or renting, license for 3877.
Automobile for hire or rent, license to be secured, when 3877.
Banks and banking defined 3728.
Banks to obtain license, how and when 3728-3730.
Bankers, classified according to volume of business 3730.
Bankers, classified for purpose of license 3728, 3730.
Blanks to be prepared by auditor, how 3739.
Boarding-house, defined for purpose of license tax 3734.
Boards of city, town or municipal government, may revoke, when 3869.
Boards of county commissioners not to allow claim by sheriff, when 3740.
Bond, state not required to give undertaking for attachment, license, suit 3737.
Bondsmen, liability for negligence of sheriff in not collecting license 3741.
Book, auditor to make entries, how and when 3740.
Brokers defined and classified according to amount of business 3729.
Business, carrying on without license, penalty 3737.
Business, license revoked for cause by commissioners, when 3867.
Carriers to obtain license in county, when 3730.
Carrying on business without, penalty 3737.
Cigarettes, license for, what 3872.
Cigarettes and cigarette papers, how collected and accounted 3876.
Cigarettes or cigarette papers, unlawful to give or sell, when 3874.
Cigarettes, license collected and accounted for, how 3876.
City attorney, forfeit office for failing to act regarding, when 3870.
City attorney, prosecute persons doing business without 3870.
City council, revoke license for cause, how and when 3869.
City, incorporated, may exact 3737.
City trustees hear complaint filed against certain licensed business 3868.
City trustees revoke licenses for cause, how and when 3869.
Claim, none to be allowed sheriff until statement of auditor filed with county commissioner 3740.

Licenses—continued.
Claim of sheriff, amount of licenses not accounted for to be deducted, when 3740.
Classification of business and license to be paid 3730.
Classification of license for certain persons and merchants 3732.
Classification of license for brokers 3729.
Collection of, for cigarettes, how made 3876.
Collector, guilty of misdemeanor, when 3744.
Collector to demand statement from persons, when 3737.
Collector to receive fee in license suit 3737.
Collector to receive what fees 3745.
Collected by sheriff to be paid to treasurer, how and when 3741.
Collected by the sheriff, when 3741.
Commercial travelers not affected by laws relative to peddlers, when 3893.
Commissioners by unanimous consent can revoke license for cause, when 3867.
Commissioners, instruct sheriff to revoke or withdraw license, when 3868.
Commissioners, receive complaint and petition against business license, how, when 3868.
Commissioners, revoke license for cause, when 3867.
Common carriers to obtain license, how and when 662, 3728, 3730.
Complaint against licensed business filed, how and when 3868.
Complaint against licensed business filed with town or city board, when 3868.
Complaint lodged against business operated under, how 3868.
Constable to see that peddler has license 3735.
Contract of sales by peddlers, etc., without, void 3890.
Corporation doing business, to obtain, when 3728.
Corporation, officer to make statement for 3737.
Cost in suit for, to include what 3737.
County commissioners forfeit office, how and when 3868.
County commissioners not to allow any claim of sheriff, when 3740.
County commissioners, sheriff to file statement of auditor for license settlement 3740.
County general fund, to receive part dance-hall license 3736.
County treasury to receive tax 3743.
Crime, felony for sheriff, treasurer, auditor to issue fraudulent 3744.
Criminal action for nonpayment, defendant may plead in bar, what 3737.
Criminal action, nonpayment of, defendant may plead what in bar 3737.
Damages, liquidated, amount to be collected in suit 3737.
Dance hall, license for conducting, what 3736, 6511-6513.
Dance hall, etc., paid into what funds 3736.
Defendant in criminal action for nonpayment of license may plead, what 3737.
Definition, itinerant merchant, trader, peddler, etc. 3891.
District attorney, forfeit office for failure to act regarding 3870.
Licenses—continued.
District attorney to make affidavit in suit for, when 3737.
District attorney to prosecute persons doing business without 3870.
District attorney to receive fee in license suit 3737.
Doing business without, penalty for 3870, 6810.
Double license, required, how and when 3737.
Drummer, act concerning not to apply to hucksters and peddlers 3880, 3890, 3895.
Drummer, exempt from certain licenses, when 3879.
Drug stores to use liquors without, when 3731.
Duty of peace officers to see that peddlers have 3735.
Duty of sheriff to collect from whom 3741.
Duty of sheriff to exact statement under oath, person liable for 3737.
Engineer's license, acting without license for certain engines and hoists, penalty 3904.
Application for license for stationary engineer, how issued 3899.
Applicant to take oath as to experience before engineer's license issued 3900.
Cause for revoking stationary engineer's license, what 3901.
Cities or towns to operate stationary engines or hoists without license, when 3904.
Commissioners to prepare oath, affidavit and license for stationary engineers 3899.
Complaint against licensed engineer to be investigated by commissioners 3901.
County clerk, stationary engineer to file license with, when 3902.
County commissioners shall not issue stationary engineer's license, when 3900.
County commissioners to issue license for stationary engineers, how and when 3899.
County commissioners to regulate stationary engineers, steam hoists, etc., how 3898.
County commissioners to revoke stationary engineer's license, when 3901.
Exempt from obtaining license for certain engines and hoists, who 3904.
Experience, oath of to be made by applicant for engineer's license 3900.
Fee for obtaining stationary engineer's license, what 3903.
Fees for engineer's license to go to general county fund 3903.
Filed with county clerk, when 3902.
Fund, general county, to receive engineer's license fees, when 3903.
Good in one county good in all, when 3902.
Hoisting machinery and apparatus of mines regulated by commissioners 3898.
Intoxication, engineer's license revoked for, not to be again issued in state 3901.
License for stationary engineers to be issued by county commissioners, how and when 3899.
Mining hoists to be operated by licensed engineers, when 3904.
Misdemeanor to operate certain engines and hoists without license 3904.

Licenses, engineers'—continued.
Engineer's, no license to be issued unless commissioners satisfied of applicant's competency 3900.
Oath as to experience to be taken by applicant for engineer's license 3900.
Operation of stationary engines and hoists to be regulated by commissioners 3898.
Persons operating certain engines and hoists without license, penalty 3904.
Private persons to operate own machinery and hoist without license, when 3904.
Prohibition against issuing stationary engineer's license, what 3900.
Revocation of engineer's license for intoxication final in all counties 3901.
Revocation of stationary engineer's license for cause, when 3901.
Revoked for cause, when 3901.
Revoked, not to be issued again, when 3901.
Stationary engineer's license not to be granted, when 3900.
Stationary engineer's license issued in one county good in another, when 3902.
Stationary engines to be regulated by commissioners, when 3898.
Stationary engineer to pay fee for license, what 3903.
Towns or cities to operate stationary engines without license, when 3904.
Who exempt from obtaining license for stationary engine and hoist 3904.
Evidence, license deemed evidence of payment, when 3737.
Exacted by incorporated town must be paid together with county 3737.
Exempt from certain license, salesmen and drummers, etc., when 3879, 3893.
Exempt from paying license, who 3731.
Exemption, farm and range products from peddler's license 3894.
Exceptions, in matters of paying, what 3731.
Failure, board to act on complaint against, penalty 3868.
Failure officer to revoke when ordered, penalty 3870.
Farm and range products exempt from peddler's license, when 3894.
Felony for person to issue fraudulent, when 3744.
Fees and licenses collected from insurance to go to state general fund 3761.
Fees and licenses collected under act to restrict gaming to go to state general fund, what 3761, 6518.
Fees collected in suit for license, how paid 3737.
Fees received by sheriff as collector, what 3745.
Fees, sheriff to give civil war veterans peddler's license, when 3797.
Forfeiture of office by commissioners for failure to act in matter, when 3868.
Forfeiture of office by person failing to revoke, when ordered 3870.
Funds, county general to receive license tax, what 3743.
Funds, license for dance hall paid into, what 3736.
Funds, state general, fees and license of insurance to go into, when 1280, 3761.
Licenses—continued.
Honorable discharge certificate entitles veteran to free peddler's license, when 3897.
Hotels, lodging and boarding-houses, to have separate license for liquor, etc. 3734.
Hotels, boarding-houses, restaurants, etc., what 3734.
Hotels, classified for purpose of 3734.
Hotel, lodging and boarding to have separate, for sale of liquors, etc. 3734.
Houses of amusement, license for conducting, what 3736.
Hurdy-gurdy houses, license for conducting, what 3736.
Incorporated town may exact, when 3737.
Issuance or possession of fraudulent, felony 3744.
Judgment in suit for to include, what 3737.
Justice of peace to see that peddler has license 3735.
Liability of sheriff and bondsmen for negligence in not collecting 3741.
Limit as to time of, what 3738.
Limit for time, license granted, what 3738.
Liquidated damages to be collected in suit 3737.
Liquor and wines, sale of to be licensed, how 3732.
Liquors or wines, sold by traveling vendors 3735.
Liquor dealers classified, for 3733.
Liquor dealer's license to contain what 3733.
Liquor dealer to pay license 3731, 3732, 3733.
Liquor not to be sold on certain days 3733.
Lodging-house, not to pay license, when 3734.
Made out in full by auditor, how and when 3740.
Manner and mode of collecting cigarette 3876.
Medicines, liquors used in preparation, license not necessary 3731.
Merchant, classified according to amount of business 3732.
Merchant to pay quarterly licenses, when 3731.
Merchant, peddlers, hawker, etc., to secure, how and when 3735.
Merchant with wagon to procure license 3735.
Minors, unlawful to sell or give cigarettes or papers to 3874.
Misdemeanor, doing business without 3737.
Misdemeanor to collect license without delivering same 3744.
Misdemeanor, peddler without, when 3735.
Misdemeanor, rent or hire out automobiles without 3878.
Misdemeanor, sell or give cigarettes or papers to minors 3875.
Moneys collected from to go to county general fund 3743.
Negligence of sheriff in not collecting, what 3741.
Not accounted for, to be deducted before sheriff's claims allowed 3740.
Not necessary for use of liquor as medicine, when 3731.
Oath, persons liable for license to make statement under, how and when 3737.
Obtained by brokers, what 3729.
Obtained by common carrier, when 3730.

Licenses—continued.
Obtained by corporation, when 3728.
Obtained by liquor dealers, what 3731-3733.
Obtained by person conducting bank, what 3728.
Officers to see that peddlers take out 3735.
Officers failing to carry out order of board revoking license, penalty 3870.
Paid by merchant, what 3731.
Paid in advance, when 3727.
Payment of by bankers, how and when 3730.
Payment of for brokers, what and how made 3730.
Peddlers' licenses, collection, how and when made 3894.
County to collect $300 peddler's license, when 3892.
Drummers not affected by laws relating to peddlers, etc. 3893, 3879.
Exemption from, soldiers and sailors civil war 3896.
Failure to obtain, penalty 3895.
Good for one month only 3892.
Honorable discharge certificate entitles veteran to peddler's license, when 3897.
How secured in each county, when 3892.
Hucksters and peddlers not exempt from 3880.
Itinerant merchant, peddler, trader, defined 3891.
Itinerant or unsettled merchant to obtain license 3890.
License for merchant 3731.
License for peddler, what 3735, 3890, et seq.
Merchant, itinerant or unsettled obtain license 3890.
Merchant, itinerant, peddler, etc., defined for purpose of license 3891.
Misdemeanor not obtain peddler's license, when 3895.
Not taken out for farm and range products, when 3894.
Peddlers or hucksters not exempt from license 3890, 3895.
Peddlers, itinerant merchant, trader or auctioneer obtain license, exemption 3735, 3880, 3890, 3896, 3897.
Peddler, secure license, how, when 3735.
Peddling license, how issued and collected 3894.
Peddling without license, penalty 3735.
Penalty not taking out peddler's license, what 3895.
Procured by veteran soldiers and sailors free, how 3897.
Procured in every county, when 3892.
Sailors and soldiers (veterans) peddle goods without paying for license, when 3896.
Sales or contracts for sales by peddlers without licenses, void 3890.
Selling goods without peddler's license, penalty 3895.
Sheriff failing to enforce act concerning peddling license, penalty 3895.
Sheriff on presentation of certificate honorable discharge give veterans license 3897.
Traveling salesman not affected by laws to peddlers, when 3893.
Unlawful to peddle goods, merchandise without license 3890.
Licenses, peddlers'—continued.
Wholesale houses, drummers and traveling men exempt from peddler's license, when 3893.
Penalty, carrying on business without license 3737.
Hiring out or renting automobiles without license 3878.
Peddling without license 3735.
Person doing business after license revoked 3870.
Sale or gift of cigarettes to minors 3875.
Person, hiring or renting automobile to obtain license, when 3877.
Not obtaining same, sued, how and when 3737.
Operating, license revoked, penalty 3870, 6810.
Prohibited from selling or giving cigarettes, when 3874.
Selling or giving cigarettes to minors, penalty 3875.
Who keeps automobile for hire without license, penalty 3878.
Who must take out cigarette license 3873.
Personal property sold for license, how and when 3742.
Petition of freeholder of school district filed against license, how and when 3868.
Plaintiff in suit for license need not put up undertaking on attachment, when 3737.
Pleading, suit commenced in name of state for license, when 3737.
Possession of fraudulent licenses felony, when 3744.
Prize-fights, admission fee charged to prize-fight, when 3888.
Amount of license for prize-fights 3882.
Auditor of county prepare prize-fight license, how and when 3883.
Certificate of doctors as to prize-fighter's condition filed with clerk, when 3884.
Condition of fighter certified to by doctor and filed with county clerk 3884.
Contest within enclosure, and liquor forbidden, when 3885.
Contrary to law, misdemeanor 3889.
County treasurer receive portion prize-fight license 3887.
Division of license derived from prize-fights 3887.
Enclosure for glove contest, liquor forbidden, when 3885.
Exhibition with gloves for wager, license procured, when 3881.
Glove contest, who may procure license for 3881.
License, collected from prize-fights, how apportioned 3887.
Cost of license 3882.
Delivered by sheriff, contain name of licensed contestants and rewards 3883.
How issued and accounted for 3883.
Procured, when 3881.
Who may procure license for glove contest 3881.
Licensee of prize-fight file doctor's certificate with county clerk, how and when 3884.
Misdemeanor to conduct or have prize-fight, when 3889.

Licenses, prize-fight—continued.
Prize-fight, not prohibited by municipal corporations 3886.
Penalty for violation of sections relative to prize-fights 3889.
Person procuring license authorized charge admission to fights 3888.
Person violating provisions of law relative to prize-fights, penalty 3889.
Physicians certify as to condition of contestants 3884.
Prize-fighter's condition certified by doctors and filed with county clerk 3884.
Regulation prize-fights by municipal corporation, prohibited 3886.
Sale or giving intoxicating liquors forbidden in prize-fight grounds 3885.
Sheriff issue license for prize-fights, when 3882.
State treasury receive portion prize-fight license, what 3887.
Sunday, no prize-fight can take place on 3886.
Town, city or municipal corporation has no power to govern prize-fight 3886.
Unlawful to sell or give away intoxicating liquor at prize-fight 3885.
Who may procure license for glove contest 3881.
Weight of gloves to be not less than 3881.
Within enclosure, how 3885.
Proceedings against licensed business, how instituted 3868.
Procured, when 3737.
Products of farm and range exempt from peddler's license 3894.
Property sold for license, what 3742.
Purchaser of license receive receipt, when 3739.
Quarterly license for sale of cigarettes or cigarette papers, what 3872.
Range and farm products exempt from peddler's license 3894.
Receipts for license signed by sheriff, when 3739.
Rent service, automobiles, secure license for 3877.
Restaurants obtain license, what 3734.
Retail liquor license amount 3733, 3777, 3785.
Returned by sheriff filed and canceled by auditor, how 3740.
Revocation of license by board of county commissioners for cause, when 3867.
Revoked by town boards, city trustees, city council 3869.
Revoked or withdrawn by sheriff, when 3868.
Sale of cigarettes or cigarette papers, license for 3872.
Sale or giving cigarettes or papers unlawful, when 3874.
Sale of liquor or wines, licenses to be, what 3732.
Sale of personal property for license tax 3742.
Sale of property for payment of licenses 3742, 3718.
Salesman, not to pay county, town or city license, when 3879.
Savings banks license, what 3729.
Separate license obtained for each establishment in county 3729, 3730.

Licenses—continued.
Sheep, annual, amount of and how graded 3768.
Attachment, writ levied against sheep for license, when 3770.
Auditor prepare, how and when 3771.
Authorized owner to do what 3770.
Collectors of licenses for sheep classify according to number, how and when 3770.
Collector receive fee for sheep license 3772.
Costs of suit for collection for sheep, what 3770.
County, license procured by owners of sheep, how and when 3768.
County treasury, license money paid into by sheriff 3773.
Criminal action for failure to pay sheep license, presumption, what 3770.
Damage, award in suit for collection of sheep license, what 3770.
Definition of person as applied to issuing sheep licenses 3774.
District attorney to commence suit for 3770.
District attorney receive fees in suit for 3770.
Double paid by owners underestimating number of sheep 3770.
Evidence of payment, judgment, etc., for sheep license bar to criminal action, when 3770.
Evidence of payment of sheep license bar to criminal action 3770.
Failure to procure sheep license, misdemeanor 3769.
Failure to procure sheep license, penalty 3769.
Fees paid in suits for collection sheep license, what 3770.
Fees paid sheriff by person purchasing sheep license 3772.
General fund, license money to go into county, when 3773.
Grades, for purpose of sheep license, what 3768.
Judgment in suit for collection sheep license, what 3770.
Land owners not liable for sheep licenses, when 3768.
Lessee of sheep liable for annual license, when 3768.
Liable only for one annual license 3768.
Liability for failure procure sheep license, what 3770.
Misdemeanor, failure procure sheep license, when 3769.
Money collected from licenses placed in general county fund 3773.
Money paid county treasurer, how 3773.
Oath, sheep owners furnish sheriff with statement, when 3770.
Owners make statement under oath, when 3770.
Pasturage sheep, license obtained, how and when 3768.
Payment sheep license may be plead in bar, criminal action, when 3770.
Penalty for failure to procure, what 3769.
Person defined with reference to sheep license 3774.

Licenses, sheep—continued.
Persons exempt from paying annual sheep license 3768.
Persons failing obtain same, guilty misdemeanor, when 3769.
Person not procuring sheep license, penalty 3770.
Pleading, action for collection sheep license brought in name of state 3770.
Prepared by auditor, how and when 3771.
Procured from sheriff by sheep owner, when 3768.
Sheep owners procure license from sheriff, when 3768.
Sheriff, cause suit for collection unpaid, how and when 3770.
Deduct commission from license collection, how and when 3773.
Duty to require sheep owners make statement under oath 3770.
Issue licenses to sheep owners, how and when 3768.
Receive fee for sheep licenses, how 3772.
Receive fee in suit for sheep license 3770.
Receive license for sheep from auditor 3771.
Receive percentage of collections, how 3773.
Suit for collection of sheep license, how commenced 3770.
Treasurer place license money in general fund, when 3773.
Writ of attachment levied against sheep for unpaid license 3770.
Sheriff and bondsmen liable for negligence in license collection 3744.
Sheriff and bondsmen liable for negligence in not collecting 3741.
Sheriff, as license collector, make diligent search, when 3737.
As license collector, receive fees, what 3745.
Authorized sell property for license tax, how and when 3742.
Classify persons in business for licenses, when 3731.
Collect license for dance hall, hurdy-gurdy house, etc., what 3736.
Credited by auditor for licenses, how and when 3741.
Credited with collection of, how and when 3741.
Ex officio license collector of licenses, when 3727.
Failing to revoke license when instructed, forfeiture of office 3870.
File with county commissioners certified statement of auditor, when 3740.
File treasurer's receipt for license money with auditor 3741.
Give license to certain persons, when 3732.
Issue license for automobiles, when 3877.
Issue license to liquor dealers, how and when 3733.
Issue licenses to traveling merchants, peddlers, etc. 3735.
Issuing or having in possession fraudulent licenses, felony, when 3744.
Licenses not accounted for deducted before any claim is allowed 3740.
Licenses—continued.
Sheriff, make affidavit in suit for licenses 3737.
Make inquiries for person liable for license 3737, 6810.
No claim of sheriff allowed until license settlement made 3740.
Open monthly license account with auditor 3741.
Pay over monthly license collected 3741.
Receive licenses from auditor, how and when 3740.
Return licenses unused and auditor file and cancel same 3740.
Revoke or withdraw certain licenses, when 3868.
See that peddler has license 3735.
Sign license receipt, when 3739.
Signed by auditor and returned to sheriff 3740.
Soldiers and sailors, peddle without paying for licenses, how and when 3892, 3896.
State general fund, all fees and license insurance, paid into 3761.
Receive fees and license from act to restrict gambling, what amount 3761.
Receive part dance-hall licenses 3736.
State liquor, blank for, supplied by controller 3778.
Bullion tax agent, enforce collection of 3783.
Controller to furnish sheriff with 3781.
Controller make settlement with sheriff for, quarterly 3782.
Drug store pay retail state liquor license, when 3779.
Expire with calendar year 3785.
Failure to collect, penalty 3784.
Forfeiture of office by sheriff for neglect duty, when 3784.
Form of, provided by controller, what 3778.
Furnished by controller 3781.
Furnished sheriff by controller 3781.
Misdemeanor sell liquor without state license, when 3784.
Money collected for, paid state treasury 3782.
None given for less than quarter-year 3785.
Not refunded 3785.
Not transferable 3777.
Office, sheriff to forfeit for not collecting 3784.
Payment and expiration of 3785.
Penalty for failure to pay 3784.
Persons liable for 3777.
Procured, how and when 3777, 3783.
Quarterly settlement for, made by sheriff to controller 3782.
Retail, amount of 3779.
Retail to be written on, how and when 3780.
Retail, who deemed retail liquor merchants 3779.
Selling without, penalty 3784.
Settlement made with controller quarterly for, by sheriff 3782.
Sheriff failing to collect, penalty 3784.
Sheriff forfeit office for failure collect 3784.
Sheriff issue and collect, how and when 3779.
Sheriff pay license money in state treasury, when 3782.

Licenses—continued.
State liquor, sheriff receive licenses from controller 3781, 4240, 4248.
Sheriff settle quarterly with controller for 3782.
State license and bullion tax agent to enforce collection of 3783, 4240, 4248.
State treasurer receive liquor license money 3782.
Vacancy in office of sheriff, how and when created 3784.
Venders of liquor, wines, etc., traveling in wagons 3735.
Wholesale, amount of 3780.
Wholesale dealer, defined 3780.
Wholesale, what 3780.
Wholesale written on state liquor license, how and when 3780.
Year, divided into quarters for 3785.
Statement furnished by persons paying licenses, when 3737.
Suit commenced against person for license money, how and when 3737.
Taxpayers school district file complaint against licensed business, how and when 3688.
Time, limit as to licenses granted 3738.
Town board hear complaint against certain licensed business, when 3868.
Town board revoke license for cause, when 3869.
Town, incorporated may exact license, when 3737.
Trader, obtain license, when 3890.
Traveling merchant secure license, when and how 3735.
Traveling salesmen exempt from certain licenses, when 3879.
Treasurer charged by auditor with license money received 3741.
Treasurer countersign and deliver to auditor, when 3739.
Treasurer countersign license receipts, when 3739.
Treasurer countersign, give sheriff receipts for license money 3741.
Treasurer possessing or issuing fraudulent license, felony, when 3744.
Treasurer receive license money from sheriff, how and when 3741.
Treasury, county receive license tax 3743.
Undertaking, on behalf of state not necessary in suit for licenses 3737.
Unlawful give or sell cigarettes to person under twenty-one 3874.
Unlawful impose on drummers and salesmen, when 3879.
Vacancy in board of county commissioners caused, how and when 3868.
Venders of liquors, wines, etc., traveling in wagons 3735.
Veterans of civil war to peddle without paying for license, how 3896.
Who exempt from paying license 3731.
Writ of attachment issue in suit for collection license, how and when 3737.

Taxation—

Account of treasurer to be balanced by auditor, how and when 3748.
Action for delinquent taxes commenced, how and when 3657, 3659, 3865.

Taxation—continued.
Action for foreclosure of mortgage to lien, affidavit of tax payment to be attached to complaint 3756.
Action to recover possession of property be obtained by tax deed, commenced, how and when 3666.
Acknowledgment of deed of treasurer, by whom made 3653.
Adjournment, board of equalization, when 3638.
Administrator may be assessed for estates, how and when 3629.
Ad valorem state tax, what 3617.
Ad valorem tax to be levied by county commissioners for county, how and when 3762.
Advertisement of delinquent tax property by treasurer, how and when 3651, 3865, 3646.
Affidavit, arrest, concerning certain personal property taxes 3679.
Filed by auditor with the district attorney, how and when 3657.
Made by assessor in personal property tax suit 3679.
Made by assessor relating to personal property taxes, when 3679.
Made by mortgagee or other person of payment of taxes 3755.
Made of payment of taxes before release of mortgage or lien is filed by recorder 3751.
Made on foreclosure of mortgage or lien, what 3756.
Paying over taxes to be made by district attorney 3674.
Payment of taxes 3674, 3755.
Publication to be prima facie evidence in tax suit, when 3756.
Satisfaction on mortgage or lien, penalty for false swearing 3755.
Taxes, payment to be made before satisfaction of mortgage or lien entered by recorder 3755.
Annual reports to be made to controller, how and when 3835.
Annual tax levy to be made by county commissioners, how and when 3762.
Answer, failure of defendant to answer summons in tax suit, what 3663.
Answer in tax suit, to be made, how and when 3665.
Answer in tax suit, to be verified 3664, 3682.
Answer of defendant in tax suit, to contain what 3664.
Answer to delinquent taxpayers, how and when made 3663.
Answer to be filed by owner of personal property in suit, when 3679.
Apportionment of county funds, made, how 1555-1557, 3764.
Apportionment tax money, how made 3647.
Arrest to be made for attempt to convey property, when 3679.
Arrest to be made when taxpayer about to abscond 3679.
Assessed against live stock at large, how levied 3843.
Assessment, added by board of equalization, how 3638.
By assessors 3624, 3797-3812, 3814, 3838-3840, 3843, 3845-3861, 3786, 3790-3792.

Taxation—continued.
Assessment, certain lands, minimum valuation, to be what 3838.
Charged by board of equalization, how and when 3638.
Express companies, how made 3791.
Lands by board of assessors to stand, when 3840.
Live stock at large, how made 3843.
Mines for taxes, how made 3687.
Personal property of railroads, how made 3815.
Proceeds of mines, how and when made 3689.
Property at full cash value 3624.
Property held in trust by treasurer, how possessed 3670.
Property in several counties, how paid 3628.
Property when owner unknown 3624.
Railroads failing to furnish required statement 3817.
Railroads, how made 3814, 3816, 3794.
Rate, to set for taxation of property 3633.
Assessment roll, auditor to enter schedules, when 3680.
Changed by auditor, how and when 3638, 3640.
Computed, when 3635.
Contain, what 3633.
Corrected by auditor to be delivered, when 3641, 3795.
Delivered to auditor, when 3640.
Delivered to clerk, when 3636.
Duties of auditor upon receipt of 3794.
Names to be listed alphabetically 3633.
Open for inspection, when and where 3636.
Tax receiver to subscribe to oath upon 3796.
Turned over, how and when 3648, 3796.
Assessment schedules to be turned over to auditor, when 3680.
Assessment, statement to be furnished assessor by mine operators 3690.
Assessment, when and how made 3624.
Assessor, and bondsmen to be sued for taxes on lands, when 3839.
Duties as to personal property tax, what 3678.
Furnished books by county commissioners, when 3623.
Liable for property not assessed 3625.
Liability for using tax receipt not provided by law 3684.
Liable for taxes on unassessed lands 3839.
Map to contain, what 3634.
May be removed from office, when 3681.
Neglect to make monthly statement, misdemeanor 3681.
Not liable for taxes, when 3679.
Not liable, when 3627.
Shall demand statement 3624.
Assessors, state board of, valuation placed on lands to stand, when 3840.
Assessors, assess patented and contract lands, how 3838.
Be furnished list of property in other counties 3626.
Be present board of equalization, when 3638.
Be removed from office, how and when 3684, 3753.
Taxation—continued.
Assessors, bring suit for taxes district court, when 3679.
Bring suit for taxes justice's court, when 3679.
Collect entire amount of personal tax except, when 3866.
Collect entire personal tax, when 3866, 3678.
Deliver tax list to taxpayer, how and when 3775.
Demand statement from railroad as to property 3814.
File list tax collector with auditor under oath, when 3680.
File treasurer's receipt for tax money with auditor 3680.
File under oath list of tax collections with auditor 3680.
Fix valuation of railroad for taxes, how 3816, 3797.
Give certificate to purchaser at tax sale 3679.
Have hearing before county commissioners 3678.
List and assess proceeds of mines, how and when 3689.
Mail list of property to taxpayer 3632.
Mail or express list in other counties 3627.
Make affidavit in personal property tax suits, how and when 3679.
Make financial settlement with auditor, when 3754.
Make affidavit relative to personal property taxes, when 3679.
Notify assessor in other counties, when 3627.
Pay tax money over, how and when 3680.
Prepare assessment roll, how 3633.
Prepare list of taxpayers, how and when 3632.
Prepare map when directed by county commissioners, 3634.
Prepare printed list taxpayers and property, when 3775.
Receive and file copy of levy from commissioners, when 3763.
Receive blank tax receipts from auditor, how and when 3683.
Receive fee for tax sale, when 3679.
Receive no compensation except salary, when 3765.
Receive personal property for taxes, how and when 3679.
Report to district attorney 3624.
Return unused blanks and stubs of receipts to auditor, when 3685.
Seize personal property for taxes, how and when 3679.
Take oath as to uniform assessment 3635.
Turn over assessment schedule to auditors, when 3680.
Use personal property tax receipts prepared by controller 3682.
Unlawful to prepare other tax list, when 3776.
Attorney-general to instruct district attorney to remove commissioners, when 3834.
Attorney-general to request district attorney to remove county commissioners, when 3828.
Attorney-general to request district attorney to remove officers, when 3830.
Auction, personal property to be sold at, when 3679.

Taxation—continued.
Auditor, action instituted and directed by controller, when 3685.
Add up tax roll, when 3641, 3794.
Attach certificate to tax roll, when 3641.
Balance treasurer's account, how and when 3748.
Be removed from office, how and when 3753.
Charge county treasurer with moneys paid in, how and when 3747.
Charge tax receiver amount taxes levied 3642.
Compare and fill assessment schedules with tax collections 3680.
Compare delinquent tax list with receipts, how and when 3862.
Compare tax list and receipts with district attorney 3675.
Countersign blank tax receipts, when 3683.
County, to inform district attorney 3625.
Deliver corrected assessment roll to tax receiver, when 3795.
Deliver delinquent tax list to district attorney, when 3657.
Deliver tax roll to tax receiver, when 3641.
Draw warrant in payment of printing tax list, when 3775.
Duties upon receipt of assessment roll 3794, 3641.
Endorse amount due from state and county for expenses revenue collections 3749.
File affidavit with district attorney, when 3657.
File budget prepared by commissioners of county's expense 3829.
File delinquent tax list and statement with commissioners, how and when 3862.
File duplicate voucher for claims against state with county treasurer 3749.
File list of judgments obtained by district attorney in tax suits 3674.
File receipts of taxes with district attorney, how and when 3674.
File statement of uncollected taxes with board county commissioners 3675.
File sworn statement of county treasurer, how and when 3647.
File tax receipt, when 3651.
Furnish abstract mortgages and liens board of equalization, when 3638.
Furnish treasurer with necessary report, when 3748.
Give acquittance to persons in return for receipt of county treasurer 3747.
Give delinquent taxpayers certificate, when 3654.
Give district attorney receipt, when 3675.
Give purchaser of tax property receipt, when 3668.
Give treasurer and tax receiver receipt, when 3862.
Have settlement with tax receiver, how and when 3796.
Liable for assessor's defalcation, when 3685.
Liable for failure to notify district attorney 3685.
Mail statement to controller, showing state and county taxes 3642.
Make changes on assessment roll, when 3638.
Make comparison of tax receipts with sworn statement of assessor, how and when 3686.
Taxation—continued.
Auditor, make final settlement with tax receiver, how and when 3648.
Make financial settlement with various county officers, when 3754.
Mark taxes paid, how and when 3680.
Notify district attorney of failure of assessor to make statement 3681.
Receipt to controller for blank tax receipts, when 3683.
Receive and file treasurer's tax receipt from assessor 3680.
Receive assessment roll, when 3640.
Receive assessment roll, how and when 3648.
Receive back and file with controller's entry made thereon 3748.
Receive delinquent tax list, when 3646.
Receive and file copy of levy from commissioners, when 3763.
Receive list of tax collection from assessor 3680.
Receive no compensation except salary, when 3765.
Receive revised tax list from county commissioners, when 3675.
Receive statement from district attorney of uncollected taxes 3675.
Receive unused blank tax receipts, when 3686.
Refusing or neglecting duties of, felony, when 3751.
Report to controller of taxes struck off by commissioners 3862.
Report to be sent to the controller and filed, when 3748.
Report to state controller taxes struck off 3675.
Return unused receipts and stubs to state controller, when 3686.
Send a statement to controller of property delinquent 3796.
Send statement to state controller, when 3750.
Turn over blank tax receipts to assessor, how and when 3683.
Balance of taxes unpaid to be remitted, how and when 3670.
Banks, assessment of, in which no shares of stock issued 3819.
Assessment of real estate, how made 3821.
Assessment of shares of stock issued 3820.
Assessment, statements relative to, furnished, when 3823.
Assessor to receive a statement from, as to shareholders 3823.
Capital stock, statement concerning, given to assessor 3823.
Failure of, to pay taxes on its shares, penalty 3824.
Holders of shares of stock in, assessed, how 3820.
Liability of bank for taxes upon shares 3824.
Lien on shares of stock to have, when 3825.
List of stockholders and shares, to be furnished by 3823.
Owners of shares of stock, how determined 3820.
Payment of taxes by, gives lien on shares and property, when 3825.

Taxation—continued.
Banks, penalty for failure to pay taxes on shares 3824.
Property of, assessed, how 3819.
Property of, assessed to owners, how and when 3819.
Property of, to be assessed, how and when 3822.
Property of, subject to liens for taxes, how and when 3825.
Real estate of, how assessed 3821.
Real estate only to be assessed, when 3822.
Shares of, subject to lien for taxes, how and when 3825.
Shares of stock in, assessed to owner, how and when 3820.
Statement of, furnished assessor, to contain what 3823.
Stock, shares of, to be assessed at cash value after deducting real estate 3820.
Stock assessed to owners at full cash value, how and when 3820.
Stockholder in, to be assessed, how 3822.
Taxes paid on its shares of stock, how and when 3824.
Taxes, payment of, to have lien on shares of stock 3825.
Taxation, to furnish statement for purpose of 3823.
Basis for city, town, school, road 3637.
Basis of taxation 975-983, 3637.
Benevolent society, what property exempt 3621.
Board of assessors, absence of, vacancy, how filled 3798.
Ad valorem tax to be what 3617, 3802.
Allowed expenses upon presentation of itemized claim 3858.
Appropriation to carry out provisions of act 3813.
Assessment of personal property, how made 3617, 3803.
Assessment, uniform, to be made by board of, how 3797.
Attendance of, compelled, how 3798.
Attorney-general to act as chairman, when 3798.
Attorney-general to assist district attorney in suit against 3810.
Auditor to notify controller aggregate assessment, how 3806.
Board of equalization cannot equalize taxes assessed by 3797.
Board of examiners to allow expense claim of 3808.
Board of revenue to institute suit, when 3809.
Bond on appeal to stay proceedings against, when 3810.
Bondsmen of, liable for penalty, when 3809.
Cattle and sheep to be assessed at uniform rate 3797.
Chairman of board county commissioners to take place of, when 3798.
Chairman to preside and secretary keep record of proceedings 3799.
Claims for expenses of attendance to be allowed by board of examiners 3808.
Claims for expenses of governor, attorney-general and controller, how paid 3811.
Composed, how 3798.
Taxation—continued.
Board of assessors, controller to receive statement from auditor of aggregate assessments 3806.
Controller to notify assessor of state tax rate 3804, 3617.
Cost of suit against assessor, how paid 3810.
District attorney, to proceed against assessor, when 3798.
District attorney to remove assessor from office, how and when 3809.
Duty of assessor to fix valuation of property, how 3807.
Enter on rolls valuation placed by 3800.
Equalization, board of, cannot equalize taxes assessed by board or assessors 3797.
Electric light and power lines to be uniformly assessed 3797.
Excess taxes refunded, how and when 3812.
Expenses of assessor in attending annual meeting, how paid 3808.
Expenses of governor, controller and attorney-general, how paid 3811.
Failure of assessor to vote, cause for removal 3798.
Failure to place valuation fixed by board, penalty 3809, 3828.
Fix valuation same as placed by board of 3807, 3617.
Forfeiture of office by assessor, how and when 3798, 3809.
Governor, controller and attorney-general to fix tax rate, when 3803, 3617.
Governor's secretary to be clerk 3798.
Governor to be chairman of 3798.
Governor to issue subpena for assessor, how and when 3798.
Governor to vote in case of tie 3798.
In suit against assessor either party has right of appeal 3810.
Jurisdiction of court in removal of assessor from office 3809.
Levy, reduction made, controller to credit counties, how 3805.
Levy, to be what for taxes 3802.
Notified by controller of state tax rate 3804, 3617.
Penalty for failure to assess according to law 3809, 3828.
Penalty for failure of assessor to attend 3798.
Penalties recovered from assessors to be paid state treasury 3809.
Personal property in excess of levy to be refunded, when and how 3812.
Place uniform valuations, except, when 3801.
Powers of board 3801.
Power of board of assessors 3798.
Power of board of revenue 3809.
Printing necessary for board to be done at state printing office 3811.
Property assessed to be placed on rolls by assessor, how 3800.
Property, how and when assessed by board of assessors 3797.
Property not considered by board, how assessed 3801.
Property to be assessed at uniform rate, when 3797.
Quorum to consist of eight assessors, majority decides 3798.

Taxation—continued.
Board of assessors, railroads and rolling stock to have uniform valuation 3797.
Record of proceedings to be kept by secretary 3799.
Records to be kept in governor's office 3799.
Reduction in state levy, to be credited counties by controller, how 3805.
Removed for failure to attend by board of revenue 3798.
Revenue board, created, how 3809.
Revenue board to direct district attorney to remove assessor, when 3809.
Settlement with state to credit reduction in levy to counties 3805.
State board of county assessors to meet, when 3797, 3814, 3840.
State controller to act as chairman, when 3798.
State controller to supply information, when 3798.
State rate of taxation, how fixed 3803, 3617.
Statement of aggregate assessment to be furnished controller, how and when 3806.
Subpena to be issued for assessor, when 3798.
Suit to be instituted against assessor and bondsmen, when 3807.
Taxes, board of equalization cannot equalize, when 3797.
Taxes paid in excess of final levy, refused, how 3812.
Tax levy, what and how apportioned 3802.
Telephone and telegraph lines to have uniform valuation 3797.
To meet, how and when 3797.
Valuation by board of assessors cannot be changed by board of equalization 3797.
Valuation fixed to be actual cash value 3800.
Valuation to be uniform on all property designated, where 3801.
When conditions to be considered affecting valuation by board 3801.
Board of county commissioners, allow county treasurer reasonable compensation for services, how and when 3671.
Apportion county revenue, how 3764.
Approve rents for property held for taxes 3668.
Board of equalization, to meet as, how and when 3638, 3378.
Designate and levy number of cents for each purpose 3378.
Instruct district attorney to begin suit, when 3650.
Make annual tax levy, how and when 3762.
Make order directing treasurer to sell tax property 3667.
Meet and consider tax levy 3818.
Power to suspend officer, how and when 3753.
Receive joint statement of finances from county auditor and treasurer, how and when 3746.
Refund personal property tax, how and when 3678.
Remit balance of taxes, how 3670.
Require additional bond of district attorney, when 3658.
Strike off taxes, how and when 3675.
Taxation—continued.
Board of equalization, collect taxes from assessor for unassessed lands 3839.
Equalize taxes on live stock at large, how and when 3844.
Hear complaints on assessment live stock, how and when 3844.
Meet and be in session, when 3638.
Meet how and when 3636, 3638, 3678, 3793, 3797.
Powers and duties 3638.
Quorum, how constituted 3638.
Require assessor to assess mortgage lien 3638.
Board of revenue, approve resolution for emergency loan by county, how and when 3831.
Cause removal of county commissioners, when 3828.
Constituted how 3809.
Request removal of county commissioners, when 3834.
Bond, auditor liable for failure to notify district attorney, when 3685.
Given by officer acting temporarily 3753.
Issued by commissioners for "floating debt," how and when 3833.
Liability of county treasurer and sureties, when 3672.
Recorder liabile for failure to enter satisfaction on mortgage or lien 3755.
Bondsmen liable for negligence of county treasurer in not sending vouchers to controller 3749.
Bondsmen of assessor to be sued for land taxes, when 3839.
Books relative to revenue collections and disbursements to be open for inspection, when 3752.
Budget of expense to be made by county commissioners, how and when 3829.
Building used for religious worship, exempt from 3621.
Cattle at large upon uninclosed lands, how assessed 3843.
Cemeteries exempt, when 3621.
Certificate of sale tax property filed, how and when 3652.
Certificate of sale of tax property to be taken by treasurer, when 3667.
Certificate of sale tax property given county treasurer, how and when 3669.
Certificate of sale to treasurer, to include what 3669.
Certificate of tax sale, to recite, what 3667, 3670, 3767.
Certificate of tax sale, to state, what 3652.
Charitable society, what property exempt 3621.
Churches, chapels exempt, when 3621.
Citation, personal property tax suit, how made 3679.
Citation to be issued by court in suit personal property tax, when 3679.
Cities, special tax for 3620.
City tax, basis for 3637.
Claims against state and county to be paid by treasurer upon warrant drawn by auditor, how and when 3749.
Claims for expenses for state revenue collections, how paid 3749.

Taxation—continued.
Claims, mining, how assessed for taxes 3689.
Claims, unpatented mining, exempt 3621.
Clerk, county to give notice of assessment roll for inspection 3636.
Clerk of county commissioners to certify vouchers of county auditor for state revenue expense claims 3749.
Clerk of district court to issue execution in tax suits, how and when 3665.
Collection of taxes, district attorney to make entry on delinquent list, when 3674.
Collection of taxes from treasurer as trustee 3670.
Collection of taxes turned over to treasurer by assessor, when 3680.
Collector as disbursing revenue officer, guilty of felony, when 3751.
Commissioner not to authorize, allow or contract expenditures, when 3830.
Commissioners to direct treasurer to sell tax property, when 3667, 3767.
Commissioners to revise delinquent tax list and strike off same, when 3862.
Commissioners voting for excess tax to be removed, how and when 3818.
Complaint against assessment of live stock to be filed with county clerk, how and when 3844.
Complaint in assessment to be heard, when 3638.
Complaint, form of in suit for delinquent taxes 3661.
Complaint in suit for delinquent taxes to contain additional recitals, when 3662.
Complaint in suit for delinquent taxes to state what 3660.
Complaint in suit for foreclosure of mortgage and lien, affidavit to be attached, when 3756.
Contempt, refusal to obey citation in personal property tax suit, when 3679.
Contract land, minimum valuation for assessment, what 3838.
Controller, not to settle with county treasurer unless vouchers are first received 3749.
File report of auditor, how and when 3748.
Make classification of accounts of county in report 3835.
Make entries upon auditor's report, how and when 3748.
Receive annual reports of county finances 3835.
Receive delinquent tax list, when 3649.
Receive report from auditor as to taxes struck off, when 3862.
Receive statement from auditor of property delinquent 3796.
Receive statement from county auditor, when 3750.
Receive statement assessed valuation from county auditor, when 3642.
Receive vouchers for claims against state from county treasurer, how, when 3749.
Send form of receipts to assessor for personal property 3682.
To send personal property tax receipt to auditor, when 3683.
Corporations assessed, when 3629.
Furnish sworn statement of property in other counties 3626.
Furnish statement to assessor 3624.
Taxation—continued.
Costs and penalties in tax suits, to be what 3665.
Due officers for enforcement of taxes paid by treasurer, how and when 3671.
For collection of taxes paid by county, how and when 3673.
How taxed against several defendants in tax suit 3673.
How taxed and entered in judgment in tax suits 3673.
In tax matters not to be charged against county, when 3671.
In tax suits, to be charged against whom 3663.
In suit for delinquent taxes, to be what 3660, 1603, 3677.
Not a charge against the county 3671.
Not to be deducted from fine, how and when 3760.
Of printing tax list, what, how paid 3775.
Paid by county in tax matters, how and when 3673.
Person liable in tax suit, when 3655.
Printing taxpayers' list, how paid 3632.
Publication of tax list, what 3646.
Tax sale to include what 3651.
To be paid to officers by treasurer, how and when 3671.
County and state taxes, how levied 3618.
County, financial condition of set forth in joint statement auditor and treasurer, how and when 3746.
Funds, how kept 3747.
General fund receive money recovered in suit against auditor, when 3685.
Not liable for costs for services rendered in tax suit matters 3671.
Not liable for fee district attorney tax suits 3677.
Penalty for taxes paid to, when 3656.
Power to increase tax rate, what 3837, 3826.
Property exempt from taxation, what 3621.
Proportion of expenses in collection of revenue, what 3749.
Suits for delinquent taxes commenced in, when 3659.
Tax, levied, how 3618.
Tax rate, how fixed 3826.
Tax rate, not to exceed what 3762.
Treasurer to bid for at tax sale, when 3652.
With certain amount indebtedness exempt from certain statute 3836.
County auditor, allow printing bill for tax list 3632.
Deliver delinquent tax list to district attorney, when 3657.
File affidavit of district attorney, how and when 3674.
Furnish abstract mortgages and liens to board of equalization 3638.
Inform district attorney nonassessment 3625.
Receive assessment roll, how and when 3648.
Report to state controller, when 3675.
Send statement to controller, when 3750.
Send to state controller statement of state moneys in county treasury and sources of 3748.
Treasurer to make joint statement of finances to county commissioners, when 3746.

Taxation—continued.
County clerk, acknowledge treasurer's deed, when 3653.
Publish statement, added assessments, how and when 3638.
Sign budget of expenses prepared by commissioners 3829.
County commissioners, add state levy to county levy, when 3763.
Allow assessor a hearing 3625.
Allow bill for printing tax list 3775.
Allow claims for expenses incurred collection state revenue 3744.
Allow county treasurer reasonable compensation for services, how and when 3671.
Allow for printing tax list 3632.
Appoint certain officers, how and when 3753.
Apportion revenue in county treasury 3764.
Apportion tax as basis for what 3637.
Approve rent for property held for taxes 3668.
Create redemption fund, how 3764.
Direct assessor to prepare map 3634.
Enter order of neglect of assessor 3625.
Fix county tax rates, how 3826.
Fix tax rate, how 3827.
Furnish assessor books, when 3623.
Increase or decrease levy of taxes, how and when 3818, 3762.
Increase tax rate in certain counties, when 3837.
Instruct district attorney to commence suit, when 3650.
Issue bonds for "floating debt," how and when 3833.
Levy ad valorem tax for county, how and when 3618, 3762, 3818.
Levy emergency tax, how and when 3832.
Levy state and county tax, when 3618.
Levy tax for "floating tax debt," how and when 3833.
Make budget county expenses, how and when 3829.
Make order directing treasurer sell tax property, how and when 3667.
Making levy, to designate purposes 3763.
May authorize temporary loan, how and when 3831.
May enter order excusing assessors 3625.
Meet as board of equalization, how and when 3793.
Not to contract indebtedness, when 3834.
Provide for certain indebtedness of county, how and when 3762.
Receive joint statement of finance from county auditor and treasurer, how and when 3746.
Receive report district attorney, when 3625.
Refund personal property tax, how and when 3678.
Remit balance of taxes, how and when 3670.
Removed for contracting certain indebtedness 3837, 3828, 3809.
Removed from office, when 3828.
Require additional bond of district attorney 3658.
Return tax list revised to auditor 3675.
Send copy state and county levy, to whom 3763.
Strike off taxes, how and when 3675.
Taxation—continued.
County officers, make settlement of finances with county auditor, how and when 3754.
Not to make expenditures unless money set apart, when 3830.
Removed and others substituted, when 3753.
Removed from office for making certain expenditures, when 3830.
County recorder, file notices published or posted, when 3663.
File tax certificate, when 3657.
Liable for failure to enter satisfaction of mortgage or lien 3755.
Paid for filing certificates of sale and deeds of taxes 3666.
County tax receiver, compare delinquent tax list with auditor 3646, 3675, 3862.
County treasurer, advertise delinquent tax property for sale, when and how 3651.
Amount of liability for not making final settlement, what 3651.
Apportion all tax money, when and how 3647.
Buy at tax sale, when 3667, 3767.
Compensated for services in tax matters, when and how 3671.
Deliver statement to controller of moneys received, and sources 3748.
Ex officio tax receiver 3643.
File auditor's report with controller's entries made thereon with auditor 3748.
File receipt of state treasurer with controller, when 3748.
File sworn statement with auditor, how and when 3647.
Forward voucher for claims against state controller for allowance in settlement, when 3749.
Hold property in trust for state and county, when 3667.
Inform district attorney, nonassessment 3625.
Keep moneys in his possession or on special deposit, how and when 3747.
Liable on his bond for not sending vouchers to controller, when 3749.
Liable on his official bond, when and how 3672.
Make out duplicate tax certificate of sale 3652.
May bid at tax sale, when 3652.
Pay costs due officer for enforcement taxes, how and when 3671.
County treasurer pay over state moneys when ordered by state controller and state treasurer 3748.
Pay tax money into general county fund, how and when 3671.
Pay upon warrant drawn by county auditor claims against state and county, when 3749.
Perform duties, liability for neglect 3674.
Receive certificate of sale of property in trust, how and when 3669.
Receive no compensation except salary, when 3765.
Receive taxes from district attorney, when 3674.
Receive tax penalty, when 3656.
Sell property held in trust, how and when 3667.

Taxation—continued.
County treasurer, send funds to state controller, when 3748.
Settle with state controller, how and when 3748.
Sued by district attorney, when 3650.
Transmit report of county auditor and state controller, how and when 3748.
County treasury, revenue apportioned by commissioners 3764.
Court, in suit for foreclosure of mortgage or lien, proceedings stayed until affidavit of tax payment filed 3756.
Issue citation in suit personal property tax, when 3679.
Order personal property turned over to assessor, when 3679.
Require affidavit before entering judgment in suit for foreclosure of mortgage or lien 3756.
Crime, district attorney guilty of misdemeanor, when 3676.
Perjury committed, when 3631.
Transferring property to avoid taxes, when 3679.
Deduction in taxes, when and how made 3629.
Deed, acknowledging same, what 3653.
Conclusive evidence of title, when 3666.
Given county treasurer for tax property, how, when 3667.
Made out by treasurer, how and when 3653.
Real property derived from tax sale conclusive evidence of what 3666.
Tax property executed by treasurer, how and when 3667.
Tax property taken by treasurer, when 3667.
Treasurers', to recite what 3653.
Trust, given county treasurer, how and when 3667.
Default in tax suit entered, when 3663.
Default judgment in tax suit, when entered 3665.
Defendant in tax suit to make answer, how 3664.
Defense in tax suit, consist of what 3664.
Deficit in payment of taxes, how remitted 3670.
Definition, full cash value 3622.
Personal property 3622.
Railroad, for taxation purposes 3815.
Real estate 3622.
Delinquent property, statement sent controller by auditor 3796.
Delinquent taxes, become when 3644, 3646, 3862, 3863.
District attorney to receive fee for collection of 3677.
How compared and receipted for by auditor 3862.
How struck off, and when 3862.
Less than $300, how treated 3862.
List compared with tax receipts, how and when 3675.
List delivered by auditor to district attorney, when 3657.
List prepared by tax receiver, how and when 3646.
List, prima facie evidence of what 3658.
List, revised, to be returned to treasurer, when 3862.
List sent to controller, when 3649.
Taxation—continued.
Delinquent taxes, pay, when and how 3654.
Property held by treasurer sold for, how and when 3767.
Property sold for, bought by treasurer 3667.
Struck off by commissioners, how and when 3862.
Delinquent taxpayers, how notified of suit 3663.
Delinquent, when property becomes for taxes 3864.
Deputy assessor, take oath, when 3635.
District attorney, commence suit against assessor, how and when 3625.
Commence suit against treasurer and ex officio tax receiver, when 3650.
Commence suit for taxes, when 3651.
Commence suit for taxes, for streets in towns 934.
Compare tax list and receipt with auditor, when 3675.
Demand state and county taxes, when 3625.
File affidavit of payment of taxes by county auditor, when 3674.
File list judgments in tax suits with auditor, how and when 3674.
File receipt of taxes with auditor, how and when 3674.
File suit against assessor and bondsmen, when 3839.
File tax receipts, when 3654.
File with auditor, statement of uncollected taxes 3675.
File with county recorder copy of notice published or posted, when 3663.
Form of tax complaint to be filed by 3661.
Furnish additional bond, when 3658.
Guilty of misdemeanor, when 3676.
Make additional recitals in tax complaint 3662.
Make entry on delinquent list of taxes paid, how and when 3674.
Make financial settlement with auditor, when 3754.
Not to file suit for taxes, when 3655.
Notify county commissioners of nonassessment, when 3625.
Pay taxes to county treasurer, when 3674.
Prosecute assessors, how and when 3840, 3841.
Prosecute persons refusing assessor's statement 3624.
Prosecute recorder for neglect, when 3755.
Receive affidavit of auditor, when 3657.
Receive delinquent tax from auditor, when 3657.
Receive fee in tax suit, how 3677.
Receive fees in suit against recorder 3755.
Receive receipt for taxes from auditor 3675.
Remove commissioners or county officer, when 3830.
Remove county commissioners, how and when 3834.
Remove county commissioners, when 3828.
District court, jurisdiction, suits, personal property tax 3679.
District judge appoint officer, how and when 3753.
Have power suspend officer, how and when 3753.
Order taxes paid out of funds of estate 3629.

Taxation—continued.
Disbursing officer or collector of revenue guilty of felony 3757.
Duties board of equalization 3793.
Duties county commissioners to increase or decrease tax levy, when 3818, 3762.
Duties county treasurer deliver state controller statement of money received and sources 3748.
Duties of assessor as to personal property 3678, 3866.
Duties of assessor, make out list in other county, when 3627.
Duties of auditor and treasurer make joint statement of county finances and post same, when 3746.
Duties of auditor, to compare stubs of receipts and assessor's statement, when 3686.
Furnish treasurer with necessary report, when 3748.
Mark taxes paid, when 3680.
Send controller statement containing what 3750.
Duties of court before entering judgment in suit for foreclosure of mortgage or lien 3756.
Duties of district attorney to prosecute recorder for neglect, when 3755.
Duties of officers performed by proper officer and no other 3751.
Duties of tax receiver when taxes paid 3645.
Emergency loan by counties, how authorized 3831.
Emergency tax levied by commissioners, how and when 3832.
Entries made upon auditor's report by controller, what 3748.
Equalization board, compel assessor to pay taxes on lands unassessed 3839.
Consider tax on live stock at large, how and when 3844.
How constituted, and when to meet 3638.
Give taxpayers hearing, when 3638.
Meet for special cases, when 3638.
Powers and duties 3638.
Quorum, how constituted 3639.
Require assessor to assess mortgages, liens, when 3638.
Session to end, when 3638.
Equalization of personal property tax, how made 3678.
Estates deceased persons assessed, how 3629.
Estates not distributed until taxes paid 3629.
Estimate county expenses prepared by commissioners and filed with auditor 3829.
Evidence, affidavit of time and place of posting notice to be prima facie, when 3663.
Delinquent list to be prima facie, when 3658.
Receipt for taxes and costs by district attorney prima facie, when 3665.
Return of officer conclusive evidence service of summons, when 3663.
Statement under seal by controller, evidence of what 3685.
Exceptions to mode of redemption of taxed property, what 3666.
Excess of limitations in taxes imposed by law, void as to excess 3828.
Execution in tax suits issued by clerk, when 3665.
Taxation—continued.
Executors assessed for estates, when 3629.
Exempt from taxation property of Y. M. C. A., when 3842.
Exemption of benevolent, charitable societies and lodges, not to exceed 3621.
Exempt property (Const. art. x) 352, 1396, 1407, 3621, 3842.
Exempt property, when taxable 3621.
Expenses allowed in collection of state revenue 3748.
Expenses in collection of state and county revenue, how paid 3749.
Expense of county officers, commissioners to prepare estimate and file with auditor 3829.
Expenditure authorized with money in treasury, unlawful, when 3830.
Express companies, how assessed for taxes 3791.
Taxation of, what 3791.
To make statement, when and what 3792.
Failure, assessor to make monthly statement, misdemeanor 3681.
Assessor to pay taxes on demand equalization board, penalty 3839.
False statement by mining company to assessor, perjury, when 3690.
Pay over taxes by district attorney, misdemeanor, when 3676.
Railroad company to make statement required, assessor to proceed 3817.
Fee, acknowledging treasurer's deed, what 3653.
Allowed officers in tax matters, when 3673.
Assessor to receive for tax sale, what 3679.
Collection personal property tax suit, what 3679.
Enforcement of taxes paid by treasurer, how and when 3671.
Paid district attorney for prosecution of recorder, what 3755.
Paid from property redeemed, how and when 3671.
Recorder for recording certificates and deeds, how paid 3669.
Recorder to receive what for filing notices of publication 3663.
Recording affidavit of tax payment, what 3755.
Tax suit, district attorney, what 1603, 3677, 3709.
Felony, assessor adjudged guilty, when 3684.
Felony, officers intrusted with collecting and disbursing revenue, guilty of, when 3751.
Final judgment in tax suit, how rendered 3663.
Fine, costs not to be deducted, when 3760.
Fines paid in state treasury for state school fund 3760.
"Floating debt tax," levied by commissioners, how and when 3833.
Form, assessment roll to contain, what 3633.
Form, complaint in suit for delinquent taxes 3661.
Form of notice in delinquent tax suit 3663.
Form of notice to delinquent taxpayers, what 3663.
Form of personal property receipts, how prepared by controller 3682.
Form of tax complaint 3661.
Form of tax complaint to contain additional recitals, when 3663.

Taxation—continued.
Foreman in printing office make affidavit of publication, when 3663.
Free Masons, what property exempt 3621.
Full cash value, defined 3622.
Funds, county, not to be expended, when 3830.
County or state misappropriated, felony, when 3751.
Money apportioned into same, how 3647.
Paid over by county treasurer into state treasury, how 3740.
Fund, redemption, created by county commissioners, how 3764.
Funds, state ad valorem apportioned 3617.
Funds, state school, to receive all moneys paid in fines, how and when 3760.
Furniture, equipment, churches exempt from taxation, when 3621.
General fund, county, to pay cost of tax collection, when 3673.
County receive balance tax money, how and when 3671.
County receive money arising from tax property, when 3668.
County, receive proceeds from taxes, when 3671.
Giving false list taxable property under oath, perjury 3630.
Graveyards exempt, when 3621.
Ground used by churches exempt 3621.
Guardians assessed for estates, when 3629.
Heirs assessed for estates, when 3629.
Held in trust by treasurer, property to be rented, how and when 3668.
Indebtedness contracted by commissioners, cause for removal, when 3834.
Indebtedness county, how provided for by floating debt, tax or bonds 3833.
Indebtedness county, provided for by levy, how and when 3762.
Indebtedness not to be incurred by commissioners, what 3834.
Indebtedness outstanding paid by redemption fund, how 3764.
Individuals in partnership not assessed, when 3629.
Inspection of tax books, assessment rolls and papers concerning same, open to public, when 3752.
Installments of taxes, how and when paid 3644, 3659, 3864.
Judge issue citation in suit personal property tax, how and when 3679.
Judge order taxes paid, when 3629.
Judge turn personal property over to assessor for taxes, when 3679.
Judgment by default in suit for delinquent taxes, when and how given 3663.
Judgment by default in tax suits rendered how, when 3665.
Judgment, court to require affidavit before entering in suit for foreclosure of mortgage or lien 3756.
Judgment for delinquent taxes, how rendered 3665.
Judgment in favor of plaintiff in tax suits, what 3665.
Judgment in suit for delinquent taxes, how satisfied 3660.
Judgment, in suit for delinquent taxes, satisfied, how and when 3660.
Taxation—continued.
Judgment, in tax suits entered against real estate, when 3665.
In tax suit, how rendered 3665.
In tax suits include what 3665.
In tax suits in favor of defendant, what 3665.
Jurisdiction, district court suit for personal property 3679.
Justice court suits for taxes personal property 3679.
Suits for delinquent taxes determined how 3659.
Suits to obtain possession of taxed property, when commenced 3666.
Justice's court, jurisdiction suits personal property tax 3679.
Justices' courts have jurisdiction in matters concerning taxed property, when 3666.
Lands, assessed by board of assessors, how and when 3797, 3840.
Lands held under state land contract, minimum valuation 3838.
Lands, patented and under state contract assessed, how 3838.
Lands, taxes levied by board of assessors to stand, when 3840.
Levy, ad valorem tax for county made by commissioners, how and when 3762.
Levy, tax against express companies, how made 3791.
Commissioners to show, what 3763.
Copy of to be sent to auditor, assessor and treasurer, when 3763.
County commissioners not to exceed certain amount, when 3762.
Designate number of cents for each purpose 3763.
Emergency tax, how and when made 3832.
Excess of limitation, void, when 3828.
Increased or decreased, how and when 3762, 3818.
Increased or decreased by county commissioners, how and when 3818.
Made by county commissioners, how and when 3762.
Meet indebtedness of county not bonded or funded, made how and when 3762.
Not to exceed what 3762.
Provide for certain county indebtedness, how and when 3762.
Special tax, how made 3620.
State added to county by commissioners 3763.
Liability, assessor and sureties for property not assessed 3625.
Auditor for failure to notify district attorney relative to assessor, when 3685.
County recorder for failure to enter satisfaction of mortgage or lien 3755.
County treasurer on his bond, when 3672.
Treasurer and ex officio tax receiver for not making settlement, when 3650.
Treasurer as trustee for taxes 3670.
Liens, abstract furnished board of equalization, when 3638.
Affidavit made by person holding same that taxes are paid before auditor enters satisfaction, recorded 3755.
Against real property for taxes, when 3665.
Attach to mines, when 3688.

Taxation—continued.
Liens, on mine, how satisfied, when 3688.
On real property 3619.
Release of, filed with recorder, how and when 3755.
Suit for foreclosure or lien, affidavit of tax payment attached to complaint 3756.
Taxes for personal property 3619.
Taxes on mines, how satisfied 3688.
Taxes to attach, when 3619.
Taxes released, how and when 3665.
Limitation of county tax rate, when 3826.
Limitation of time for redemption of property, what 3651.
Liquidated damages in tax suits, what 3665.
List, assessors furnish taxpayer with, when 3775.
List, tax, cost of publication paid by taxpayers 3646.
List, tax, delinquent, compared by auditor, treasurer and tax receiver 3862.
List, tax, published, how and when 3646.
List, tax, unlawful for assessor to prepare other, when 3776.
Live stock, assessed in county, where found 3849.
Abstract certificate entered on assessment roll 3847.
Assessed for special tax, how and when 3850.
Assessor, collect per capita tax on 3648.
Enter abstract certificate on assessment roll 3847.
Enter list of transient in other county to assessment roll 3850.
Finding transient, to render certificate to clerk, when 3858.
Furnish owner of transient with certificate 3851.
List of transient sent to county, where owned 3850.
Send certificate to clerk other county, when 3858.
Assessment of, made in county where found 3849.
Assessment of, omitted in one county made in other, how 3854.
Assessment of, when not full in one county, how remedied 3854.
Assessment roll, abstract certificate of, entered on 3847.
Assessment roll, transient in county added to, when 3849.
Attachment, writ may issue against, without undertaking, when 3856.
Bond, owners of transient provide for payment of taxes, when 3848.
Certificate, assessor to give owner of transient stock, form 3857.
Assessor to enumerate, what relative to 3858.
Filed with clerk, how and when 3846.
Rendered by assessor, same force as owner, when 3858.
Statement filed by stock owners with clerk, when 3852.
Certified, per capita tax paid on, when and where 3848.
Commissioner commence action against owners, when 3855.
Taxation—continued.
Live stock, commissioner demand taxes on, from other county, when 3853.
Construction of "person" as contemplated in statutes concerning 3860.
Cost of collection of taxes on, deducted, how 3853.
County commissioners, claim taxes on transient from other county, when 3853.
Failing to perform duties, guilty of misdemeanor, when 3859.
Failing to perform duties relative to, penalty 3859.
County clerk deliver assessor abstract certificate of 3847.
County clerk, enter abstract on assessment rolls, when 3847.
County treasurer approve and file bond for payment taxes on 3848.
County treasurer per capita tax on transient, deposited with 3848.
Counties receive division of tax on transient, how and when 3853.
Counties receive penalties collected against 3857.
County may accept bond for payment of taxes on transient, when 3848.
County transient stock, how taxed in 3849.
Defendant in action for unlawfully grazing, who may be 3855.
Definition of person as used in statute concerning 3860.
Driven from one county to another, assessment, when 3849.
Equalization of tax on stock at large 3844.
Exemption of owner from additional tax of, grazing in counties, how obtained 3852.
Failure file certificate, misdemeanor 3857.
Form of certificate filed by owners of, grazing in county 3846.
Form of certificate given by assessor to owner, transient 3851.
Free passage through state for commercial purposes 3843.
Grazing stock in state, pay per capita tax 3848.
Grazing stock owned by residents of state assessed when first found 3849.
Misdemeanor, failure file certificate 3857.
Misdemeanor, move out of county pending suit, when 3856.
Misdemeanor, officers failing to perform duties relative to 3859.
Moving intentionally out of state, misdemeanor, when 3856.
Not assessed in one county, assessed when grazing 3854.
Officers failing to perform duties relative to, penalty 3859.
Owned in one county, tax paid there, when 3850.
Owners certifying, pay per capita tax, how and when 3848.
Owners exempt from further taxation 3852.
Owners of, failing to file certificate and statement, misdemeanor 3858.
Owners not complying with law guilty of misdemeanor, when 3857.
Owners, transient, given certificate by assessor, how and when 3851.

Taxation—continued.
Live stock, owners transient, may give bond to county for taxes, when 3848.
Parties to suit for unlawfully grazing, who 3855.
Payment of taxes on, grazing in various counties, where made 3850.
Payment of taxes on transient in one county releases taxes paid in another 3848.
Penalties collected against, paid to county 3857.
Penalty for failure file certificate for grazing 3857.
Penalty for failure of officers to perform duties relative to 3859.
Penalty for moving from state pending suit, what 3856.
Per capita tax on transient, returned how and when 3848.
Personal service in action for unlawfully grazing, how made 3855.
Persons, bringing into Nevada to graze, must pay tax 3846.
Bringing into Nevada to graze, must file certificate 3846.
Defined in relation to statutes concerning 3860.
Failing to file certificate, penalty 3857.
Include corporations, companies, firms, associations, when 3860.
Moving from state pending suit, penalty 3856.
Proceeding in suit against owners of, what 3856.
Punishment of officers for failure of duties toward, what 3859.
Punishment of owners not filing certificate and statement, what 3858.
Running at large, how assessed 3843.
Service in suit for unlawfully grazing, made how 3855.
Sheep and transient stock grazing in Nevada pay per capita tax 3848.
Situs of stock for tax purposes deemed, where 3843.
Special school tax assessed against transient, how and when 3850.
Statement and certificate filed by owners with county clerk 3852.
Suit commenced against owners by county, when 3855.
Summons in action for unlawfully grazing, served how 3855.
Taxes, stock grazing in various counties, when paid 3850.
Stock paid in one county apportioned to other counties 3853.
Transient stock and sheep returned 3848.
Transient stock in county, how collected 3849.
Transient stock paid in county where owned, if grazed there 3850.
Owner of transient exempt from additional tax, when 3852.
Per capita on sheep and transient, how and when paid 3848.
Per capita on transient sheep and stock returned, when 3848.
Special school, how levied and collected against 3850.
Transient stock, defined 3845.
Taxation—continued.
Live stock, transient, owner may give bond for payment of taxes, when 3848.
Owner of, given certificate by assessor 3851.
Sheep grazing in Nevada to pay per capita tax, when 3848.
Undertaking unnecessary in writs of attachment against, when 3856.
Unlawfully grazing in county subject to civil action 3855.
Writs of attachment issue against, how and when 3856.
Loan, emergency, how authorized by county 3831.
Mail, taxpayer to receive list by, when 3632.
Malfeasance of treasurer, what liability 3672.
Manner of equalizing taxes 3793.
Map, assessor to prepare, when 3634.
Mark paid, names on assessment roll, by auditor, how and when 3680.
Mines, account of ores kept by mill owner, how 3694.
Action, collection delinquent mining tax commenced in name of state, when 3707.
Answer in suit for delinquent mine tax, contain what 3665, 3667, 3709.
Assessor, assess without mining company statement, how and when 3692.
Charged with full amount of taxes, when 3698.
Collect taxes on, how and when 3699.
Complain of mining companies, when 3691.
Credited with mining taxes by auditor, when 3702.
Delivery assessment roll and statement mining company to auditor, how and when 3697.
Demand access of book, mill owner, when 3694.
Failure make tax settlement, penalty 3704.
File delinquent tax list with auditor, how and when 3699.
File treasurer's tax receipt with auditor, when 3703.
Furnish additional bonds, when and how much 3705.
File notice taxes on payable, how and when 3699.
Give receipt payment tax, how 3701.
Have access to book mining company, when 3691.
Make personal demand mining companies for taxes, when 3699.
Make quarterly statement proceeds, how and when 3696.
Make statement yield of in other counties, when 3695.
Not to deduct cost of mining, when 3692.
Not to receive mining taxes, when 3699.
Pay over mining tax to treasurer, when 3703.
Present at equalization of taxes mining property, when 3693.
Receive fee for sale of mining property for taxes 3700.
Receive statement from mill owner, how and when 3694.
Seize personal property for taxes on, how and when 3700.

Taxation, mines—continued.
Assessor, settle with auditor for tax collected from, how and when 3702.
Swear to complaint against milling companies, when 3694.
Transmit statement yield of to other assessors, when 3695.
Assessment, expenses allowed certain cases 3687.
Made without mining company statement, how and when 3692.
Proceeds of, equalized, how and when 3693.
Roll, assessor to enter oath on, when 3702.
Roll, proceeds of prepared by assessor, how and when 3696.
Roll, proceeds of, form 3696.
Roll, taxes on mining property given assessor, when 3698.
Roll, together with statement ores given auditor 3697.
Auction personal property of for taxes, how and when 3700.
Auditor administer oath assessor, when 3702.
Charge assessor full amount of taxes, when 3698.
Credit assessor with taxes paid, how and when 3702.
Deliver delinquent tax list to district attorney, when 3706.
Deliver mining assessment roll assessor, when 3698.
File treasurer tax receipt and credit assessor, when 3703.
Prepare sworn statement tax on for controller, how and when 3697.
Receive and file list of mining company taxes, delinquent, how and when 3699.
Settle with assessor for taxes collected from, how and when 3702.
Board of county commissioners, exact additional bond of assessor, when 3705.
Meet at special session equalize taxes on, when 2693.
Bonds, assessor furnish additional, amount 3705.
District attorney liable for collection of taxes on 3706.
Liability of sureties for assessor, failure make tax settlement 3704.
Books of mill company inspected by assessor, when 3694.
Books mining company open to assessor, when 3691.
Collection delinquent taxes on, penalty 3707.
Collection mining taxes made by assessor, how 3700.
Complaint in tax suit against state, what 3708.
Controller receive sworn statement from auditor relation mining taxes 3697.
Costs mining not deducted by assessor, when 3692.
County assessors prepare assessment roll proceeds of, how and when 3696.
Auditor receive assessment roll for tax on, when 3697.
Commissioners equalize taxation, when 3693.
Taxation, mines—continued.
County assessors, commissioners to exact additional bond of, when 3705.
Courts have jurisdiction in suit for mining tax, what 3707.
Crime make false statement to assessor, when 3690.
District attorney commence suit for delinquent mining taxes, how and when 3707.
Liable on bond for collection mining tax, when 3706.
Receive delinquent tax list for, when 3706.
Delinquent tax list for, delivered to district attorney, when 3706.
Filed by assessor, how and when 3699.
Mining companies filed with auditor, when 3699.
Proceeds of, suit to recover, how instituted 3707.
Duty assessor collect tax on, how and when 3699.
Assessor demand access to books milling companies, when 3694.
Assessor make statement concerning in other counties, when 3695.
Assessor prepare assessment roll, for quarterly 3696.
Auditor to deliver delinquent tax list to district attorney 3706.
Equalization, county commissioners to meet consider taxation of, when 3638, 3693.
Expenses allowed in certain cases assessment of 3687.
Expenses allowed with reference to assessment 3687.
Failure mining company make statement, penalty 3692.
Fees, assessor receive for sale mining property for taxes 3700.
Fees, district attorney for collection delinquent mining tax, what 3709.
Form of assessment roll, proceeds of, what 3696.
Form of complaint in suit against mining company for taxes 3708.
Form of statement furnished by controller, how and when 3710.
Jurisdiction, suits for delinquent mining tax, how determined 3707.
Liability assessor for failure make tax settlement, amount 3704.
Liability, district attorney in collecting proceeds of 3706.
Mileage, assessor receive for selling mining property for taxes 2037, 2040, 3700.
Milling company give assessor access to books, when 3694.
Milling companies guilty of misdemeanor, how and when 3694.
Mill owner keep account of ores, how 3694.
Mining companies, failure to make settlement to assessor, penalty 3692.
Give assessor access to books, when 3691.
Guilty of misdemeanor, when 3691.
Pay taxes on proceeds, how and when 3699.
Pay taxes, what 3687.
Property sold for taxes, how and when 3700.
Taxes equalized, how and when 3693.

Taxation, mines—continued.
Misdemeanor, milling company, when guilty of 3694.
Misdemeanor, mining company guilty, when 3691.
Mode of levying taxes on mines 3687.
Net proceeds defined for tax purposes 3687.
Net proceeds of, for purpose of taxes, what 3687.
Newspaper, publish notice for payment of tax on, how and when 3699.
Notices given assessor payment taxes on, how and when 3699.
Notices of sale personal property of, for taxes, how given 3700.
Oath, assessor enter on assesment roll, when 3702.
Oath, assessor make statement delinquent mining taxes under, when 3699.
Oath, mill owner furnish assessor statement under, when 3694.
Ores, assessed for taxes, how 3687.
Ores, account kept by mill owner, how 3694.
Payment, taxes by mining companies, how and when made 3699.
Payment of taxes by mining companies receipted for by assessor 3701.
Payment of taxes on proceeds of, made quarterly 3687.
Penalty, failure of assessor make tax settlement 3704.
Failure mining company make settlement to assessor, what 3692.
Milling company for failure furnish statement to assessor 3694.
Person furnishing false statement to assessor 3690.
Refusal of mining company to show books 3691.
Suit for delinquent mining tax, what 3707.
Perjury, mining company to furnish false statement to assessor 3690.
Personal property of, sold for taxes, how and when 3700.
Pleading complaint in suit against for taxes state, what 3708.
Proceeds of, how taxed 3687, 4240, 4248.
Procedure in suit for delinquent tax, what 3709.
Property sold for mining taxes, purchaser to receive absolute title, how and when 3700.
Publication of notice for payment of taxes, how made 3699.
Quarterly payment taxes by mining company, how made 3699.
Quarterly taxes on, collected 3687.
Receipt for payment taxes mining company, how given 3701.
Refusal furnish assessor with statement by mill company, penalty 3694.
Refusal mill owner give assessor statement, penalty 3694.
Roll, assessment for proceeds of, in what form 3696.
Sale personal property of, for taxes, how and when 3700.
Sale of property for mining taxes, title to vest, when 3700.
Settlement by assessor with auditor for mining tax collection, how made 3702.
Taxation, mines—continued.
Smelting companies furnish assessor with statement, how and when 3694.
Smelting companies guilty misdemeanor, how and when 3694.
State controller furnish form of statement to be filed in his office, when 3710.
State controller receive sworn statement from auditor, of mining taxes 3697.
Statement, failure to give by mining company, penalty 3692.
Statement of ores furnished assessor, how and when 3694.
Statement under oath filed with auditor, showing amount of delinquent taxes on mines 3699.
Statement yield of mines in other counties made by assessor, when 3695.
Statement, refusal of mill operator to give, what 3694.
Sued for delinquent taxes, how, when 3708.
Suit for collection of delinquent taxes, how prosecuted 3709.
Suit for delinquent mining taxes instituted by district attorney, how and when 3707.
Sureties, liability for assessor's failure to make tax settlement 3704.
Tax a lien on property 3688.
Taxation, books of mining companies open to assessor, when 3691.
Taxation of mines equalized, how and when 3693.
Taxes, assessed without statement of mining company, how and when 3692.
Assessors to make personal demand of mining companies, when 3699.
Auditor to send controller sworn statement of proceeds of mines 3697.
Complaint in suit for delinquent mine tax, contain what 3708.
District attorney liable on bond for collection from mines 3706.
List of delinquent mining companies and amount of taxes filed with auditor, when 3699.
List of proceeds of mines made by assessor, how and when 3696.
Mining companies not received by assessor, when 3699.
On proceeds of mines, how and when collected 3698.
Paid by mining companies, how receipted for 3701.
Penalty collected for delinquent mine tax 3707.
Personal property mines sold for taxes by assessor, when 3700.
Proceeds of mines, how and when collected 3698.
Proceeds of mines payable, how and when 3699.
Procedure in suit for delinquent mine tax 3709.
Suit for delinquent mining tax brought, how and when 3707.
Taxpayers, assessor make out list delinquent mining companies, when 3699.
Title to property sold for delinquent mining taxes vested, how and when 3700.
Treasurer receive taxes of mines from assessor, when 3703.

Taxation, mines—continued.
Unpatented mining claims exempt from taxation 3621.

Misappropriation public funds, felony, when 3751.
Misdemeanor, district attorney adjudged guilty, when 3676.
Misdemeanor, failure or neglect of assessor to make monthly statement 3680.
Misdemeanor, officer charged with collection of revenue, guilty, when 3753.
Misdemeanor, transfer property to avoid taxes, when 3679.
Misfeasance, county treasurer, liability for 3672.
Mode of assessing railroads in counties 3816.
Money, how and when apportioned 3647.
Proof of loss for personal property taxes, how made by controller 3685.
Received by county treasurer kept in his possession on special deposit, how and when 3747.
Received for tax, property to be apportioned, how 3671.
Received from redemption of property, how paid 3671.
Received from rental tax property, how apportioned 3668.
Received from sale, rents or redemption of property, how apportioned 3671.
Received in suit against auditor by controller, what disposition 3685.
Mortgage, abstract furnished board of equalization, when 3638.
Mortgage, action for foreclosure, affidavit tax payment attached to complaint 3756.
Mortgage, affidavit made that all taxes paid before satisfaction entered by recorder 3755.
Mortgage, satisfaction of, entered by recorder 3755.
Mortgaged personal property, ownership, how considered 3631.
Mortgagee, make affidavits of payment of taxes, how and when 3755.
Mortgage tax, against whom levied 3786, 3787. [Mortgage tax law of 1911 (secs. 3786-3790) repealed at special session of 1912.]
Assessor assess debt and security how 3788.
Assessment, banks and trust companies 3790.
Debt and security made at cash value, when 3788.
Mortgages and deed of trust, how treated 3786.
Mortgages, against owner of 3787.
On money loaned, when 3786.
Property assessed full cash value 3786.
Assignment secured debt made, how 3787.
Banks and trust companies upon shares and capital stock 3790.
Capital stock and shares of banks and trust companies assessed 3790.
Debt assessed to owner of record 3787.
Debt assessed for taxation 3786.
Debt secured by mortgaged property in one county, how assessed 3787.
Taxation, mortgage tax—continued.
Debt secured, taxes become lien on, when 3787.
Deducted from amount of capital shares bank and trust company 3790.
Deed of trust considered as interest in property for taxation 3786.
Duty of recorder, record on margin of mortgage, when 3789.
Evidence, certified copies of recorder's record, received as 3789.
Improvements on land, how assessed 3786.
Land assessed, how 3786.
Lien, taxes on debt and security, subject to 3787.
Lien, taxes on mortgage, when 3787.
Lien, taxes shall be lien on property and security, when 3786.
Levied, becomes lien on property and security, when 3786.
Owner of for purposes of taxation, who 3786, 3787.
Payment of taxes before tax levy, how computed 3786.
Payments, assignments, evidence of debt noted on margin by recorder 3789.
Payments on secured debts, how and when considered by assessor 3788.
Property must be assessed full cash value 3786.
Property situated in one county, how assessed 3787.
Railroads and public corporations, how treated 3786.
Recorder note on margin all assignments and payments 3789.
Recorder to record on margin assignments and payments 3789.
Security assessed to owner of record 3787.
Securities for debt, how taxed 3786.
Taxation banks and trust companies 3790.
Taxation of mortgages and deeds of trust 3786.
Taxation, owner of mortgage who, for purposes of 3787.
Transfer of secured debt null and void, when 3787.
Trust companies and banks, how taxed 3790.
Value of mortgages owned by banks and trust companies deducted, how and when 3790.
Municipal corporation property exempt 3621,
Necessity for emergency loan set forth in commissioners' resolution 3831.
Neglect, county treasurer liable on bond for 3672.
Neglect to make statement, penalty 3624.
Neglect of treasurer to make settlement, penalty therefor 3650.
Net proceeds of mines, defined 3687.
Newspaper, notice of meeting board of equalization published, when 3636.
Newspaper, notice sale of property for taxes to be published, when 3767.
Newspaper, publish delinquent tax list, how, when and at what cost 3646.
Nonpayment of taxes, property becomes delinquent, when 3864.
Nonresidents owning live stock in state, how taxed 3843.

Taxation—continued.
Notice, added assessment, posted, when 3638.
Affidavit of posting in tax suits, how given and why 3663.
Clerk of board of county commissioners to give, when 3636.
County clerk publish statement added assessment, when 3638.
Delinquent tax list, how given 3646.
Delinquent taxpayers, how and when given 3646.
Delinquent tax sale, how given 3651.
Given delinquent taxpayers by auditor, how and when 3657.
Meeting board of equalization, how given 3636.
Personal property tax posted, when 3679.
Published or posted, filed with county recorder, when 3663.
Sale delinquent tax property, to specify what 3651.
Sale of property for taxes, how given 3637.
To taxpayers, how given 3644, 3864, 3866.
Tax suit to contain what 3663.
Oath, assessor's oath relative to assessments 3635.
Assessor to make oath of tax collection 3680.
List of taxable property under oath 3626.
List of property sworn to, how and when 3624.
Mining companies furnish assessor statement under, when 3690.
Railroad company furnish assessor statement under, when 3814.
Tax receiver subscribe to oath on assessment roll, when and how 3796.
Tax receiver subscribe to same, how and when 3648.
What effect failure of assessor to take same 3635.
Odd Fellows, what property exempt 3621.
Office, district attorney forfeit office, when 3676.
Officers, acting under temporary appointment give bond, when 3753.
Each to perform his own duties, when 3751.
Going out of office, turn over property to successor 3754.
Intrusted with revenue matter guilty of felony, when 3751.
Keep open for inspection books relative to taxes and revenue matters 3752.
Make settlement of finances with county auditor, how and when 3754.
Not to receive costs from county in tax matters 3671.
Perform own duties and no other 3751.
Receive fees for enforcement of taxes, how and when 3671.
Receive fees for services in tax matters, when 3673.
Refusing or neglecting to perform duty, misdemeanor, when 3753.
Removed for misappropriating public funds 3751.
Selling property to county treasurer tc make deed, how and when 3669.
Suspended by board county commissioners, how and when 3753.
Taxation—continued.
Official bond, auditor liable, when 3685.
Official bond, liability of county treasurer, when 3672.
Operators mining property furnish assessor with statement, when and what 3680.
Orphans' property, exempt, when 3621.
Owner of undivided real estate pay what taxes 3645.
Paid before distribution of estate 3629.
Paid by court order, when 3629.
Paid in December and June 3644, 3659, 3864.
Paid in other state does not exempt cattle at large in this state 3843.
Paid, when and how 3644.
Paid to whom 3643.
Patented lands, minimum valuation for assessment, what 3838.
Parties to action for delinquent taxes, who 3654.
Partnership property, how assessed 3629.
Pay floating debt and scrip tax to be levied, how and when 3833.
Payment, funds by county treasurer into state treasury, how 3748.
Taxes, bar to suit, when 3628.
Taxes in December and June 3644, 3659, 3864.
Taxes paid from rent, how 3670.
Taxes made, how 3645.
Penalty, added on taxes, when 3654.
Added for nonpayment, when and what 3864.
Assessor's neglect to make monthly statement 3687.
Collected in delinquent tax sale to include what 3651.
Commissioner or officer making expenditures when money not set apart 3830.
Delinquent taxpayers 3644.
Failure to pay over taxes by district attorney 3676.
False swearing to affidavit for satisfaction of mortgage 3755.
Falsely listing taxable property 3630.
Imposed on assessor for giving the receipt not provided 3684.
Misappropriation of public funds, what 3751.
Neglect of revenue officers to perform duties of 3753.
Neglect or refusal to make statement 3624.
Nonpayment of taxes, what 3864.
Paid by delinquents, how and when 3654.
Paid by taxpayers, how and when 3654.
Recorder for failure to enter satisfaction on mortgage or lien 3755.
Suits for delinquent taxes, to be what 3659.
Transferring property to avoid taxes 3679.
Perjury, falsifying list taxable property 3630.
Perjury to swear falsely to affidavit for satisfaction of mortgage or lien 3755.
Permanent limitation of taxation for county purposes, what 3826.
Personal property, defined 3622.
Lien on real property 3665.
Mortgaged, property of whom 3631.
Proceeds of mines consumed, when 3687.
Railroads assessed, how 3815.
Refunded, how and when 3678.

Taxation, personal property—continued.
Seized for taxes, how and when 3679.
Sold for taxes, how and when 3679.
Tax equalized, how and when 3678.
Tax, how collected and when 3678.
Tax lien attaches real property 3619.
Taxes collected in full, except when 3866.
Title vests when in tax sale 3679.
Turned over to assessor, how and when 3679.
Personal service in tax suits, how made 3663.
Personal tax, assessor to collect entire, when 3866.
Persons furnish statement to assessor 3624.
Persons paying money into county treasury to deliver receipts 3747.
Persons paying money into county treasury to get acquittance from auditor 3747.
Persons paying money to county treasurer to receive a receipt 3747.
Persons refusing to pay personal property tax, what action 3679.
Persons shall deliver to assessor list of property in other counties 3626.
Persons under legal disability to redeem property 3666.
Persons who may appear before board of equalization, and when 3638.
Pleading answer in tax suit 3664, 3665.
Pleading, answer to be filed in suit personal property tax 3679.
Pleading form of tax complaint 3661.
Pleading, time given to delinquent taxpayers 3663.

Poll Tax—

Applied to road work, how 256, 3711, 3841.
Assessor, as ex officio poll-tax collector, to give additional bond, when 3715.
And sureties, liable for poll tax, when 3718.
Deliver possession at poll-tax sale, sufficient title 3719.
Demand statement, number of employees for, when 3718.
Enter poll tax at time of making real property assessment, how 3618.
Give auditor receipt for poll-tax blanks 3713, 3715.
Give poll-tax receipt, how and when 3714.
Guilty of misdemeanor in giving receipt, how and when 3714.
Keep a list of all persons owing and paying 3724.
Keep roll of names for, how and wher 3724.
Make estimate poll-tax assessment, when 3718.
Make final settlement for, with auditor, how and when 3723.
Make return under oath of all poll taxes demanded 3724.
Neglecting to make return, penalty 3726.
Official collector 3713.
Pay county treasurer, how and when 3722.
Pay over all, how and when 3723.
Receive receipt for, paid by him to treasurer 3722.
Refusal to give information or access to buildings, misdemeanor 3720.
Return all receipts not used 3723.
Taxation, poll tax—continued.
Sell personal property for, when 3718.
Sell property for old taxes and return surplus 3719.
Sell property of employees, when 3718.
Serve notice in writing of poll tax, when 3718.
Sign all receipts 3841.
Swear to complaint against certain persons in poll-tax matters, when 3720.
Take oath of taxes collected and file receipt with auditor 3722.
Assessment, persons for tax not previously collected, how made 3718.
Assessment roll, assessor to keep list of names of persons, liable for 3724.
Assessment roll, poll taxes to be entered upon, how and when 3718.
Attorney-general to instruct district attorney to prosecute assessors, when 3840.
Auditor, charge treasurer with, when 3722.
File receipt given assessor by treasurer for tax collected 3722.
Furnish assessor receipts and charge them for same 3713, 3715.
Transmit to controller certified statement of, how and when 3725, 3841.
Board of county commissioners to exact additional bond of assessor as poll-tax collector 3715.
Bond, assessor liable on for failure to make return, when 3726.
Bond of collector, to be increased, when 3715.
Controller, to furnish form for statement to be filed with him 3710.
Controller no longer to furnish receipts 3841.
Controller, receive certified statement of, from county auditor 3725.
Corporation to give statement of number of employees for, when 3718.
Corporation liable for taxes of employees, when 3718.
Cost of collection of, not to exceed what 3718.
County commissioner to apply tax to road work 3841.
County commissioner to direct assessor to demand statement, how and when 3718.
Counties, furnish receipt 3841.
Delinquent, how collected 3718.
Disposition of 256, 2711, 2841.
Employers to deduct from wages of employees, when 3718.
Employers held liable for, of employees, how and when 3718.
Entered on assessment roll, how collected 3718.
Evidence of payment of, what 3716.
Exempt, persons from paying, when 3711.
False name, giving of to assessor for, misdemeanor 3720.
Felony, fraudulently issue receipt, when 3717.
Forfeiture of office by assessor for failure to make return, when 3726.
Fraudulently issuing transfer, etc., receipt, felony 3717.
How and when collected by assessor 3718.
Liability of assessor and sureties for, what 3718.
Liability of assessor for failure to make return, what 3726.

Taxation, poll tax—continued.
Lien to attach to real and personal property, for, when 3618.
Lien on real and personal property, how and when 3618.
Misdemeanor, refusal to give access to assessor, place where men working 3720.
Moneys received from, how applied to road work 3841.
Notice given in sale of employer's property for, what 3718.
Notice of sale of personal property for, how given 3718.
Oath, assessor to make return under for, demand and collections 3724.
Oath, statement of number of employees furnished by employer for 3718.
Office to be forfeited by assessor for failure to make return, when 3726.
Paid into county treasury by assessor, how and when 3722.
Paid in other state, bar to collection here, when 3711.
Payment of, how evidenced 3716.
Payment of, how proved 3716.
Penalty for assessor not giving proper receipt 3714.
How collected 3718.
For delinquent, what 3718.
Fraudulently issuing transfer, etc., receipt 3717.
Neglect of assessor to make return 3726.
Refusing information or access to assessor for 3720.
Person deemed to have paid, when 3711, 3716.
Personal property sold for, how and when 3718.
Property of employer liable for tax of employees, when 3718.
Property, real and personal, subject to lien for, when 3718.
Possession of property sold for, given by assessor, sufficient title 3719.
Purchase at sale to get possession of property, how 3719.
Receipt, for evidence of payment 3716.
Felony to fraudulently issue, etc. 3717.
Furnished by county and signed by assessor 3841.
Fraudulent manipulation, felony, when 3717.
Given by assessor, how and when 3714.
Valid, when 3716.
Refusal to give collector information, misdemeanor, when 3720.
Residence, defined for purposes of 3711.
Road work, tax to be applied to, when 3841.
Sale, surplus, turned over to owner of property 3719.
Sale of property for, surplus turned over to owner 3719.
Statement furnished by auditor to controller, how, when 3725.
Statement made by county auditor to controller, how, when 3725.
Statement under oath of number of persons employed, given assessor, when 3718.
State controller to receive statement of, from auditor, how, when 3725.
Summary collection of, by assessor, how made 3718.
Taxation, poll tax—continued.
Sureties and assessor liable for, when 3718.
Sureties liable on bond for failure of assessor to make return 3726.
Taxes, sale of property for, surplus to go to owner 3719.
Taxes, statement furnished by auditor to state controller, how, when 3725.
Taxes, use of state and county 3711.
Title, to property sold at sale, how given 3719.
Treasurer to give assessor duplicate receipts for poll taxes paid in 3722.
Treasurer to go with assessor to auditor when final settlement made 3723.
Treasurer responsible for, when 3722.
Transfer poll-tax receipt, felony 3717.
Wages, may be garnisheed for, how and when 3718.
Wages of employees liable for, how and when 3718.
Who is exempt from payment of 3711.
Who shall pay 3711.
[Sec. 3721 superseded by sec. 3841. See Const. sec. 256.]
[Sec. 3712 superseded by sec. 3841.]

Possessor of mortgaged property deemed owner, when 3631.
Possession to property obtained by tax deed, how 3666.
Possession to property sold for taxes obtained, how 3666.
Posting notice of sale of property for taxes, when 3767.
Posted notice of tax suit, form of 3663.
Powers of board of equalization 3638.
Powers, officers acting under temporary appointment 3753.
Printing tax list, cost to be allowed by county commissioners, how 3775.
Printing taxpayer's list, to be paid, how and by whom 3632.
Proceedings in suit for foreclosure of mortgage or lien, tax stayed until affidavit of payment of taxes filed, when 3756.
Proceedings in tax suit, judgment, how rendered 3665.
Proceeds of mines, taxes on collected, when 3689.
Proceeds of taxable property paid into general fund, when and how 3671.
Proceeds from sale of property by treasurer to go, when 3767.
Proceeds from sale, rents, redemption of tax property, how appropriated 3671.
Procedure for collection of taxes, personal property 5307, 5314, 3679.
Procedure in suit for delinquent taxes, what 3662.
Prohibition on expenditures of county funds, what 3830.
Proof of loss, personal property, tax money, how made by controller 3685.
Proof of payment of taxes to be made in suit for foreclosure mortgage or lien 3756.
Property, amount thereof to be sold for taxes 3666.
Arrest to be made for fraudulent conveyance to avoid taxes, when 3679.
Assessed in several counties, how paid 3678.

Taxation, property—continued.
Assessed full cash value 3623.
Assessment roll to describe and list, how 3633.
Becomes delinquent for taxes, when 3646.
Certificate to be given at tax sale 3652.
Claimed by several, assessed how 3633.
Conveyed to treasurer by deed of trust, how and when 3669.
Deceased persons, how assessed 3629.
Delinquent for nonpayment of taxes, when 3864.
Delinquent for taxes to be advertised by treasurer, how, when 3646, 3651, 3865.
Delinquent, list to be sent controller, how and when 3649.
Exempt from taxation 3621.
Of firm, company, corporation assessed, when 3629.
Held by treasurer to be sold, how and when 3667.
Held for taxes redeemed from county treasurer, when 3667.
Held in trust by treasurer assessed, how, when 3670.
Held in trust by treasurer, taxes, how paid 3670.
Held in trust by treasurer, how and when sold 3667.
Held in trust by treasurer, to be rented, how and when 3668.
Held for taxes, treasurer to sell by order of commissioners, when 3767.
Included in officers' certificate of sale 3669.
In other counties assessed by list sent assessor, when 3627.
Insufficient to pay taxes, balances, how remitted 3670.
In tax suits, how redeemed after judgment 3665.
List describing same to be sworn to 3626.
List of added assessment by board of equalization, published 3635.
List of valuation prepared by assessor, when 3632.
Not assessed, assessor and sureties liable 3625.
Notice to be posted on, when sold for taxes 3767.
Of persons under legal disability, how redeemed 3666.
Of railroad company, classified for purposes of taxation 3815.
Of Y. M. C. A. exempt from taxation 3842.
Personal, sold for taxes, title vests, when 3679.
Personal, tax to be collected by assessor, when 3866.
Possession of paid by tax deed, how 3666.
Purchaser at tax sale to receive deed, how and when 3654.
Purchased by county for taxes, costs, how paid 3673.
Redeemed from county treasurer, how and when 3667.
Rents therefrom to pay for taxes by treasurer, when 3668.
Sold at sale, subject to redemption, when and how 3651.
Sold for delinquent taxes, how and when 3651.
Taxation, property—continued.
Sold for taxes to be bought by treasurer, when 3667.
Sold for taxes by treasurer, how and when 3667.
Sold for taxes, procedure 3651.
Sold for taxes, notice posted, when 3767.
Sold for taxes, redeemed, how and when 3666.
Subject to taxation 3621.
Suit for delinquent taxes not to be filed, when 3655.
Taxes paid, how and where 3643.
Taxes paid, how 3645.
Tax, personal property, how collected 3678.
Total valuation of assessment roll to be added by auditor 3641.
Title from tax sale to pass, when 3652.
Transferred to avoid taxes, unlawful 3679.
Treasurer to make out deed, when 3653.
Unknown owner, how assessed 3624.
Widow and orphans exempt 3621.
Within city limits, how listed 3633.
Without city limits, how listed 3633.
Provisions for diminution of county tax rate, what 3827.
Public auction for personal property, sold for taxes, when 3679.
Public to have access to all tax books, assessment rolls, when 3752.
Publication, cost of tax list to be what 3646.
Form of notice of tax suit 3663.
Of delinquent tax notice, to contain what 3657.
Of joint statement made by auditor and treasurer of condition county finances to be published, how and when 3746.
Of notice in newspaper, for tax sale, when 3767.
Of notice of delinquent tax sale to cost, what 3646.
Of summons in tax suit, how and when made 3663.
Publisher to make affidavit of publication in tax suit, when 3663.
Public schoolhouses exempt 3621.
Punishment district attorney for failure to pay over taxes 3676.
Punishment for attempt to avoid personal property tax 3679.
Punishment for transferring property to avoid taxes 3679.
Purchaser of property from treasurer to file statement of auditor, when 3668.
Purchaser tax property to receive absolute deed, when 3667.
Quarterly reports to be made to controller, how 3835.
Quorum, board of equalization, how constituted 3638.
Railroads and property tax, how provided 3815.
Railroads and rolling stock, how assessed 3814.
Railroads defined for purposes of assessment 3815.
Railroads failing to make required statement, assessors to proceed, how 3817.
Railroads, portion in each county assessed as part of whole 3816.
Rate of taxes in certain counties increased, how and when 3837.

Taxation—continued.
Rate of for county purposes, how fixed 3827, 3837.
For county purposes, not to exceed, what 3762.
For counties, how fixed 3826, 3827.
Increased in certain counties, how and when 3837.
Real estate, defined 3622.
Owner of undivided real estate may pay proportion of taxes 3645.
Taxes, how released 3665.
Real property held by treasurer, sold, when 3667, 3767.
Held for taxes of personal property, when 3665.
Lien attaches for personal property tax 3619.
Tax deed conclusive evidence of title, when 3666.
Receipts for money paid into county treasury delivered to auditor, how, when 3747.
Receipts for taxes, countersigned by auditor, how and when 3683.
By district attorney, for taxes and costs, prima facie evidence of, what 3665.
Failure to file with district attorney, what 3655.
Filed with auditor, when 3654.
Filed with district attorney, when 3654.
Given by county treasurer to persons paying in money, when 3747.
Given by tax receiver 3643.
Proper to cause dismissal of suit, when 3628.
State treasurer to give county treasurer receipts for money paid over 3748.
Unused blank receipts and stubs returned to auditor, how and when 3686.
Receiver of taxes and treasurer attend office of auditor with delinquent list, when 3862.
Receiver of taxes, county treasurer to be 3643.
Receiver of taxes charged by auditor with amount of taxes levied 3642.
Enter statement of delinquent taxes upon assessment roll 3646.
File list of delinquent taxpayers with auditor, when 3646.
Issue duplicate tax receipts, when 3654.
Give receipt for payment of taxes, how 3645.
Liable for neglect to make settlement 3650.
Not to receive less than the least subdivision on assessment roll 3645.
Publish notices for taxes, how and when 3644.
Receive assessment roll 3641.
Receive corrected assessment roll, when 3795.
Receive taxes from delinquent taxpayers 3654.
Settle with auditor, how and when 3648, 3796.
Subscribe to oath on assessment roll, how and when 3648.
Turn over assessment roll, when and how 3648.
Records of county commissioners show state and county levies 3763.
Recorder, enter satisfaction of mortgage on lien, how and when 3755.
Liable for failure to file affidavit in satisfaction of mortgage and lien, when 3755.
Liable on official bond for failure to enter satisfaction of mortgage on lien 3755.
Taxation—continued.
Recorder, receive fee for filing affidavit of tax payment 3755.
Receive fee filing notice of publication 3663.
Record certificate and deed of property, how and when 3669.
Satisfied by affidavit before satisfaction of mortgage or lien can be entered 3755.
Redemption fund created by commissioners, how and when 3764.
Redemption, money, how appropriated 3671.
Money paid for property, how proportioned 3671.
Property from county treasury made, how and when 3667.
Property held by county, when 3652.
Property not redeemed for taxes sold, how and when 3767.
Property sold at tax sale subject to, when 3651, 3865, et seq. 5300.
Property sold for taxes after judgment 3665.
Property sold for taxes, how made 3666.
Reduction in assessment made, how and when 3638.
Refusal make statement of tax property, penalty 3624.
Refusal obey citation personal property tax suit, contempt, when 3679.
Release mortgage or lien, affidavit of payment of taxes made before entry 3755.
Remaining half unpaid taxes becomes delinquent, how and when 3864.
Removal assessor for failure to make monthly statement 3681.
Assessor from office, when 3684.
Commissioner for contracting indebtedness, how and when 3834.
From office district attorney, cause of 3676.
Of officer for misappropriation public funds, when 3751.
Rents of property held for taxes, how apportioned 3668.
Reports, annual, of county finances made to controller, how 3835.
Auditor's, filed in office of controller, when 3748.
County auditor's, sent controller by county treasurer, when 3748.
Duty of auditor to furnish treasurer with, when 3748.
Mileage, receipts, expenses, dividends, surplus of express companies made 3792.
Resolution commissioners for temporary loan to state, what 3831.
Revenue board to approve temporary loan by county, how and when 3764.
Revenue, county apportioned by commissioners, how and when 3764.
Insufficient to meet county needs, how and when 3818.
Officer, removed from office, how and when 3753.
Settlement by county officers made with auditor, when 3754.
Road, special tax for 3620.
Road tax, basis for 3637.
Roll, assessment added by auditor, when 3641.
Roll, assessment, changed by commissioners, how and when 3640.
Delivered to auditor, when 3640.
Delivered to clerk, when 3636.

Taxation—continued.
Roll, assessment, divided into separate columns, how 3633.
How prepared 3633.
Sale, notice of for property sold by treasurer, how given 3767.
Personal property, fee for assessor 3679.
Personal property for taxes, when and how made 3679.
Property by treasurer, proceeds to go, when 3767.
Property for delinquent taxes by treasurer, how and when 3865.
Property for taxes to be redeemed, how and when 3666.
Property sold for taxes redeemed, how and when 3651.
Tax, property held by treasurer in trust, how made 3667.
Satisfaction of mortgage or lien entered by recorder 3755.
School fund to receive all fines, how and when 3760.
Schools, special tax for 3620.
School tax, basis for 3637.
Scrip, tax to be levied to redeem same, how and when 3833.
Semiannual payments of taxes, how made 3864.
Service, affidavit of publication prima facie of, when 3663.
Citation in suit personal property tax, how made 3679.
Effect of personal service in tax suits 3666.
Of summons in delinquent tax suits, how made 3663.
Of summons upon personal defendant in tax suit, how made 3663.
Of summons upon real estate and improvements thereon, how made 3663.
Session of board of equalization to be, when 3793.
Settlement made by county treasurer, when, if vouchers for claims are received 3749.
Settlement, state controller with county treasurer, how made and when 3748.
Settlement, tax receiver with county auditor, how and when 3648.
Several counties, tax rate, how fixed 3827.
Sheriff, ex officio license collector, make financial settlement with auditor, when 3754.
Sheriff, ex officio license collector, removed from office, how and when 3753.
Sheriff, serve summons in delinquent tax suit, how, when 3663.
Situs of live stock for purpose of taxation 3843.
Societies, charitable, benevolent, what property exempt 3621.
Special deposit, county funds to be kept on special deposit by county treasurer, how, when 3747.
Special tax for cities, towns, schools, road 3620.
How assessed and collected 3620.
Levied, how 3620.
Lien on property 3620.
Levy made by county commissioners, how and when 3762.
State ad valorem tax, how levied 3617.
State board of assessors, valuation on land to stand, when 3797, 3840.
Taxation—continued.
State controller, and state treasurer to order county treasurer to pay over state moneys, how and when 3748.
Auditor to furnish tax statement 3642.
Cause suit to be commenced against county treasurer, when 3650.
Institute suit against county auditor, when 3685.
Prepare form of personal property tax receipts for use by assessor 3682.
Receive joint statement of county's finances from auditor and treasurer, when 3746.
Receive receipt of state treasurer from county treasurer, when 3748.
Receive report from county auditor of taxes stricken 3675.
Receive statement from auditor 3750.
Receive statement from county auditor of state moneys in county treasury, and sources of 3748.
Receive unused receipts and stubs from auditor, when 3686.
Settle with county treasurer, how and when 3748.
State, general fund to receive money recovered in suit against auditor, when 3685.
Levy added to county levy by commissioners 3763.
Moneys paid by county treasurer upon order of state controller and state treasurer 3748.
Property exempt from taxation 3621.
Proportion of expenses in collection of revenue, what 3749.
Revenue expenses, incurred by officers to be paid, how 3749.
Tax, how apportioned 3617.
Tax, how levied 3618.
To allow part compensation for revenue officers, how and when 3749.
Treasurer and state controller, order county treasurer to pay over state moneys, how and when 3748.
Treasurer, receive all fines and credit to school fund 3760.
Treasurer to receive funds from county treasurer, when 3748.
Statement, certified by controller with official seal, to be used as evidence of what 3685.
County auditor to controller, to contain what 3750.
County treasurer to file statement under oath, how and when 3647.
Delivered by treasurer, giving reason for not collecting delinquent taxes 3862.
Filed with state controller, showing valuation taxes, when 3642.
Furnished assessor by taxpayer 3624.
Furnished assessor by mining company, to contain 3690.
Made by express company, to include what 3792.
Made by auditor and treasurer of county's financial condition, to be published, how and when 3746.
Made jointly by treasurer and auditor of county's finances, to contain what 3746.
Railroad company as to property, to contain what 3814.

Taxation—continued.
Statement, showing moneys received and sources by county treasurer, to be delivered to state controller, how, when 3748.
Statement of state money in county treasury to be furnished state controller and state treasurer, how and when 3748.
Stock running at large assessed, when and how 3843.
Stockholder, shall not be assessed 3629.
Striking off of delinquent taxes by commissioners, how and when 3862.
Suit, affidavit of publication of summons in tax suit, how made 3663.
Against assessor and bondsmen to be started, when 3839.
Answer to be filed in personal property tax suit, how and when 3679.
Brought by assessor for taxes, personal property, how and when 3679.
Brought in the name of the State of Nevada, when 3659.
Character of judgment, how entered 1603, 1636, 1677, 3665.
Collection personal property, what fees allowed 3679.
Commenced against recorder by district attorney in mortgage tax matters, when 3755.
Commenced by district attorney, when 3650.
Commenced for taxes, how and when 3657.
Commenced, when 3659.
Complaint for delinquent tax, form 3661.
Dismissed, for taxes, when 3678.
District attorney to receive fee, amount 3677.
Delinquent taxes 3663.
Delinquent taxes, begun when 3659.
Delinquent taxes, judgment, how rendered 3665.
Foreclosure of mortgage or lien, affidavit attached to complaint, what 3756.
Judgment, how entered 3673.
Judgment, to include, what 3665.
Recovery delinquent taxes, commenced, when 3646, 3651, 3865.
Shall not be commenced by district attorney for taxes, when 3655.
Tax, order for foreclosure on mortgage or lien, proceedings stayed until affidavit of payment of taxes filed, when 3756.
Personal property tax, citation, how served 3679.
Property, how redeemed after judgment 3665.
Service citation, how made 3679.
Summons, how issued and served 3663.
Summons, in suit for delinquent tax, how served 3663.
Summons, in suit for delinquent taxes to state, what 3660.
Sureties, liable for county treasurer, how, when 3672.
Of assessor, liable for property not assessed 3625.
Of assessor, liable for unassessed land, taxes, when 3839.
Revenue officer acting under temporary appointment to give bond, when 3753.
Treasurer and ex officio tax receiver liable, when 3650.
Taxation—continued.
Sworn statements, to assessor, by whom made 3624.
Taxpayer, arrested for evasion of taxes, when 3679.
How notified of suit for delinquent taxes 3663.
List prepared by assessor, when 3632.
Notified by tax receiver, when 3644.
Notified of delinquent taxes, how 3646.
Optional to pay full amount, when 3644, 3659, 3864.
Pay cost of publication delinquent tax list 3646.
Receive list of taxpayers and property assessed 3775.
Select county to pay taxes, when 3628.
Taxes struck off by county commissioners, how and when 3675.
Time to answer in delinquent tax suit, what 3663.
Title, tax property, how vested 3652.
Personal property, tax sale vests, when 3679.
Real property by tax deed, what 3666.
Tax property set aside, when and how 3666.
Toll roads, affidavit made by owners of to county treasurer, when 3757.
Complaint made county commissioners notify toll roads to repair 3759.
Costs in suit by county for collection of money due from toll roads, how taxed 3757.
County commissioners compel toll roads kept in repair 3759.
Direct district attorney bring suit for money due from toll roads 3757.
Direct district attorney commence action against toll roads, how and when 3757.
Direct district attorney start suit forfeit franchise toll road 3759.
Give owners reasonable time repair toll road 3759.
County treasurer pay into state treasury for general school fund receipts from toll roads 3758.
District attorney bring suit for collection of money due on toll roads 3757.
Bring suit forfeit franchise toll road, when 3759.
Receive fees for prosecution of suit against toll roads, what 3757.
Duty of district attorney to commence suit against toll roads, when 3757, 3759.
Failure of owner of toll roads settle with county treasurer, penalty 3757.
Fees allowed district attorney prosecution of suit against toll roads 3757.
Forfeiture franchise by toll roads, how caused 3959.
Franchise, forfeited how, when 3757.
Kept in repair, how, when 3759.
Money received from paid into state treasury for general school fund, how, when 3758.
Owners pay percentage into county treasury, how, when 3757.
Penalty, failure for owner of toll road settle with county treasurer 3757.
Quo warranto, action brought by district attorney against toll roads, how and when 3757.

Taxation—continued.
Toll roads, report to county treasurer, how and when 3757.
Roads, owners of toll roads report to county treasurer, how and when 3757.
Roads, toll, kept in repair, how and when 3759.
School fund receive money collected from toll roads, how and when 3758.
Settlement, owners of toll roads make with county treasurer, when 3757.
Statement under oath made to treasurer of gross receipts of toll roads 3757.
State school fund receive moneys collected from toll roads, how, when 3758.
Suit for collection of money due from toll roads, how instituted 3757.
Treasurer receive statement under oath of gross amount of toll from roads, when 3757.
Town property exempt 3621.
Special tax for 3620.
Tax, basis for 3637.
Transfer of property to avoid taxes unlawful 3679.
Treasurer and county auditor to make joint statement of finances to county commissioners, how and when 3746.
Treasurer and ex officio tax receiver, to be removed from office, how and when 3753.
Advertise property delinquent for taxes, how and when 3646, 3651, 3865.
As trustee, assessed for property, how 3670.
As trustee, pay taxes from rent of property, how and when 3670.
Compensated for services in tax matters, how and when 3671.
Deliver statements with auditor showing why delinquent taxes not collected 3862.
File statement with county auditor, how and when 3668.
Give assessor receipt for tax collection paid over 3680.
Have account balanced by auditor, how and when 3748.
Hold property in trust for state and county, when 3667.
Inform district attorney 3625.
Keep county moneys in his own possession on special deposit, how and when 3747.
Liable for not making settlement, when 3650.
Liable on his official bond, when and how 3672.
Make apportionment of moneys, how and when 3647.
Make out deed, when 3653.
Make out tax certificate, how and when 3652.
Make settlement with auditor, when 3754.
May buy at tax sale, when 3652.
May buy as trustee at tax sale, how and and when 3667.
Pay proceeds from taxes into general fund, how, when 3671.
Quantity of property to be sold for taxes 3666.
Receive and file copy of levy from commissioner, when 3763.
Receive deed for tax property, when 3667.
Receive necessary report from auditor, when 3748.
Taxation—continued.
Treasurer and ex officio tax receiver, receive revised delinquent tax list from auditor, when 3862.
Receive tax money from assessor, how and when 3680.
Refuse personal property tax, how and when 3678.
Rent property held in trust by, how and when 3668.
Sell property for delinquent taxes, how and when 3865.
Sell property held in trust by him, how and when 3667.
Treasurer to receive penalty for taxes 3656.
Temporary officer, act to be valid, when 3753.
Unable to be collected, struck off, how and when 3862.
Unassessed land taxes paid by assessor, when 3839.
Uncollected taxes by district attorney, how treated 3675, 3862, 3863.
United States property exempt 3621.
Unknown owners, how assessed 3624.
Unlawful for officer of county make expenditures unless money in treasury, when 3830.
Unpatented mines and mining claims exempt 3621.
Valuation, list of property prepared by assessor, when 3632.
Assessment roll added by auditor, when 3794.
Certain lands for purpose assessment, what 3838.
On lands placed by board of assessors, to stand, when 3840.
Verification of answer made in tax suit 3664.
Village property exempt 3621.
Vouchers certified and allowed by county commissioners for state expense claim in revenue collections 3749.
Vouchers for claims against state sent by county treasurer to controller for final settlement, how and when 3749.
Vouchers for claims against state sent by county treasurer and controller, when 3749.
Warrants, auditor to draw for printing tax list 3632, 3775.
What amount of property disposed of for taxes 3666.
When a person is considered under legal disability for purposes of tax redemption 3666.
Who may appear before board of equalization and when 3638.
Widows, amount of property exempt 3621.
Y. M. C. A. property exempt from taxation, when 3842.

Revised Laws, compilation of 1005-1016.
Revised Laws, distribution of 1015.
Revised Laws of Nevada 431-7634.
Revision of constitution, convention for, how called 384.
Revocation of license 3867, 6841.
Revocation of parole 7631.
Revocation of power of attorney 1042.
Revocation of reward offered 3906.
Rewards 3905-3907.
Act to authorize and require payment of rewards in certain cases (approved February 26, 1877) 3905.

Rewards—continued.
Act to authorize county commissioners of the several counties in this state to offer and pay rewards in certain cases (approved March 3, 1869) 3906, 3907.
Amount of, offered by bank examiner in certain cases 646.
Amount of, offered by county commissioners in certain cases 3906.
Amount of, offered by governor in certain cases 3905, 2831.
Amount of, offered by governor for violation of election laws 1831, 2831.
Bank examiner offer for larceny from bank 646.
Commissioners may offer for murderer 3906.
County commissioners may offer in case of murder, made how 3906.
Election laws, violation of 1831.
Escapes 2831.
Governor shall offer for capture of escapes from prison 1831, 2831, 3905.
Governor shall offer capture of murderers, 3906, 2831.
Governor shall offer standing for capture highway robbers 3905.
Governor shall offer violation election laws 1831.
Governor required to offer certain cases 2831, 1831.
Highway robbery 3905.
How made and revoked 3906.
How paid 3909.
Larceny from bank 646.
Murders 2831, 3906.
Not payable to officer in discharge of duty 3905.
Offer made by county commissioners revoked, how, when 3906.
Offered apprehension escapes from prison, when 2831.
Offered capture of murderers, paid how 3907, 2831.
Offered capture murderers of Harry Cambron and associates, by whom, amount of (see Statutes 1911, p. 16).
Offered certain cases, by whom 3905-3907, 2831, 1831, 646.
Offered by county commissioners, paid how 3907.
Offered for violation banking laws, by whom, paid how 646.
Offered for violation election laws, by whom 1831.
Paid to person or persons making arrest, when 3905.
Peace officers not eligible to, when 3905.
Revocation of 3906.
Robbery 3905.
Standing, for highway robbery 3905.
State detectives, eligible for 4304.
State treasurer to pay, when 646, 1831.
Violation of election laws 1831.
Rights, declaration of 230.
Inalienable proclaimed 230.
In general, retained by people 249.
Right of eminent domain given irrigation districts 3770. See Water.
Right of representation, defined 6129.
Right of suffrage, office-holding not to be withheld from any male citizen by reason of color or previous condition of servitude 411.
Right of way, acquired through private lands by ditch, flume builders 4712, 4714. See Water.
Across public lands 3169, 3171, 3172. See Water.
For railroad, court may order clerk to pay money to claimant entitled, proceedings 3535-3548.
Granted 3531.
Highways, limit to 3060. See Public Highways.
Irrigation districts, acquired how 4768-4769. See Water.
Not to be appropriated until compensation is made or secured 344.
Over state lands, irrigation projects 4769. See Water.
Obtained under eminent domain, crossings and culverts to be kept in repair 5626.
Secured how, by telegraph company 4629.
Through forest reservations 2420.
Where veins intersect 2398.
Right to use water depends on putting to beneficial use 4674, 3105. See note preceding 4672.
Riot, defined 6596.
Riot, in case of, property may be taken for public use, compensation to be made afterward 237.
Riotous assemblage, ordered dispersed, when 2836-2838.
Riotous assemblage, power to suppress 2836-2843, 3982, 4058, 6593-6596.
Riot, suppression of 6862.
Road districts, county commissioners to disorganize, when 3014.
Road districts, established in certain counties 3037.
Road districts, eminent domain may be exercised for 5606.
Road fund created 3006, 3014. See County Government, Public Highways.
Road inspector. See Public Highways.
Road, right of way for, with railroads through canyon 5628.
Road, special tax, basis for 3637. See Revenue.
Road supervisor, compensation of 3039. See Public Highways.
Road supervisor, office of, abolished 3010, 3037-3040.
Road tax, basis for 3637. See Revenue.
Roads and bridges. See County Commissioners, Public Highways.
Roads, local and special laws for vacating are invalid 278.
Roads, owners of, to report to county treasurer 3757. See Revenue.
Robery, defined 6427.
Robbery, assault with intent to commit 6413, 6917.
Robbery, reward offered for 3905.
Rondo 6518.
Roop County, creation, boundaries 390, 409, 1447, 1484, 1485.

Roop County—continued.
Attached to Washoe County for judicial purposes 409.
Rouge et noir, gambling game, penalty 6518.
Roulette, gambling game, penalty 6518.
Rout, defined, penalty 6596.
Rule of court may provide how cases shall be entered on calendar 5200.
Rule of decision to be in accordance with common law of England 5474.
Rule of district court may provide penalty on overruling demurrer 4845.
Rules and regulations, interior department have effect of laws 2421. See Mines and Mining.
Rules of board of pardons, pp. 2109-2110.
Rules of board of parole commissioners, pp. 2109, 2110, 2111.
Rules of district court, pp. 1421-1425, 1431, 4942. See special index under Civil Practice.
Rules of pleading, in civil action, schedule of sections relating to 5065.
Rules of supreme court, pp. 1421-1425. See special index under Civil Practice.

S

Sabbath breaking, defined, penalty 6608. See Sunday.
Safety appliances, failure to provide 6797-6799.
Safety appliances on railroads, power of commission to regulate 4555.
Safety cages in mines, failure to provide 6799.
Sagehen, closed season for 2087.
Salaries. See the several state and county officers.
Increase or diminution of, restricted 377.
Of county and township officers, legislature may determine 278.
Of justices of supreme court, to be fixed by law, how payable, not to be increased or diminished during term 330.
Of officers, fixed by constitution, not to be increased or diminished during term 377, 401.
Of officers, rebate or division for reward, prohibited 6313-6316.
Officer refusing to obey writ of mandamus, applied on fine 5707.
Subject to attachment, when 2864, 2865.
Salaried officers, neglect to pay over fees, penalty 1698.
Sale. See Civil Practice.
Bailment, property held by 530-542.
Bank, real estate of 656.
Corporate property, by court 1197, 1198.
Estates of decedents, real property 5985, 6020. See Estates Deceased Persons.
Fish, restrictions regarding 2078.
Homestead, forced, when not to take place 228.
Horse meat, when unlawful 6524, 6525.
Liquor to Indians 6507-6509.
Personal property, for taxes 3679.
Real estate belonging to minors or persons under legal disability, legislature not permitted pass local or special law concerning (as amended 1889) 278.
Stolen property, when 7449.
Under execution. See Civil Practice.
When evidence of fraud 1078, 1079.
Sales of merchandise 3908-3912.
Agent to notify creditors 3909.
Agent to receive statement from 3909.
Agent to supply statement 3908.
Bulk, merchandise purchased in, requirements 3908-3909.
Creditors, verified statement of, to demand 3908.
False statement, perjury 3910.
Purchased in bulk, requirements 3908-3909.
Provisions of act, waived, when 3911.
Purchaser in bulk to demand verified statement of creditors 3908.
Purchase money to be paid creditors 3909.
Sale or transfer, defined 3911.
Sale void, when 3909.
Venders, who are 3912.
Violation of act, penalty 3910.
Salesman, has preferred claim for wages 5493, 5494.
Saline lands, location of, survey of, title, how acquired 2392, 2421, 2447-2450, 2454, 2455. See Mines and Mining 2375-2496.
Saloons. See Liquor.
Impure liquor, sale of, penalty 6816.
License for conducting 3732.
Minors not to be employed or permitted in 6506, 6842, 6843.
Mixing or distilling impure 6816.
Near construction camp, license to be revoked 6841.
Permitting minors in, penalty 6506, 6842, 6843.
Wages of miners, not to be paid in 4230.
Sandhill crane, closed season for 2089.
Sanity of defendant, inquiry into 7271-7275, 7385-7394. See Criminal Practice.
Satisfaction of judgment, civil action 507, 5279. Tax suit 3660.
Satisfaction of lien, failure to enter acknowledgment of, penalty 2228.
Satisfaction of mortgage or lien 3755.
Savings bank, restrictions and regulations 621, 622.
Sawdust, depositing in streams, penalty 4716, 4718, 6547.
School district bonds 3431-3442. See Public Schools.
School district, neglecting to maintain school or allowing sectarian instruction, may be deprived of proportion of public school fund 354.
School, books, overcharge for 3412.
Children, interference with 6599.
District, presenting fraudulent claim for audit or payment 6715.
Disturbing of 3453.
Election law, violation of 3294, 3296.
False statement of age or attendance of pupil 3450.
Females, eligible as superintendent and trustee of, when (Const.) 371.
Funds, auditor and treasurer failing to classify 3558.
Houses, injury to 6760, 6761, 3455, 3456.
Houses of prostitution near 3457, 6510.
Interfering with pupils 3452, 6599.
Legislature to provide special tax for, when (Const.) 358.
Normal and public of certain grades, legislature may establish, how (Const.) 357.

School—continued.
Property of, injuring or defacing 3455.
Supply act, violation of 3472.
Truancy, encouraging 3449.
Truancy, parent failing to prevent 3435.
Trustee, certain females eligible, when (Const.) 371.
School tax, general and special, basis for 3620, 3637.
School teachers, libraries and certain property exempt from execution 5288. See Public Schools.
School uses, eminent domain for, when 5606.
Scientific improvement to be encouraged by legislature 353.
Scrip, county, redemption tax 3833.
Seal. See Civil Practice.
District and supreme court, to have 4875-4880, 5481.
Of county 1527.
Of notary public 2753.
Of state 4402, 4403.
Of state, to be kept by governor 308.
"Seal" or "L. S." unnecessary 1095.
Sealed letters, messages or telegrams, opening unlawfully 6714.
Sealed verdict 5217.
Search and seizure, not to take place except on probable cause supported by oath and particulars 247.
Search of defendant 7434.
Search warrant, affidavit of probable cause 7417.
Defined 7415.
Examination before issuing 7418, 7419.
Force, using unnecessary in serving, penalty 6742.
Form of 7421.
Grounds, disputed hearing 7431.
Grounds, for issuance 7416.
Inventory 7429, 7430.
Magistrate's duty 7433.
Magistrate to issue, when 7420.
Maliciously procuring, penalty 6741.
Officer, power of 7423, 7424.
Officer exceeding authority, penalty 6742.
Probable cause must exist 247, 7417-7419.
Procedure to obtain and serve 7415-7434.
Property destroyed, when 7432.
Property taken, disposal 7428.
Receipt for property 7427.
Return and inventory 7429.
Service of 7422-7425.
Service in daytime, exception 7425.
Time of service 7425-7426.
Seat of government, Carson City, designated by constitution 369.
Sessions of legislature to be held at 259.
Terms of supreme court to be held at 322.
Secession, right of denied 231.
Second degree murder 6386.
Second-hand dealer, defined 6472.
Second-hand dealer, duties and penalties 6465-6472.
Second judicial district, number of judges, powers, rules, may make 4903. See District Courts.
Secret offenses, limitation of prosecution for 6924.
Secret or military orders or societies, badge or insignia of, unlawful wearing 6717.
Secretary of corporation, depositions of may be taken 5454.
Secretary of interior to cooperate with state engineer relative to water 4681.
Secretary of state. See Officers Generally.
Age qualification 2766.
"Agreement and contract book," to keep 4267.
Appointments and elections reported to 2795.
Assembly, roll of to make out and to call to order 4112, 4113.
Bank, to issue certificate of incorporation of 617.
Biennial report to governor, number and printing, what to include 2929, 4262, 4268.
Bill vetoed after adjournment of legislature, to be filed with 293.
Board of capitol commissioners, member 4411.
Board of examiners, member of, duties as 314, 4455, 4476.
Board of examiners, to audit expenses of 4263.
Board of prison commissioners, member of 314, 4328.
Bond, governor to approve 4251, 4252.
Bond of deputy, may require 4261.
Bond of guardian of insane person, to be given for expenses 2201.
Bond, to be deposited with 4252.
Books delivered to, to stamp, how 2932-2936.
Business hours 4253.
Certificates of incorporation, to issue 1109, 1142, 1145, 1151, 1243.
Certified copies of records, to furnish 4256.
City, certificate of incorporation filed with 772.
Clerk and typists, may employ, compensation 4195.
Clerks, extra may employ, when 4258.
Clerks to certify elections and appointments to 2801.
Commission to commissioners of deeds 1003, 1004.
Commission, to countersign 2793, 3967.
Contracts, recording and filing 4266, 4267.
Cooperative associations to file articles with 1251, 1255.
Copy of session laws, resolutions and memorials indexed, to furnish state printer 4337.
Corporations (act of 1865), articles filed with 1220, 1238.
Biennial list, to compile and publish 1204.
Certificate of incorporation, may certify to 1221.
Certificates, to issue to 1109, 1142, 1145, 1151, 1243.
Decree of dissolution filed with 1196.
Dissolution of, duties as to 1189, 1181.
Fees for filing articles 1203, 1349.
Foreign, copy of articles to file with 1348.
Foreign, certificate of appointment of resident agent filed with 5024.
Officers and agents to be reported to 1136.
Railroad, charter to file with 3513.
Renewal certificate, to issue 1208, 1209.

Secretary of state—continued.
Countersign grants and commissions 309.
Deputy, power to appoint, bond, may require, salary 4261, 4395.
Distribution of statutes and documents 2932-2936, 4257, 4335.
Duties, in reference to official acts of governor 4255.
Duties, information to furnish to legislature and governor 4255.
Duties of 313, 315.
Duties of office, general 4254.
Duties relative to board of examiners 4470.
Election of 312, 2765, 2773, 2774.
Elections, duties in relation to. See Elections.
Election, duties relating to violation of, penalty 2815. See Elections.
Election returns, failure to receive, duty 2816.
Election, term 313.
Eligibility 312, 313, 2766.
Enrolled bills and resolutions, binding of, to supervise, expense, how paid 4264, 4265.
Ex officio librarian 3947, 4110.
Expenditures, board of examiners to audit 4263.
Expenses, how paid 4259.
Extra clerks, may employ when, compensation 4258.
Fees, and disposition of 3952, 4260.
Fees, corporation articles, filing 1203, 1349.
Fees, or perquisites, not to receive to own use 389.
Foreign corporations, failing to comply with law, to notify governor 1350.
Foreign corporations to file copy of articles with 1348.
Furnishing board, member of 4468-4475.
General duties 4255.
Governor, duties in relation to official act of, information, to furnish to 4255.
Governor to file resignations in office 2795.
Governor, to notify, of foreign corporations failing to comply with law 1350.
Hospitals and asylums, charter filed with 1390.
Insane person becoming indigent, duties as to 2201.
Inventory, to take 4471.
Law books and reports, to distribute 2932-2936.
Law books, to sell, price of 2937.
Law books and journals, distribution of 4257, 4335.
Law books and journals, for official use only 4257.
Law books and journals, receipt, to take for 4257.
Legislature, contest papers to receive 1820-1822.
Legislature, information to furnish to 4255.
Legislature to be presented with bills vetoed after adjournment 293.
Librarian, ex officio 4110. See State Library.
Library, fees to go into fund 3952, 4260.
Library fees, account to render 3952.
Member board of state prison commissioners and board of examiners 314.
Secretary of state—continued.
Militia, commissions, to attest 3967.
Miliary commissions, blanks to keep 4056.
Oath of district officers, duplicate, file with 2795.
Office, at capital 380, 2774, 4253.
Official bond 4251.
Official services, members of legislature, or state officers not to charge 4260.
Printing of laws and journals, to superintend 4257.
Process, service on, when 5025.
Public documents and reports 2929-2951.
Railroad corporations to file articles with 3513.
Railroads, duties concerning 3527, 3554, 3556, 3568. See Railroads.
Receipts, to demand for public documents, delivered 2935-2939.
Records, not to be removed from office 4254.
Removal of officer or vacancy, duty to notify appointing power 2801.
Report, when must present draft of to governor 2929.
Resignations filed in office of 2795.
Salary of 4394.
Seal for controller, to procure, impression of to retain 4171.
Seal of state, to procure and use for verification 4403, 4404.
Seal on extradition papers, to fix without charge 7435.
Service of process on, when 5025.
State contracts, to be filed with 4266.
State library fund, fees to constitute part of 3952, 4260.
State printer, copy for printing, to furnish 4337.
State seal, access to 4404.
Statutes and legislative documents to deliver to, when 2932-2936.
Stenographer, to employ, salary 4270.
Supplies, to keep 4468-4475.
Supreme court reports, to sell, price of 2951, 2943.
Surety company, certificate, to issue 697, 701.
Telegraph companies, certificates to file with 4625.
Term of office 2774.
To surrender office to successor 4255.
Typist, to employ, salary 4269.
Vacancies, county clerk to certify to 2795.
Vacancies, duty in relation to 2801.
Weather service, director of, to furnish with stationery 4407.
Sectarian purposes, public funds not to be used for 361, 362, 364.
Security. See Civil Practice.
Securities for debt, how taxed 3786, 3787.
Security to keep peace 6869, 6870. See Criminal Practice.
Seduction, action for, evidence 4994, 4995, 7177.
Limitation of action for 4967.
Self-defense, what essential to establish 6394, 6395, 6402.
Self-incrimination before public service commission, immunity 4536.
Selling, adulterated liquors 6816.

Selling—continued.
Goods containing forged or counterfeit stamps or labels 6690.
Liquor at religious or camp meeting 6598.
Liquor near prison or in capitol building 6504, 6505.
Liquor to drunkards or dipsomaniacs 6523, 6836, 6838.
Liquor to husband or father, when unlawful 6523.
Liquor to imbeciles 6506.
Liquor to Indians 6507-6509.
Liquor to minors 6506.
Lots before plat filed 959.
Or keeping lottery tickets 6496-6498.
Or purchasing carcass or hide of animal, when grand larceny 6640.
Or transferring services of person abducted or kidnaped 6420, 6421.
Tickets for entertainments without authority 6718.
Semiannual payment of taxes, how made 3864.
Senate to try impeachments 334.
Senators, state. See Legislature.
Compensation not to be increased or diminished during session 286.
Number to be not less than one-third nor more than one-half that of members of assembly 263.
Payment of expense for postage, express charges, newspapers and stationery 291.
People have right to instruct 239.
Prohibited from receiving fees or perquisites 389.
Qualifications 263.
Terms of office of to be four years 394.
To be apportioned according to population 242.
When to be elected 262.
Senators, United States. See United States Senator.
Sending or delivering threatening letters 6437, 6438.
Sentence. See Judgment, under Criminal Practice.
Minimum or maximum, court to fix, when 7260.
Of death, suspension of 7270-7278.
On indictment for contempt 5405.
Second conviction, when to begin 6818.
Separate property. See Husband and Wife.
Defined 289, 2155.
Husband's, not liable for debts of wife contracted before marriage 2170.
Inventory of wife's, to be made 2157-2159.
Only community property affected by probate act 6125.
Probate proceedings, inventory to show 5944.
Wife to control her own 2163.
Wife's, not liable for debts of husband 2171.
Separation of husband and wife, contract of 2175.
Servant, has preferred claim for wages 5493, 5494.
Service of process. See Civil Practice, Criminal Practice.
Servitude, involuntary not to be tolerated, except as punishment for crime 246.
Involuntary prohibited, except for crime 228.
Sessions of legislature. See Legislature.
Regular not to exceed 60 days, special 20 days 287.
To be biennial, commencing on third Monday in January (as amended in 1889) 260, 396.
To be held at seat of government 259.
Set-off, bankruptcy proceedings 610. See Counterclaim under Civil Practice.
Setting spring gun 6567.
Settlement between parties does not affect lien for attorney fee 5376.
Settlement of instructions, rule xl, p. 1431.
Settlement of statement on appeal 5331.
Seven-and-a-half, gambling game, penalty for playing 6518.
Sewerage, eminent domain may be exercised for 5606.
Sewerage system for towns, provisions 940-953, 984-990. See Towns.
Sexton, burying without permit, penalty 2972.
Shaft in mine. See Mining Inspector.
Shares of corporation, subject to attachment 5151, 5152, 5287.
Sham and irrelevant matter stricken from pleadings 5067.
Sheep. See Live Stock, Sheep Commission, Sheep Inspector, State Veterinarian.
Brands or marks. See Live Stock.
Bringing into state without inspection 2300, 2301.
Bureau of animal industry (U. S.) 4390.
Certificates of state board of health to obtain, when, before bringing into state 2988, 2994.
Coming into state without inspection, penalty, duties of inspector 2300.
County to county, moving permit to obtain 2308.
Damages for unlawful grazing 2319, 2320.
Defined, includes goats 4593.
Dipped, when required 2302, 2314.
Diseased, information, herder to give 2306.
Estrays, when deemed 2321.
Examination of, before bringing into state 2300.
False complaint of infection, liability for 2311.
Failure of inspector to examine, penalty 2304.
Goats included in term "sheep" 4593.
Grazing on land of another or near town or ranch house unlawful 2317-2321.
Herder, refusing information to inspector 2306.
Herding or grazing within three miles of town or village 2317, 2318.
Impounded, when 2328-2331.
Infected, exposing or permitting to roam at large 2315.
Infected, failure to dip 2302.
Infected, moving permit to obtain, penalty for without 2301, 2308.
Infected, notice to inspector 2306.
Inspection act, violation of 4602.
Inspector, appointment, qualifications, powers and duties 2298, 2299, 2303, 2307, 2316. See Sheep Inspector.
Inspector, permitting removal without examination 2304.
Marks or brands. See Live Stock.

Sheep—continued.
Notice, owner to give before entering state 2315.
Owner failing to report infected, to inspector 2305.
Permitting to run at large in towns or cities 2330.
Quarantine, declared when, enforced, how 2269, 4588, 4591, 4595.
Railroads transporting without health certificate 2309.
Ranch house, grazing within one mile of, unlawful 2319.
Scab, affected with, failure to report 2305.
Scab, affected with, permit to move 2301, 2308.
Scab, affected with, possession of, when misdemeanor, penalty 2310.
Shearing within limits of town or city 6548.
Situs for purposes of taxation 3843.
State board of health, powers and duties concerning 2988, 2994.
Transportation 2309, 3585-3587.
Veterinarian employed, when 2270, 2994. See State Veterinarian.
Veterinarian, state 4376-4389.
Sheep commission, assessor to prepare statement, number and value of sheep 4590.
Appropriation 4601.
Bill of health, inspector to issue 4593.
Board, created 4586.
Board, how constituted 4587.
Board, governor to appoint 4587.
Board, meetings 4587.
Bond of inspectors 4591.
Bond, to furnish 4587.
County treasurer to notify board 4590.
Dipping of sheep 4596.
Diseased sheep, permit to move 4598.
Expenses, how paid 4588.
Expenses, owner to pay 4595.
Formula for dip 4596.
Health regulations 4588.
Infected sheep, immediate notification of 4594.
Inspection, record to keep 4591.
Inspector, authority of 4588.
Legal notice 4588.
Lien, expenses to be 4591-4595.
Noncompliance with dipping directions, penalty 4591.
Office, term of 4587.
Officers of 4588.
Office, to be maintained 4588.
Orders, publication of 4588.
Powers, of board 4588.
Powers, of inspectors 4591.
Proper vouchers, inspector to file 4600.
Quarantine, declared, when 4591.
Quarantine, enforced 4595.
Quarantine and dipping 4588.
Qualifications of board 4587.
Report of inspector 4592.
Report to governor annually 4588.
Rules of bureau of animal husbandry 4588.
Salary 4587.
Salary of inspector 4591.
Secretary, to appoint 4588.
Secretary, duties of 4588.
Secretary, salary of 4588.
Sheep inspection fund 4590.
Sheep commission—continued.
Sheep inspectors, how appointed 4591.
Sheep brought into state, board or inspector to be notified 4597.
Sheep in railroad transit, not applicable to 4597.
Tax, county commissioners must levy on order of board 4589.
Tax on sheep, for sheep inspection 4589.
Tax rate to establish 4588.
Term "sheep" defined 4593.
Term, includes goats 4593.
Violation of act, misdemeanor, penalty 4602.
Sheep inspector, appointment of 2298, 4591.
Authority under commission act, record to keep 4588, 4591.
Bond to furnish, approval of 2298.
Deputies 2299.
Duties of 2316, 4588, 4591.
Expenses of sale, how paid 2316.
Fees of, how paid 2303.
Fees to collect, when paid 2313.
Powers and duties 2299, 4588, 4591.
Prosecutions to make, proviso 2307.
Sheep inspection fund 4589, 4590.
Sheriff. See Officers Generally, Civil Practice.
Absence, leave of 1566, 1568.
Action against, for official acts 4957, 5242.
Arrest, how made. See Arrest, Criminal Practice.
Arrest, civil action, duty, liability 5092, 5094, 5098, 5106-5111, 5308, 5446, 5744, 5748.
Arrest, refusal to make, penalty 2820.
Arrested by elisor, how confined 5497.
Attachment, how executed 5150, 5157, 5168, 5169, 5173.
Auditor, settlement with, for licenses 3740, 3741.
Authority, when superior to constable 1692.
Bailiff may perform duties of, when 4919.
Bench warrant, service of. See Criminal Practice.
Bond and oath, approval and filing 1644.
Bond, failure to give new, coroner to succeed, when 2882.
Bond of indemnity, when may demand 1659.
Books open to inspection 3752.
Charging illegal fees, penalty 1654.
Claim and delivery, party demanding property, service 5127, 5134.
Collection made, liability for, damages 1652.
Commissioners not to allow claim of, when 3740.
Contempt proceedings, duties 5399, 5401, 5407.
Coroner to succeed, when 2882.
Coroner acting as, fees for 7558.
Court, may adjourn, when 4872.
Defrauding prisoner, penalty 7607.
Deputies, may appoint, oath of 1645, 2848.
Deputies, in charge of branch jail, compensation 7615.
Deputies, special for elections 1789.
Delinquent tax suit, summons, to serve 3663.
District court to attend, orders to obey and enforce, rule xxxix, p. 1431, 1648.
District court may adjourn, when 4872.
District judge, to provide office for, when 4921.

Sheriff—continued.
District judge may direct, to provide room and necessities for district court 4841.
Duel, duty to prevent 2823.
Duties as to revenue, neglect of, penalty 3751, 3753.
Duties of 1647.
Duties of other office, not to perform 3751.
Election of 1643, 2733, 2765, 2781.
Election contest, papers, to serve 1808, 1809, 1811, 1818-1820.
Election supplies, to officers of, to deliver 1769.
Elisor, appointed to act for, when 5495.
Elisor, may arrest, when 5497.
Escape, permitting, liability, 1657, 5110.
Estray animals, to impound 2261-2265, 2329-2331.
Execution, duties pending stay of, rules xxii, xxvi, p. 1429.
Execution from justice court, duties as to 5786, 5793, 5810.
Execution, how issued and enforced 5159, 5160, 5281, 5295, 5494.
Execution, powers after term 1656.
Ex officio license collector 3727-3746.
Ex officio license collector, to make financial statement with auditor 3754.
Expenses, transporting prisoners, claim for 1544, 1545.
False certificate relative to horses shipped out of state, penalty 2394.
Fee book to keep, inspection of 2020.
Fees, animals, sale of for charges 5499.
Coroner, acting as 7558.
Counties, 800 or less 1997.
Counties, 800 or over 2009, 2919.
Excessive, demanding or receiving, penalty 1654.
Failure to keep record of and report, penalty 2023.
General provisions of, concerning 1696, 1700.
Illegal charge of, penalty 1654.
In advance 2027.
Mileage, how computed 2037, 2040.
Monthly statement of, to commissioners 2021.
Not paid, liability 1659.
On returns, when not to charge for 2041, 2441.
Under pure food and drug act 3501.
Veterinarian, act under, court to allow 4384.
Firearms, duty to enforce law concerning 6570.
Garnishee, disposal of property received from 5185, 5187.
Garnishee, property from to receive 5155, 5175.
Glove contest, to issue license for 3882.
Governor may apply to, to remove prisoner 7612.
Grand jury, special summons for 7017, 7019.
Grand jury, venire to summon, return on 4931.
Habeas corpus, writ to serve, when 6232.
Horse inspector, to report to commissioners, other duties 2291-2296.
Houses of prostitution, law to enforce 3459.
Sheriff—continued.
Indemnifying bond, when may demand 1659.
Insane, transportation of, allowance for 7591, 7592.
Inspector of horses, duties 2289, 2296.
Insurance agents, license from, to collect 1280.
Itinerant peddler act, failure to enforce, penalty 3895.
Jail, custody of 1646, 7605, 7615, 7619.
Jails, duties and powers over 7605, 7622.
Fraud upon or misconduct toward prisoner, penalty 7607.
Jailer, salary in certain counties 1693, 1695, 7606.
Jailer to appoint, responsible for 1646, 7605, 7615.
Prisoners' earnings, to account for and dispose of, how 7609.
Prisoners in, may employ, and report labor of 7609, 7610, 7616-7622.
Prisoners in, may hire out 7609.
Prisoners in, may remove, when 7612.
Prisoners in, to have charge of 7619.
Prisoners, transfer of, mileage and expenses 7606.
Punishment of prisoners in, to report 7620.
Returns to make, penalty for neglect 7608, 7620.
Supplies, expenses, mileage 7605, 7606.
U. S. prisoners to receive, authority over, liability for 7610.
Jailer, salary in certain counties 1693, 1695, 7606.
Jailer, to appoint 1646, 7605, 7615.
Jury, civil trial, to have charge of 5208.
Criminal trial, to have charge of 7192, 7201, 7488.
Provide food and lodging for 4942, 5208, 5213, 7205.
To summon, return on venire 4930, 4939.
Leave of absence 1566-1568.
Liability, when fees not paid 1659.
License, auditor to furnish blanks 3740.
Glove contest 3882.
Revoked, failure to enforce 3871.
Sale of personal property to secure payment for 3742.
License collected, list to be posted, statement furnished commissioners 1661.
License collector, duties and powers as 3727, 3746.
Fee of 3745.
Settlement with auditor 3740, 3741.
Sheep license, duties, fees 3770, 3772, 3773.
Mileage and expenses for transporting prisoners 7606.
Mileage and expenses for transporting convicts, certified by warden 7565.
Mileage, how computed 2037, 2040.
Militia, may control, when 2839, 2840, 3982, 4058.
Mortgaged property, in two or more counties, sale, how made 5501.
Neglect in executing writ, liability 1651-1652.
Nuisances in town, abatement 920.
Oath of office 1644.
Office and office hours 1564, 1565, 1653.
Ormsby County, bailiff supreme court 4888.

Sheriff—continued.
Party to action, other party arrested and detained, how 5497.
Peace to preserve 1647.
Policemen of towns, appointment of 903.
Power of county, may demand, when 2833, 2840, 5132.
Powers after term 1656.
Practice law prohibited 1646.
Predecessor, deed, may execute for land sold by 1662, 1663.
Prisoners, guard to have 7621.
Permitting escape of, liability 1657.
Punishments of, record to keep 7620.
Refusal to receive, penalty 2820.
Removal of, when 7612.
To bring before court on order 7459.
To report on to commissioners 7608, 7620.
Process, how executed 1648-1650. See Civil Practice.
Public service commission, subpenas for, to serve 4532.
Pure food law, agent to enforce 3498-3500.
Railroad commission act, process to serve 4565.
Redemption of real property sold under execution 5302, 5303.
Refusal to aid, penalty 6361.
Removal or suspension, successor pending charges 3753.
Report as to prisoners, neglect, penalty 7608, 7620.
Return, not to charge for 2041.
Rewards, not eligible for, when 3905.
Sale under execution, not to purchase at, duties 1655, 2828, 5292, 5296, 5301.
Settlements as to revenue 3754.
Service on, how made 1660.
Sheep licenses, duties as to, fees 3770, 3773.
Sheriff sale, not to become purchaser at 1655.
State detectives, to deliver prisoners to 4302.
State liquor license, collector of 3779.
State prison, allowance for transporting convicts to 7591, 7592.
State prison, may inspect books of 7575.
Subpena, on concealed witness, how served 5434.
Successor, may execute deed for tax or execution sale 1662, 1663.
Summons, service of 5016, 5022, 5032, 5033.
Sureties, liable for failure to pay over money 1652.
Table of fees, to post 2025.
Term expired, powers after 1656.
Telegraph, service of papers and writs received by 5371.
Unlawful fees, taking of, penalty 2024.
U. S. prisoners to receive, liability for 7610.
Veterinarian, duty to assist 4380, 4384.
Wages, preferred claim, to pay over 5494.
Warden of prison, to certify mileage and expenses, when 7565.
Warrant of arrest. See Criminal Practice.
Witness, disobedience of, warrant of arrest for, to serve 5440, 5441.
Writ of attachment or execution, liability to creditor 1651, 1652.
Sidewalks, riding or driving on 6773.
Signals for vessels or railways, interference with or exhibiting false 6750.
Signals in mines, official code of 4236.
Signature books for elections 1731.
Signature by mark, witnessed, how 3913, 5475, 7457, 7458.
"Signature" defined 6294(7).
Signature of makers of note or instrument admitted in justice's court unless denied in verified answer 5770.
Signboards forbidding hunting, interference with 6768.
Signboards on highways, failure to erect, defacing or destroying 3028. See Public Highways.
Sister, when entitled to damages for death by wrongful act 5648.
Sites for electric light and power plant, eminent domain exercised for 5606.
Slander. See Civil Practice, Criminal Practice, Libel.
Action for 5073, 5074.
How pleaded, proof 5073.
Limitation of action for 4967.
Of woman, penalty 6434-6436.
Truth may be given in evidence 5074.
Slaughterhouses, city may control location 794(54).
Owner failing to keep book containing record of marks and brands 6641.
Slaughtering animals without having or examining hide containing marks or brands 6641.
Slavery, prohibited 183, 228, 246, 6847-6850.
Sleeping-car company, railroad commission may fix rates 4555, 4560, 4562.
Smelters, eminent domain, may exercise 5606.
Smelters or reduction mills, hours of labor in, eight hours 6555, 6556.
Smoke, eminent domain may be exercised for disposition of 5606.
Smoke helmets for mines 4237.
Smoking in prohibited places, penalty 6578.
Snipe, closed season for 2089.
Soap factories, city may control location 794(54).
Societies, certain, court may order sale of property of 1369.
Sodomy, defined, assault with intent to commit, trial, proof 6413, 6459, 7171.
Soldiers and sailors, funeral expenses of indigent, how paid 3915.
Homestead entries by 3129.
May vote 252.
Naturalization 2506.
Not to be quartered on people 173, 241.
Pension fees, no charge for 3914.
Poll tax, not to be exacted of 252.
Spanish war claims against United States, board examiners to aid 4478-4480.
Sole trader, wife may act as 2190-2194. See Husband and Wife.
Soliciting elector to show ballot, penalty 1862.
Soliciting jury duty, penalty 6326.
Song birds, unlawful to kill, or destroy eggs of 6812.
Sound mind, who considered of 6269.
Spanish war veterans, claims against United States, board of examiners to aid collection 4478-4480.
Speaker of assembly, election of, extra per diem 1758, 291.

Special administrator 5926-5932. See Estates of Deceased Persons.
Special city election 801.
Special election to fill vacancy in assembly 2797.
Special grand jury 7016-7019. See Grand Jury.
Special issues, when may be tried by jury 4945.
Special legislation, restrictions 278, 279, 338.
Special or local laws in certain enumerated cases, invalid, when 278, 279.
Special session of the legislature, called how, when, by whom 260, 287, 302.
Special tax levied, how 3620.
Special taxes for school and territorial debt 358, 408.
Special verdict, defined, when required, inconsistent with general 5221, 5222.
Specific performance of contract of decedent 6032, 6033, 6147.
Specific performance of contracts 1073.
Specifications of error, reviewed on appeal 5340.
Specimen cabinets, exempt from execution 5822-5824.
Speech, freedom of guaranteed 171, 238.
Spring gun, setting of 6567.
Squirrels, extermination of 455.
Staff, noncommissioned to consist of 4030.
  Of adjutant-general 4005.
  Of battalion, to consist of 4029.
  Of brigadier 4005.
  Of governor 4004.
  Of major-general 4005.
Stallions, forbidden to run at large 2252.
Standard of water measure 4677. See Water 4672-4791.
Standing army not to be maintained by state in time of peace 240.
State (constitutional provisions, State Constitution):
  All claims against to be examined by board of examiners, except salaries or fixed compensation of officers 314.
  Became liable for indebtedness of territory 391.
  Bringing pauper into, penalty 2928.
  Contract or indebtedness assumed when liabilities exceed $300,000 shall be void, exception 350.
  Indebtedness or liability to, local or special law releasing, invalid 278.
  May contract debts, purposes to be specified, not to exceed $300,000, exceptions, provision for payment required 350.
  Not to assume debts of county, town, city or corporation unless created to repel invasion, suppress insurrection, or for public defense 351.
  Not to donate or loan money or credit or be interested in stock of company, association or corporation, except for educational or charitable purposes 346.
  Not to maintain standing army in time of peace 240.
  Not to tax United States property 228.
  Peace or safety not to be endangered by religious profession or worship 233.
  Prosecutions conducted in name of 328.
  Provision may be made by general law for bringing action against 280.
  Rights of Territory of Nevada transferred to 385, 387, 388,
State—continued.
  Seal of 4402, 4403.
  When claim against not to be passed upon by legislature without being acted upon by board of examiners 314.
State (constitutional provisions, U. S. Constitution):
  Bound to respect, supreme law of land 168.
  Boundaries, not to be changed without consent 163.
  Cannot abridge privileges or immunities of citizens, or deny equal protection of law 185.
  Contracts, law impairing, not to pass 137.
  Debt of, incurred in insurrection, void 188.
  Domestic violence in, suppression of 165.
  Full faith and credit to give to acts of Congress and other states 159.
  Guaranteed republican form of government 165.
  New, admission of 163.
  Not to be deprived of equal representation in senate 166.
  Powers, reserved to 180.
  Prohibited from doing certain acts 137.
  Protected from invasion 165.
  Restrictions on, without consent of Congress 138, 139.
  Suits by individuals against, cognizable by state courts 181.
State. See Civil Practice, different officers.
  Action against, procedure 5653-5655.
  Action by or against, bond not required of 5487.
  Action by, limitations 4949, 4950, 4971.
  Action in quo warranto in name of 5656, 5657, 5660.
  Action to determine adverse claim, when not bound by judgment 5524.
  Attorney-general to bring action or defend for 5064, 5654.
  Collateral attack on due incorporation of company, when may make 1154.
  Contract, may have declared void if official interested in 2829.
  Eminent domain may be exercised for 5606.
  Fiscal agent of any, any bank or corporation may be 1119.
  Records of other, how authenticated 526-529.
State agricultural experiment station 456-464, 469, 475. See Agricultural Experiment Station.
State agricultural society, additional members of board created 3932.
  Debt may be incurred, limitation of 3920.
  Governor to appoint board of control 3922.
  Incorporated, powers 3916, 3917.
  Members, may vote by proxy 3919.
  Membership 319.
  Officers, to consist of 3918.
    Board of managers 3918.
    How elected 3918.
    Vacancies, how filled 3918.
  Place of meeting 3919.
  Reports, to receive from other associations 3929.
  Reports, blanks to be furnished 3930.
  State institution 3921.
  State board, vacancies, how filled 3922.
    Debts, state not liable for 3925.

State agricultural society—continued.
State board, duties of 3923.
May appoint marshals and police, when 3926.
Members, classification of 3924, 3932.
Powers of 3925.
Term of office 3923.
To collect and disseminate information 3927.
State printer, to furnish reports 3928.
Secretary, to report to governor 3931.
State armory building, custodian of 3933.
State auditor, accountant to be 4150.
Duty of 4151.
Expenses, how paid 4149.
Governor may appoint 4148.
Inspection, refusal to permit, penalty 4152.
Oaths, may administer 4152.
Office of 4153.
Office open to inspection 4154.
Records left with state controller, when 4153.
Record to keep 4153.
Reports to make 4151.
Salary of 4149.
Term of office 4148.
Thorough accountant, to be 4150.
State banks, notes of, not to circulate as currency 343.
State board of bank commissioners 664. See Banks and Banking.
State board of capitol commissioners 4411-4426. See Board of Capitol Commissioners.
State board of commissioners for insane 365, 2198-2209. See Insane (Const.) 365, 2195-2212.
State board county assessors 3797-3812. See Revenue 3617-3904.
State board dental examiners 4427-4444. See Board Dental Examiners.
State board education 3239-3242. See Public Schools.
State board of embalmers 4445-4454. See Board of Embalmers.
State board of examiners 4455-4481. See Board Examiners.
Failure to order examination of accounts 2858, 2859.
Presenting fraudulent claim to 6715.
State board fish commissioners 4482-4485. See Fish Commissioners.
State board of health 2952-2980. See Public Health 2952-3003.
State board irrigation 4692-4694, 4706. See Water.
State board of medical examiners 2358-2374. See Medicine, Surgery, Obstetrics.
State board orphans' home directors 4089-4108. See State Orphans' Home.
State board of pharmacy 4495-4514. See Board Pharmacy.
State board of prison commissioners 314, 7561-7599. See State Prison.
State boundary, description of 368.
Surveyor-general may be required to survey 4348.
Western line defined 3934.
State bureau of agriculture, industry and irrigation 4486-4494. See Bureau Agriculture, Industry and Irrigation.
State capitol building, liquors in prohibited 6505.
State capitol grounds, defacement or obstruction of 6774.
State central committees of political parties, organized how, when and where 1760. See Elections.
State constitution 226-427. See Constitution of State.
State controller. See Officers Generally, Insurance Companies under Corporations, Revenue.
Accounts, against persons failing to settle, to state 4161.
Amount, to certify to 4157.
Damages and interest, to add, when 4161.
Debtor, how discharged 4173.
Debtor, to deliver receipt to 4173.
Of county treasurers, to examine 4157.
Orders for payment to treasurer, to issue 4173.
Settlement and payment of 4173.
Treasurer, how charged 4174.
Treasurer to be charged with amount 4173.
To be kept 4172.
To enforce payment 4172.
To keep 4157.
To keep with treasurer 4174.
Treasurer to receipt to 4173.
Actions by or against state, duties 5654.
Age qualifications 2766.
Annual report, county revenues 3835.
Annual statements of insurance companies, abstract, to publish 1329.
Applications for state land certified to 3200, 3201.
Appointee, bond of 4169.
Appointee, salary of 4169.
Appropriations, accounts with all to keep 4159.
Assessors, auditors and collectors, to furnish with blanks and books 3682, 3683, 3710, 4177.
Assessors, duty to notify of tax rate 3804.
Attorney-general may direct to bring actions 3685, 4160, 4162.
Audit and allowance of claims 4158, 4459.
Auditors, fiscal statements to furnish to 1584, 3642, 3649, 3697, 3725, 3746, 3750, 3806.
Of county, suits against, to control, when 3685.
Report of, to file, how and when 3748.
To notify of tax rate 3804.
Unusued blanks, to return 3686.
Blanks and books for assessors and collectors, to furnish 4177.
Board of capitol commissioners, member of 4411.
Board of commissioners for insane, member of 2198.
Board of education to report to, quarterly 3387.
Board of education to report to, on securities 3383.
Board of printing commissioners, member of 4328.
Bond, conditions of 4155.
Books, records, and other property, to keep 4166.

State controller—continued.
Books, records, to permit examination of 4457.
Bounties for artesian wells, to pay 711-717.
Building and loan associations, foreign, license, reports, examination 1356-1359.
City auditors to report to 982.
Claims, audit and allowance of 4158, 4459.
Claims, deficiency, duty as to 4467.
Claims, not to draw warrant for, when 4459.
Claims, renewal of 4183.
Claims, to audit and allow 4158.
Clerk, authorized to employ 4188.
Clerk, compensation 4188, 4398.
Collection of moneys, to superintend 4156, 4160.
Constitutional provisions 312, 380.
County auditors and assessors, to notify of tax rate 3804.
County auditors, certain fiscal reports, to make to 1584, 3642, 3649, 3697, 3725, 3746, 3750, 3806.
County auditors, suits against, to control 3685.
County finances, report to, from auditor 3750.
County revenues, annual report 3835.
County revenue officers, to furnish with supplies 3682, 3683, 3710, 4177.
Counties, to charge with military property 4045.
Deficiency claims, duty as to 4467.
Delinquent tax list, to receive, when 3649.
Deputy, authorized to appoint 4179.
Deputy cannot sign warrants 4179.
Deputy, powers of 4179.
Deputy, salary of 4397, 4398.
Drafts, warrants and papers, to authenticate 4171.
Drawing warrant for clerical work without appropriation 6661, 6662.
Election of 2765, 2773, 2774.
Ex officio insurance commissioner 1266-1329, 4188.
Fee or salary of public officer garnished, may pay into court 2865.
Fire insurance fund, audited and paid as other claims 4182.
Creation of 4180.
Limitation 4181.
Money received from to be paid into 4180.
Money used for repair of destroyed property, to be taken from 4181.
Who may expend 4181.
Fiscal affairs of state, to recommend improvement 4156.
Foreign building and loan associations, license, reports, examination of 1356, 1357, 1359.
How commissioned 4154.
Information to legislature, to give 4167.
Insane, board of commissioners for, member of 2198.
Insurance commissioner, ex officio, duties 1266-1329.
Insurance companies, abstract of annual statements, to publish 1329.
Insurance companies, statements of, to furnish 1295.
Leave of absence 4154.
Legislative chaplain, warrant, to draw 4119.
State controller—continued.
Legislative officers, warrants, to draw 4117.
Library, janitor and engineer, warrants, to draw 3964.
License collections, report to, from auditor 3746.
Liquor license, state, duties as to 3778, 3781, 3782.
May instruct district attorney to bring suit against assessor for failure to make settlement for taxes 3704.
Military property, to charge to counties 4045.
Mines, tax on, report to, from auditor 3697.
Misfeasance or wilful neglect of duty, penalty for 4170.
Money drawn, receipt, form of 4175.
Money from treasury, how drawn 4175.
Monthly report of treasurer 4365.
Mutual fire insurance company, duty as to 1299, 1320. See Corporations.
Normal training-school teacher, salary to set aside, when 3429.
Office at capitol (Const. 380) 2774, 4154.
Office hours 4178.
Official bond, to give 4155.
Orders on the treasury, duties respecting 4176.
Orphans' home, warrants to draw 4091.
Orphan school expenses, warrant to draw 4108.
Other duties 4167.
Particular fund to express 4159.
Printing, unauthorized, not to draw warrant for 4324.
Printing commissioners, member of board of 4328.
Public schools, warrants for, to draw, when 3334, 3384, 3387.
Purchasing or selling warrants, scrip or claims, penalty 2824-2826.
Railroads, to transmit plats to 3531.
Receipts, loss of, relief from state 4186.
Lost, affidavits to be furnished 4186.
Lost, false affidavits, penalty 4187.
Number and year to correspond 4176.
To number 4176.
Recommend improvement in fiscal affairs 4156.
Renewed claims, how paid 4185.
Report, original draft to send to governor, when 2929.
Report statistics to legislature 1588.
Reports to, by city auditors 982.
By county auditors 1584, 3806.
By treasurer, monthly 4365.
Revenue officers, to furnish supplies 3682, 3683, 3710, 4177.
Salary of 4394.
Salary of judges, to pay, when 4887.
School officials, financial statements to furnish to 3382-3387.
Seal of office, secretary of state, to procure 4171.
State auditor to leave records with, when 4153.
State board of education to report to, what 3383, 3387.
State land, applications for, certified to 3200, 3201.
State liquor license, duties as to 3778, 3781, 3782.

State controller—continued.
State militia, settlement with counties concerning 4045.
State prison, report to be made to, of articles manufactured or sold and money received 7573, 7588, 7589.
Road work of convicts, warrants, to draw for expense 7590.
Transportation of convicts, warrant, to draw for expense 7590.
U. S. convicts at, expense of, to be reported to 7577.
State treasurer, monthly reports from, to receive 4365.
Statistical reports, auditors to make to 1584.
Suits, costs, party subject to, when 4164.
Costs, person subject to, when 4165.
Deceased debtor 4164.
For indebtedness, to direct prosecution of 4162.
For money to direct prosecution of 4160.
Prima facie evidence, copy of account 4163.
To direct attorney-general to bring, when 3685, 4160, 4162.
Summons to be served upon in action against state for services or advances authorized by law 5653.
Superintendent of public instruction, to render statement to 3383.
Surety company, to be appointed attorney for 696.
Surveyor-general, transfers for, to make 4359.
Tax rate, notice of to give 3804.
Term of office 2774.
Treasury, money drawn from, how 4175, 4370, 4372.
To draw all warrants 4159.
To draw warrant for amount of judgment against state on presentation of certified copy 5655.
To draw warrants on state treasurer, when 3334, 3384, 3387.
To notify state board of education, quarterly 3387.
To persons authorized by law, books and papers to be open to inspection 4168.
To recommend plans for fiscal improvement of state 4156.
To render statement to superintendent of public instruction, when 3383.
To report to 4156.
To report on securities to state board of education, when 3383.
To set aside money for salary normal training-school teacher, when 3429(2).
To summon witnesses and may appeal in actions against the state for services or advances authorized by law 5654.
Transfers for, surveyor-general to make 4359.
Treasurer to report to, monthly 4365.
Typist, compensation 4188, 4398.
Unexhausted appropriation, must be to draw warrant 4159.
United States convicts, expense of keeping at prison, to be certified to 7577.
Unpaid warrants, concealed, when 4183.
State controller—continued.
Vacancy of, to be filled, how 4169.
Warrants, canceled, funds, treasurer to transfer 4185.
Warrants, canceled, noted on register 4184.
Warrants, canceled, to be certified to 4184.
Warrants, canceled, treasurer not to pay 4184.
Warrants, old unpaid, canceled, legislature to allow as deficiency 4183.
Warrants, to draw 4117.
Warrants, to draw on treasurer 4158.
Warrants, scrip or claims not to purchase or sell 2824-2826.
When action may be brought on claim rejected by 5653.
Witnesses and documentary evidence, may examine 4158.
State detectives, appointments, governor may revoke 4303.
Bond, to give 4300.
Complaint, to enter 4302.
Delivery to sheriff 4302.
Fees from state or county, not to receive 4304.
Governor may appoint five 4299.
Powers of 4301.
Rewards, may receive 4304.
Term of office 4299.
State enabling act, 209-220.
State employees, leave of absence 4109.
State engineer. See Water.
Appoint assistants, when, salary of, duties 4682.
Convicts, road work, supervision over 7601.
Cooperate with secretary of interior, how, when 4681.
File report on plans irrigation district submitted to him, how, when 4745.
Furnish plans to users for headgates, weirs, how, when 4707.
Issue certificate right to appropriate to applicants, when 4703.
Issue certificate to appropriators and county recorders to record same, when 4689.
Issue certified copies records to whom 4699.
Made defendant by applicant, how, when 4701.
Make measurement, plat of ditches and irrigable lands, when 4688.
Make reports to whom, when 4684.
May install headgates and weirs, if users do not, when 4708.
Member and secretary state board irrigation 4692, 4706.
Member of bureau of industry, agriculture and irrigation 4486.
Office of, created, salary, duties, qualifications 4679.
Prepare list appropriators each stream 4685.
Provided map irrigation district by whom, how, when 4747.
Report county commissioners feasibility of consolidating irrigation districts, when 4786.
Report plans and recommendations to irrigation district officers, when 4742.
Road work by convicts, supervision over 7601.

State engineer—continued.
Rules of, relative to water, note to 7688.
Seal, provided how, contain what 4700.
With land register to examine state lands within irrigation project, how, when 4787.
State exhibits. See Exhibits.
State fish commissioners 4482-4485. See Fish.
State fish hatchery 4484-4485.
State flag 3353.
State funds not to be used for sectarian purposes 362.
State hygienic laboratory, diagnosis, to be free 3941.
Director and assistant, appointment, and qualifications 3994.
Director, examinations and research to make 3944.
Equipment, regents to purchase 3942.
Examinations, who may require 3944.
Infectious diseases, to report on 3944.
Located at university 3941.
Publication of reports and bulletins 3945.
Purpose of 3941.
Regents to appoint director and assistant 3943.
Report and bulletins, to publish 3945.
State inspector of mines 4198-4239. See Mining Inspector.
State institutions, for insane, blind, deaf and dumb, to be fostered and supported by the state 365.
State land. See Public Lands 3179-3226.
Contests concerning, district court to determine, court rule xliv, p. 1431, 3208.
Cutting timber on, penalty 2116.
Mines discovered on, may be worked 3226.
Patent of, when admissible in evidence 5415.
Reservation of minerals in patents for 2456, 2457.
Reservation of right of way in patents for 3108.
Sale of 3196-3226.
State land office and register 3196-3216, 4787. See Public Lands, Surveyor-General.
State land office, seal of, imports verity 3213.
State land register 3196-3216. See Surveyor-General.
Bond 3196.
Contract for sale of land, terms of 3203.
Fees for selecting and advertising land 3219.
Member of board to determine conflicting applications to purchase land 3208.
Office, to keep at capital 3196.
Office hours 3196.
Papers, plats, etc., open to inspection, no fee 3197.
Seal, to use 3213.
Surveyor-general, ex officio 3196.
Township plats, register to procure, cost of, etc. 3197.
Duties of, apply to U. S. land office for land 3200.
Cancel application, when 3200.
Certify application to controller 3200, 3201.
Certify conflicts for purchase to district court, when 3208.
Concerning application to purchase 3199, 3200, 3201, 3203.
State land register, duties—continued.
Contracts to make, conditions of, etc. 3203.
Contracts may be renewed 3204, 3222.
File treasurer's receipt 3200.
Keep record of contracts, sales, approvals, etc. 3197.
Must select land 3210.
Notify applicant to complete purchase, letter to register 3205.
Overdue interest on contract, to receive, when 3203.
Plats, papers, etc., to keep open to inspection 3197.
Procure township plats 3197.
Patents, to prepare, record of, to keep 3211.
Regarding treasurer's receipts, issued by E. Rhoades 3207.
Report of application and sales to assessor, time for 3199.
Sales of land, how made, selected lands, contract for 3199-3203.
Time of receipt to be endorsed on application 3200.
Withdrawn selections, when erroneously made 3212.
State library, assistant librarian, salary 3960.
Books and documents to be preserved in 3946.
Failure to return, penalty 3950.
Purchase, law books have preference 3956.
Taken out, by whom 3948.
Taken out, how long retained 3949.
Taken out, limited 3948.
Bond of librarian 3957, 4252.
Building, heating, janitor service 3962-3964.
Clerk in, salary of 4401.
Copyright on state publications, charge against fund 4308.
Duplicates, sale of 3961.
Duplicates, to university, when 3961.
Examiners to approve claims 3956.
Fees, secretary of state to render account of 3952.
Fund, fee for admission of attorney to go into 500, 2006, 3953.
Fee for commissions to go into 1004, 2745.
Fees for notary public commissions to go into 3952.
Fees of governor's secretary to go into 4191.
Fees of secretary of state's office go into, to constitute part of 3952, 4260.
Surplus annually distributed to general and school 3952.
Injury to property of 3950.
Janitor of building 3962-3964.
Law books have preference 3956.
Librarian, to bring suit, when 3951.
Duties of 3947.
Expenses, to contract 3956.
Office hours 3954.
Official bond 3958, 4252.
Penalty for injuring books, how recovered 3951.
Register, to be kept 3949.
Report, to make 3947-3957, 4268.
Secretary of state to be ex officio 3947.
Supreme court, receipt to 3959.
To appoint assistant 3960.
To receipt to supreme court 3959.

State liquor licenses 3777-3785. See Revenue.
Violation of act concerning, penalty 3784.
State license and bullion tax agent 4240-4248.
Assessor's books, refusal of inspection, penalty 4245.
Bond, examiners to approve 4248.
Books and records of mining companies, inspection of, report to 4244.
Books, inspection of, refusal, penalty 4243.
Duties of 4241.
Expenses, amount, how paid 4247, 4240.
Governor to appoint 4240.
Inspection of books, refusal to allow, penalty 4243.
Mine owners, books, refusal of inspection, penalty 4246.
Mine owners, to furnish information, refusal, penalty 4246.
Mining companies' books, may inspect 4244.
Oath and bond of 4248.
Reports to make 4241.
Salary and expenses, amount, how paid 4240.
To visit all counties and demand books of state and county officers 4242.
State mineralogist, information to furnish, if created 4147.
Office of, abolished 4344.
State militia 3965-4086.
Adjutant-general, aide-de-camp of, to rank as colonel 4023.
Assistants, to appoint 3993.
Bond of 3996.
Chief of governor's staff 3993.
Chief of ordnance 3993.
Commissary-general 3993.
Commissions, to attend 3967.
Duties and rank of, ex officio offices 3993-3995.
Governor to appoint, when 4039.
Inspector-general 3993.
Lieutenant-governor, ex officio 4250.
Mileage of 3992.
Militia, annual drill, to call out for 4022.
Must verify records 4080.
Property, duty as to 4040, 4043.
Quartermaster-general 3993.
Rank of brigadier-general on governor's staff 3993, 4004.
Records certified to, evidence 4081.
Staff of 4005.
To receipt for property 4043.
Age and qualifications for membership 4032.
Aide-de-camp to adjutant-general rank as colonel 4023.
Armory, how provided 4033.
Arms, application for, district judge must approve 4042.
Application for, to be filed with county clerk 4042.
Bond for, to be given by officer 4048.
Bonds given to secure 4042.
Damages to be repaired 4044.
Penalty for unlawful use of 4048.
Procedure to secure 4042.
Subject to inspection 4044.
To whom and how issued, exception 4047.
Transportation of, expenses 4046.
Unlawful use of 4048.
Battalion, by-laws of 4006.
How formed 4001.
State militia—continued.
Battalion, national guard to consist of one 4027.
Officers, election of, notice of 4001.
Staff, to consist of 4029.
Temporary organization 4085.
Blank cartridges, not to fire 4058.
Blank commissions, to be kept, where 4056.
Board of military auditors, powers, seal 4053-4055.
Bond of adjutant-general 3996.
Bravery in actual service recognized 3989.
Brigade, how formed 4003.
Brigadier-general, staff of 4005.
By-laws of regiment or battalion 4006.
Call of troops, when disapproved, to disband 3982.
Call, to be responded to 3983.
Called out, how and when 3982-3984.
Candidates, age and requirements of 4032.
Cashiered officers, not to hold further commission, exception 4066.
Certain words, definition of 3975.
Certificate of honorable service 4012.
Chairman board of county commissioners may call, when 2835, 2839, 2840, 3982.
Chief of governor's staff 3993.
Chief of ordnance 3993.
Civil officers, entitled to fees, liable for penalties 4079.
Civil officers, may control, when 2839, 2840, 3982, 4058.
Civil process, exemption from, when 4081.
Colonel, aide-de-camp to adjutant-general to rank as 4023.
Commander-in-chief, absence of, who may call 3982.
May disband for cause 4071.
May promulgate rules 4009.
May suspend enlistment requirements, when 4014.
Powers of 4002.
To commission officers 4000.
To name permanent offices 3988.
Commanding officer of company to furnish county clerk with list of members 4074.
Commissary-general 3993.
Commissions 4069, 4070.
Active service, termination 3989.
Attested by secretary of state 3967.
Blanks to be kept, where 4056.
Commander-in-chief to issue 4000.
Deemed vacated, when 4070.
No fee for 3967.
To take effect, when 3969.
Companies, how organized 3999, 4000.
Companies to be temporarily organized into battalion, when 4085.
Company, to consist of 4031.
Compensation not allowed, when 4018.
Constitutional provisions concerning 240, 241, 363, 364.
Congress, power over, 125, 126.
County clerk to report unorganized militia 3981.
County commissioners, duties of, may command, when 3982, 4033, 4058.
Court-martial, appointment, powers and procedure 4049.
Fines, disposition of 4059.
Fines collectible by law 4059.

State militia—continued.
Court-martial, members of, exemption from liability 4077.
Not affected by crimes act 6299.
Trial for disobedience of orders 3987.
Courts of inquiry, how ordered, rules and powers 4078.
Definition of words 3975.
Disbanded, effect of being 4071.
Disbanded, penalty for appearance after 4071.
Discharges, how granted 4068.
Discharge, when 4012.
Dismissal from service, effect 4067.
Disobedience of orders, trial by court-martial 3987.
Divisions and brigades 4057.
Draft made, how and when 3986.
Drafted troops, temporary officers of 3988.
Drafting, substitute accepted, when 4076.
Drill, annual, governor to call out for 4022.
Drill, U. S. regulations to be used 4019.
Election of battalion officers 4001.
Encampment, failure to attend 4038.
Governor to order, when 4036.
Penalty for failure to attend 4038.
To be held, where 4037.
Enlistment, period of 4015.
Requirements, suspension of, when 4014.
Term of 4010-4015.
Enrolled militia, who constitute 3966.
Equipment, exempt from execution 4086.
Equipments, members responsible for 4035.
Equipments, penalty for destruction of 4035.
Exempt from arrest on civil process, when 4081.
Exempt from jury duty, when 4016.
Exemptions from duty 4041.
Expenses, how paid 4033.
False list, making, penalty for 4074.
Falsely claiming exemption, jury duty, penalty 4016.
Fees, civil officers 4079.
Fines, collection and disposition 4059.
Fines, commander-in-chief may remit, when 4063.
Governor, adjutant-general to report to 3995.
Commander-in-chief 3967. See index, Commander-in-Chief.
Commissions, to issue 3967.
May call out to suppress insurrection or repel invasion 364.
Staff of 4004.
To appoint adjutant-general, when 4039.
To call out for annual drill 4022.
To order, military encampment, when 4036.
To suspend, when, proceedings 3996.
Honorable discharge 4012.
Informality in appointment, effect 3971.
Inspection of national guard 3994.
Instruction, U. S. tactics to control 4073.
Insulting officer or members 4083.
Jury duty, exemption from 4016.
Lieutenant-governor ex officio adjutant-general 4250.
Legislature to provide for (Nev. Const.) 363.
May be called out, how and when 3982-3984.
Major, each battalion to have one 4028.
Qualifications of 4028.
State militia—continued.
Major-general, staff of 4005.
Mayor of any city may call, when 2835, 2839, 2840, 3982.
Member, considered discharged, when 4062.
Exempt from civil process, while on duty 4081.
May be discharged, when 4012.
Must belong to but one company 4062.
Removal 4062.
Military auditors, board of, powers, seal 4053-4055.
Military auditors, duties of 4917.
Military, charges, how assessed and collected 4045.
Duty, exemptions 4041.
Duty, hours of 4081.
Duty, who liable to 3998.
Tribunals, not affected by crimes act 6299.
Militia oaths, to be kept 3972.
Minors, fines, and taxes imposed on 4063.
Mob or unlawful assemblage disbursed by 4058.
Moneys accounted for 3995.
Music, may hire, when 4075.
Muster, how made 3979.
Muster rolls of divisions, how made 3980.
Muster rolls, how made 3980.
Name, company to adopt 4061.
Name of state militia 3965.
National guard, to consist of one battalion 4027.
Necessary to state (U. S. Const.) 172.
Nevada national guard, name of 3965.
Noncommissioned staff, to consist of 4030.
Oath, failure to take, effect 3970.
Oath, form of 3972.
Obstructing 4082.
Office, tenure of 3976.
Office, vacancy, how filled 3977.
Officer, appointment, how made 3978.
Authority of 4065.
Commissions 4069.
In charge to use own discretion 4058.
Promoted by seniority, exception 3989.
Removal or absence from state, when deemed resignation 4049.
Resignations 4069.
Vacancy, how filled 4069.
When absent, who succeeds 4064.
Orders, disobedience of, trial 3987.
Past service considered, proviso 4013.
Pay of, when in actual service 4051.
Penalties, civil officers, subject to 4079.
Penalties, arms, unlawful use of 4048.
Disobedience of, orders 3987, 4084.
Encampment, failure to attend 4038.
Encroachment on grounds 4082.
False list 4074.
Insubordination 4084.
Insulting officer or soldier 4083.
Obstructing 4082.
Unlawful retention of property 4025, 4026, 4035, 4052.
Period of enlistment, except 4015.
President, commander-in-chief in service of United States (U. S. Const.) 148.
Property, adjutant-general to receipt for 4043.
Adjutant-general to turn over to successor, when 4040.

State militia—continued.
Property, dispossession of 4024, 4025.
Exempt from execution 4086.
Penalty for unlawful retention, exception 4025, 4026.
Refusal to return, penalty 4052.
Retention, unlawful 4025, 4026, 4035, 4052.
When to be returned 4043, 4052.
Quartermaster-general 3993.
Rank of officers, determined 3967.
Records, to be kept 4007.
Recruiting officers, duties of 3985.
To be known as 3984.
To name temporary officers 3988.
Reenlistment presumed, when 4011.
Regiment or battalion, by-laws of 4006.
Registry agent, report to county clerk persons subject to military duty 3981.
Rendezvous, not to obstruct highway 4082.
Repealing provisions 4020.
Reports, adjutant-general to make 3994, 3995, 3997.
To U. S. adjutant-general 3997.
Resignation of officer, what deemed 4049.
Rules, commander-in-chief to make out and publish 4060.
Rules, promulgation of 4009.
Rules and regulations U. S. army control 4008.
School census marshals, report to county clerk persons subject to military duty 3981.
Seal, adjutant-general must have 4080.
Secretary of state to keep blank commissions 4056.
Sheriff may call, when 2935, 2839, 2840, 3982.
Staff, of adjutant-general 4005.
Appointment, resignation 3974.
Battalion, to consist of 4029.
Of brigadier-general 4005.
Of governor 4004.
Of major-general 4005.
Members, how appointed, qualifications 3973.
Noncommissioned, to consist of 4030.
State controller, charge and settlement, with counties 4045.
Substitute furnished, how 3990.
Supplies may be sold, when 4017.
Support, requirements for 4034.
Suspension of, proceedings 3996.
Temporary organization, senior officer to rank 4085.
Term of enlistment 4010-4015.
Uniform, adoption of 4072.
University cadets, officers of, commissions, liability for duty 4664, 4665.
U. S. adjutant-general, reports to 3997.
U. S. army officer may call, when 3982.
U. S. army rules and regulations to control 4008.
U. S. marshal, may call, when 3982.
Vacancies, how filled 3989.
State motto 4402.
State normal school 357, 4639-4645. See University of Nevada.
State of Nevada, act of Congress enabling 209-220.
State of Nevada, land grants to 3179-3195. See Public Lands, University of Nevada.
State of Nevada, proclamation announcing admission of 430.
State officers. See Officers Generally.
Canvass of election, returns of 297.
Contest of election of, time of commencing 4972.
Duties, to perform as provided by law 315.
Election of 297, 312, 2773.
Employing or paying for clerical services or labor without appropriation, unlawful 6661, 6662.
Fees or perquisites, certain, not to receive 389.
Governor to fill vacancies in, when 406.
Impeachment of 335.
Removal for malfeasance or misfeasance 2851, 2852.
State or county indebtedness, purchase of by officials 2825.
State organization, proclamation of, governor of territory announcing 221-223.
State orphans' home, accounts, directors to examine 4091.
Accounts, how paid 4091.
Carson City school census, orphans included in 4106.
Children, other than orphans admitted, when 4098.
Children to attend Carson City school, state allowance for expense 4106-4108.
Conditions, children not orphans may be admitted under 4098.
County commissioners, orphans under supervision of, until when 4094.
County commissioners, superintendent to notify of age 4094.
County commissioners to send and support 4099.
Directors of, duties of 4089, 4090.
Employees, to appoint 4090.
Organization of 4089.
Record, to keep 4090,
Report, to make 4090.
Superintendent and matron, to appoint 4090.
Teacher, may appoint 4090.
Expenses, estimate to be filed 4101.
Gifts, directors to accept and control, exception 4104.
Guardianship of orphans 4096.
Land, to be donated 4088.
Library books, directors to provide 4107.
Location of 4087.
Nonorphans, release of, expenses to be paid by 4100.
Nonorphans, released, when 4100.
Orphans, age of admission, exception 4095.
Age of majority for purposes of act 4095.
Directors may discharge or apprentice 4097.
Education and services 4092, 4094.
Escaping, action may be brought, returned 4096.
Expenses and transportation, county charge 4093.
How admitted 4093.
Notice may be omitted, when 4093.
Property of 4096.
Public school, to attend 4106.
Superintendent and matron, salaries of 4105.
Supplies, contract awarded 4103.
Supplies, contract to be advertised 4102.

State orphans' home—continued.
Text-books, furnished to inmates 4107.
Wards of state, inmates are 4092, 4099.
State police, absence without leave 4286.
Active and reserve force, salaries of 4284.
Active service, may be called into, when 4279.
Adjutant-general, ex officio commissary 4295.
Aid to police, refusal to give, penalty 4290.
Arms and uniforms 4280.
Army regulations to control, when 4282.
Arrest, duty on making 6940, 6944-6950.
Appointments 4273.
Bills, how audited and paid 4297.
Board of investigation, to consist of 4281.
Bond and oath of superintendent and members 4286.
Commissary, adjutant-general ex officio 4295.
Duties of 4296.
Of, created 4294.
Salary and expenses of, how paid 4298.
Complaints to be investigated 4281.
Conduct, unbecoming, punishment for 4293.
Court-martialed, when 4293.
Creation of 4271.
Duel, failure to prevent, penalty 2823.
Duties and powers of 4276.
Duties of adjutant-general 4280.
Duty on making arrest 6940, 6944-6950.
Expenses, how paid 4287.
False representation of or wearing badge, penalty 4291, 4292.
Governor to appoint superintendent 4272.
Governor, transportation, expenses to order 4287.
How composed 4272.
Insubordination, how punished 4293.
Martial law, army regulations to prevail, when 4282.
Members, qualification of 4275.
Molestation of, in discharge of duty, how punished 4291, 6362.
Oath of superintendent 4286.
Office at Carson City 4283.
Party politics, not to participate in 4281.
Peace officers not absolved from any duty 4288.
Prisoners, failure or refusal to receive, penalty 2820, 4277, 6360.
Railroad officials to transport, when 4289.
Refusal to aid on command 4290.
Refusal or neglect of officer in charge of jail to receive into custody 2820, 6360.
Reserve force, organized 4279.
Resistance to, penalty 4291, 6362.
Rules and regulations, violation of, penalty for 4281.
Rules and regulations, superintendent to make 4281.
Service, absent without leave, misdemeanor 4285.
Service, removal from 4285.
Service, term of 4285.
Superintendent and members, oath and bond of 4286.
Superintendent, qualification and rank 4274.
Transportation, claim, how paid 4289.
Traveling expenses, governor to order 4287.
Unbecoming conduct, how punished 4293.
Under martial law, when, powers of 4278.

State printer. See Officers Generally.
Agricultural society, state, reports to print 3928.
Binding, commissioners may contract for 4340.
Blank stock, to be furnished, when, cost of transportation 4326.
Board of examiners, official reports to be submitted to 4316.
Board of examiners, powers relative to printing 2931, 4316, 4320, 4323.
Board of health, printing for, material furnished, how 2980.
Board of printing commissioners 4328.
Bond, to furnish 4329.
Bookkeeper and typist, appointment, compensation 4311, 4312.
Bureau of industry, etc., printing, where may be done 4493.
Compensation of employees 4330.
Constitutions, to include with session laws 4334.
Contracts, superintendent not to be interested in 4331.
Controller, member board of printing commissioners 4328.
Copyright, on state publications may take out, how paid 4307, 4308.
Cost of binding, restricted 4340.
Drafts, original of reports, submitted to board of examiners 4316.
Drafts of reports, original, revision of 4316.
Duties, general official 4330.
Duty to print code 1014.
Election of superintendent 4328.
Employees, number and compensation of 4330.
Errors in legislative bills, may correct 4120.
Finished work, transportation, expenses, how paid 4325.
Forms, blanks, letterheads, stationery and envelopes to be printed 4317-4319.
General official duties 4330.
Governor, to report to 4330.
Irrelevant matters, not to be included in reports, except 4322.
Legislative, bills and resolutions, to print, errors to correct, number of 4120, 4336.
Documents ordered printed by legislature 4336.
Journals and appendix, to print, number and distribution of 4335-4338.
Legislative session laws, journals of senate and assembly to be printed 4334-4338.
Legislative session laws, resolutions and memorials, secretary of state to prepare distribution 4337.
Legislature, copy submitted, palpable errors to correct, provided 4120.
Messages and reports, state officers to furnish duplicate copies to 4306.
Nevada historical society, reports to print 4313.
Nevada reports, duties as to 4899.
Office of superintendent created 4327.
Original drafts of reports to be sent to governor, when, exception 4315.
Printing and binding, what may be done 4313, 4314.
Printing authorized to be done 3811, 4313-4326, 4333, 4356-4359.

State printer—continued.
Printing commissioners, board of 4328.
Printing, what may be done outside of printing office 4320.
Privileges of superintendent to submit to examiners before printing 4323.
Public documents and reports to print 2931.
Public printing, binding of, commissioners may contract 4340.
Public printing, union label affixed 4309.
Quality of paper to be used 4339.
Railroad commission printing 4546.
Report to make to governor 4330.
Report, duplicate copies to be furnished 4306.
Matter not to be duplicated in 4316.
Number to be printed 4316.
Official, what to print 2931.
Revised statutes, to print 1014.
Salary of 4305.
Secretary of state, member board of printing commissioners 4328.
Secretary of state, indices and copies to furnish 4337.
Secretary of state, printing of laws and journals, to superintend 4257.
Session laws, resolutions and memorials, secretary of state to furnish copy of 4337.
State agricultural society, reports to print 3928.
State printing office 4327-4340.
State printing, what not classed as 4313, 4321.
State work only to be done 4330.
Public printing, style of 4339.
Superintendent of printing 4327.
Supplies, how furnished, may advertise 4332.
Surveyor-general, account to keep with 4356.
Transportation of stock, cost, how paid 4325.
Treasurer, member, board of printing commissioners 4328.
Treasurer's report, to include with session laws 4334.
Unauthorized printing, warrant not to be drawn for 4324.
Union label 4310.
Work, what may be done outside, examiners to determine, how paid 4320.
Weather station, printing for 4407.
State printing office 4305-4340. See State Printer.

STATE PRISON AND JAILS

Action, to be maintained by state prison commissioners for labor performed by convicts or articles sold at the prison 7564.
Bible, to be furnished convicts at state prison 7576.
Board of examiners, to approve expense of transporting indigent insane 7590.
To approve expense on road work by convicts 7602.
Board of state prison commissioners, account and records of proceedings to be kept 7563.
Books and papers of, open to inspection 7575.
Chairman of, to certify expense for road work by convicts 7602.
How constituted 314.
Board of prison commissioners—continued.
May pay to dependent wife, children or parents money earned by convicts working on public highways 7600.
Not to prescribe barbarous punishment 7579.
Not to purchase supplies above market rates 7566.
On recommendation of state engineer or county surveyor to determine on what roads convicts shall be employed, and to pass upon plans 7601.
Penalty for violation of rules and regulations 7599.
Powers of 314, 7561.
Statement of articles manufactured or sold and money collected to be filed with, by warden 7588, 7589.
To advertise for sealed proposals for furnishing supplies 7568.
To approve expense of transporting convicts 7590.
To approve rules of warden 7584.
To cause convicts to be employed 7569.
To cause convicts to labor within or without state prison or to hire them upon private work 7570.
To elect warden 7564.
To forfeit credits of convicts 7581.
To furnish supplies for use of labor of convicts 7569.
To grant credits to convicts laboring and behaving 7580.
To maintain action for sums due for labor performed by convicts or articles sold at prison 7574.
To make rules and require able-bodied convicts to labor 7585.
To post laws and regulations relating to visitors and prisoners 7578.
To provide for holding divine service at prison 7576.
To receive criminals sentenced by authority of United States 7577.
To require able-bodied convicts to labor 7581.
To select commission from members of legislature to ascertain if any prisoners should be pardoned 7586.
To work certain convicts on public highways on recommendation of warden 7598.
Bond of warden of state prison, designated by board of state prison commissioners, approved by chief justice, and filed with secretary of state 7582.
Books and papers, relating to state prison, open to inspection 7575.
Board of capitol commissioners may utilize labor of convicts 4426.
Chief justice, to approve bond of warden of state prison 7582.
Chiefs of police, to have charge of prisoners in city jails and to work when ordered 7619,
Children, not to be confined with adults, under 12 not to be committed to jail 742.
Claims, against state prison to be verified and allowed 7567.
Constable, expense of transporting prisoners, allowed 1544, 1545.

Controller, expense of keeping United States convicts in state prison, to be certified to by warden 7577.
Statement of articles manufactured or sold at state prison and money collected therefor, to be filed by warden 7588.
Sums received from labor performed or articles sold at state prison, to be reported to 7573.
To draw warrants for expense on road work by convicts 7602.
To issue warrant for expense of transporting convicts to state prison 7590.
To issue warrant for expense of transporting indigent insane 7590.
Convicts, at state prison, able-bodied required to labor 7581, 7585.
Aiding to escape, penalty 6340.
Attempting to escape, lose credits 7581.
Capitol commissioners may employ 4426.
Communicating with unlawfully 6373.
Entitled to credits 7585.
Forfeit credits for misconduct 7585.
Garb for different grades 7583.
Inhumanity to, prohibited 2818.
Insane, when removed to asylum, return of 2208, 2209.
Law, under protection of 6279.
Loss of credits for bad behavior 7581.
Not to be compelled to work when deprived of regular food 7589.
Not to receive barbarous treatment 7579.
Reduction of terms for good behavior 7581.
Rules for classification and promotion of, to be made by warden 7584.
State prison commissioners to select commission from members of legislature to ascertain if any should be pardoned 7586.
To be separated into three grades 7583.
To have credit for labor and good behavior 7580.
Trial for other offense, pending term 6818.
Witness, may be, order for 7349, 7363, 7459.
Work by, to be under agreement with county 7601.
Convicts, board of state prison commissioners to determine upon what roads may be employed 7601.
Credit for labor in jail 7622.
Credits for, to be determined by board of state prison commissioners 7585.
Disobedient or refusing to labor, may be punished 7620.
Earnings of prisoners in jails disposed of, how 7609.
Escaping from state prison may be arrested on warrant of warden, penalty for 6339, 6342, 6819, 7594. See Escapes.
Expense of keeping U. S. prisoners in county jail 7610.
Expense of removal from county jail to be defrayed by county 7613.
Expense of transporting to prison, how paid by state 7590.
Expense on road work by to be approved by board of examiners 7602.
From U. S. courts, warden to certify to controller expense of keeping in state prison 7577.
How paid by county 7606.
Convicts—continued.
In charge of sheriff, surplus earnings to be paid into county treasury 7609.
In county, city or town jail deemed sentenced to labor 7618.
In county jail for certain offenses may be hired out or worked 7609.
In jail, labor may be utilized 7617.
Inhumanity to prisoners prohibited 2818, 7579.
Insane convicts, when removed to and from asylum 2208, 2209.
Jailer under sheriff may transfer to place of imprisonment 7606.
On road work, how expense for to be certified 7602.
On what public works may be required to labor 7619.
Proceeds of work to be accounted for by sheriff 7609.
Recommendations of legislative commission for pardon of, to be filed with board of pardons 7587.
Record of, to be kept at state prison 7565.
Sentenced by United States authorities to be confined in state prison 7677.
Sentenced under United States authority may be committed to county jail 7610.
Sheriff to transfer to place of imprisonment 7606.
State prison extended to places where employed without prison walls 7572.
To be employed at hard labor 7569.
To be paid $25 when discharged from state prison 7596.
To be recommended by warden for work on public highways 7598.
Unable to pay, may be required to serve fine at $2 per day 7611.
Working on public highways, credit and pay for 7600.
Earnings of, may be paid to dependent wife, children or parent 7600.
Not to wear stripes 7599.
Punishment for infraction of rules 7599.
Rules regulating to be made by state prison commissioners 7599.
Under direction of warden 7599.
What expense allowed for transporting to state prison 7591, 7592.
Counties, may contribute toward expense of convicts on road work 7601.
To pay for bridges and material for road work by state prison convicts 7601.
County, each to build one common jail 7603.
Not liable, but sheriff liable, for escape of U. S. prisoners from jail 7610.
County commissioners, authorized to establish branch county jail 7614.
Certified list of prisoners and terms to be returned to, by jailer, penalty 7608.
May approve appointment by sheriff of deputy for branch jail 7615.
May direct working of prisoners in branch jail 7616.
May make agreement for work on public highways by convicts at state prison 7601.
To allow compensation of deputy sheriff in charge of branch jail 7615.
To allow sheriff compensation for services of jailer 7606.

County commissioners—continued.
To build and repair jails and inquire into condition of same and treatment of prisoners 7604.
To inform district court of neglect of jailer to return list of prisoners or terms 7608.
To order working of convicts in town jail 7619.
To pay expenses of transporting convicts 7606.
To pay sheriff for keeping prisoners 7605.
To recover penalty against sheriff or jailer for defrauding or depriving prisoner 7607.
To utilize labor of convicts in county jail 7616.
County surveyor, may recommend roads upon which convicts may be employed and submit plans 7601.
District court to impose penalty on jailer for neglecting to return list of prisoners and terms 7608.
Divine service, expense of holding at state prison 7575.
Employees of state prison, number and salaries 7561.
Escapes, causing death in attempt, penalty 6819.
Concealing, penalty 6343.
From custody, penalty 6338.
From prison or jail, penalty 6339.
Insane convict 2209.
Permitting, penalty 1657.
Reward for 2831.
Soliciting or receiving bribe to permit or assist 6342.
Fine, if not paid to be worked out at $2 per day 7611.
Fraud or misconduct toward prisoner, penalty 7607.
Gospel, ministers of, services in state prison 7576.
Governor, on application of sheriff may order removal of prisoner from county jail 7612.
President of board of state prison commissioners 7562.
Inhumanity to prisoners prohibited 2818, 7579.
Injury to jail, penalty for 6758.
Insane, expense allowed for transporting indigent 7591, 7592.
Transportation of indigent, to be paid by state 7590.
Jail, age below 12 not to be committed to 742.
Branch county, erection of and confinement of prisoners 7614.
Branch, deputy sheriff may have charge of 7615.
Branch, may be established by county commissioners 7614.
Branch, prisoners in may be worked 7616.
Breaking, penalty for 6339.
Children under 12 not to be committed to 742.
City prisoners may be confined in, when 794(77), 799.
Communicating with prisoners in unlawfully, penalty 6373, 6817.
Convicts in county, city or town deemed sentenced to labor 7618.
Convicts in, labor of, may be utilized 7616.
County commissioners to build and repair 1508(11), 7603, 7604, 7614.
Credit for labor of convicts in 7622.
Jail—continued.
Earnings of prisoners in, disposed of, how 7609.
Employment of prisoners in 7609, 7610, 7616-7622.
Expense of keeping U. S. prisoners 7610.
Expense of removing prisoners from, to be paid by county 7613.
Expenses, supplies and mileage, paid how 7605, 7606.
Federal prisoners, to receive in, authority over 7610.
Fraud upon prisoner, penalty 7607.
Grand jury, may enter 7029.
Injury to, penalty 6758.
One common, to be built at expense of county 7603.
Prisoners in, under United States authority may be employed 7610.
Prisoners may be removed from by order of governor 7612.
Prisoners may be hired out 7609.
Prisoners not to be allowed to go from without sufficient guard 7621.
Sheriff, duties and powers over 7605-7622.
Sheriff to have custody of 1646, 7605, 7615.
Transfer of prisoners, when 7606.
Jailer, compensation of, to be allowed sheriff by county commissioners 7606.
Failure or refusal to receive prisoners, penalty for, when 2820, 4277, 6360.
Penalty for defrauding prisoner of allowance or accommodation 7607.
Permitting escape, penalty 1657.
Salary in certain counties 1693-1695.
To be appointed by sheriff, responsible for 1646, 7605, 7615.
To have charge of prisoners under sheriff 7605.
To return to county commissioners certified list of prisoners and terms, penalty 7607, 7608.
Under sheriff may transfer prisoners to place of imprisonment 7606.
When directed by county commissioners may work prisoners in branch jail 7616.
Judge or justice may order prisoners confined in county jail instead of branch county jail when safety requires 7614.
Legislature may make recommendations to board of pardons 7587.
Members of may inspect books and papers relating to state prison 7575.
Mayor and aldermen to utilize labor of convicts in jail 7616.
Mileage, for conveying convicts to be certified by warden of state prison 7565.
For transporting prisoners 7606.
Ministers of gospel, services in state prison 7576.
Misconduct toward prisoner, penalty 7607.
Misdemeanor, persons convicted of may be confined in branch county jail 7614.
Notice, of letting contract for furnishing supplies to state prison 7568.
Officers, to keep record of punishments inflicted on disobedient prisoners and report labor 6520.
May punish disobedient prisoners 7620.
Of state prison, number and salaries 7561.

Pardons, recommendations of legislative commission to be filed with board of 7587.
State prison commissioners to select commission from members of legislature to ascertain if any prisoners should be pardoned 7586.
Prisoners, communicating with unlawfully, penalty 6817.
County commissioners to inquire into treatment of 7604.
Defrauding of allowance or accommodation by sheriff or jailer 7607.
Disobedient, may be punished 7620.
Earnings of, disposed of, how 7609.
Expense for transporting to another county for trial, how paid 7606.
Expense of keeping to be allowed sheriff by county commissioners 7605.
Expense of removing from county jail to be defrayed by county 7613.
Hired out, when 7609.
In city and county jail, chiefs of police and town marshals to have charge of and to work when ordered 7619.
In county jail may be employed 7609, 7610, 7616-7622.
In county jail, sheriff to have charge of and to work when ordered 7619.
In county jail, sheriff to have custody of 7605.
Insane, removal to and from asylum 2208, 2209.
Mileage for conveying to state prison to be certified by warden 7565.
Not to be allowed to go from prison without sufficient guard 7621.
Sustenance to be furnished by sheriff 7605.
To work out fine at $2 per day 7611.
Transfer of, when 7606.
Trial for other offense, pending term 6818.
Under U. S. authority in county jail, may be employed 7610.
Under U. S. authority may be kept in county jail, expenses 7610.
When and how may be removed from county jail 7612.
Proposals for furnishing supplies to state prison, advertisement 7568.
Public highways, expense by counties for work on by state prison convicts 7601.
State appropriation for working convicts on 7597.
Supervision by state engineer of work by convicts on 7601.
Work on by convicts to be under agreement with county commissioners 7601.
Public works, on which convicts may be required to labor 7619.
Punishment, barbarous, not to be prescribed at state prison 7579.
Road fund, payment from of expense for road work by convicts 7602.
Road work, by convicts, expense for, how certified and paid 7602.
Secretary of state, secretary of board of state prison commissioners 7562.
Selling liquor in vicinity of state prison 6504.
Sentence to jail, reduction of, for labor 7622.
Sheriff, compensation of deputy in charge of branch jail, to be allowed 7615.
Deputy or jailer under, to have charge of prisoners 7605.
Sheriff—continued.
Escape, permitting, liability for 1657.
Expense of transportation allowed 1544, 1545.
Liable for U. S. prisoners in county jail 7610.
May apply to governor for permission to remove prisoner from county jail 7612.
May hire out or work prisoners convicted of certain crimes 7609.
May inspect books and papers relating to state prison 7575.
May punish disobedient prisoners 7620.
Mileage and expenses for transporting convicts 7606.
Mileage for conveying prisoners to state prison to be certified by warden 7565.
Penalty for defrauding prisoner of allowance or accommodation 7607.
Permitting escape, liability for 1657.
Refusal to receive prisoner, penalty 2820, 4277, 6360.
To account for proceeds of work of convicts 7609.
To appoint jailer 7605.
To be allowed compensation for jailer 7606.
To furnish sustenance for prisoners 7605.
To have charge of prisoners committed to county jail 7619.
To have custody of jail and prisoners therein 7605.
To keep record and report punishment of disobedient prisoners and report labor 7620.
To transfer prisoners to place of imprisonment 7606.
What allowed for transporting convicts to state prison and transporting indigent insane 7591, 7592.
When and how may remove prisoner from county jail 7612.
With approval of county commissioners may appoint deputy for branch jail 7615.
State engineer, may recommend roads upon which convicts may be employed, and submit plans 7601.
To have supervision of road work by convicts 7601.
State prison, able-bodied convicts required to labor 7681.
Accounts for supplies furnished, to be certified by warden to board of commissioners 7567.
Accounts of, how to be kept 7565.
Accounts of board of commissioners of, to be kept 7563.
Appropriation for working convicts on public highways 7597.
Barbarous punishment not to be prescribed 7579.
Board of commissioners to audit and allow claims 7567.
Board of commissioners to designate amount of bond of warden 7582.
Board of commissioners to elect warden 7564.
Board of commissioners to grant credits to convicts laboring and behaving 7580.
Board of commissioners to maintain action for sums due for labor performed by convicts or articles sold at the prison 7574.

State prison—continued.
Board of commissioners to provide supplies on requisition of warden 7566.
Board of commissioners to receive and receipt for moneys for articles sold or labor performed and to pay same into state treasury 7573.
Bond of warden to be approved by chief justice 7582.
Books and papers of board of commissioners and warden open to inspection and to be delivered to successors 7575.
Commissioners to determine regarding credits for convicts 7585.
Commissioners to make rules and to require able-bodied convicts to labor 7585.
Commissioners to make rules for convicts working on public highways 7599.
Commissioners to select commission from members of legislature to ascertain if any prisoners should be pardoned 7586.
Convicts attempting to escape not entitled to credits 7581.
Convicts may be employed in or out of, or hired upon private work 7570.
Convicts to be furnished with copy of Bible and other books 7576.
Convicts to be separated into three grades 7583.
Convicts to forfeit credits for misconduct 7585.
Convicts working on public highways under direction of warden 7599.
Credit and pay for convicts working on public highways 7600.
Credits for orderly convicts 7585.
Counties may contribute toward expense of convicts on road work 7601.
Criminals sentenced by authority of United States to be received 7577.
Discharged prisoners to be furnished $25 7596.
Divine service to be held on Sabbath 7576.
Employment and labor of convicts 7569.
Engineer or officer in charge to certify expense of convicts on road work 7602.
Expense of recapturing escaped convicts, how paid 7595.
Expense of transporting prisoners, how paid by state 7590.
Expense of transporting prisoners to be approved by board of commissioners 7590
Extends to places where convicts are employed without the prison walls 7572.
Forfeiture of credits by convicts 7581.
Garb for different grades of convicts 7583.
Laws and rules relating to, to be posted by board of commissioners 7578.
Legislative commission to file recommendations with board of pardons 7587.
Liquor, selling in vicinity of, penalty 6504.
Maintained by state 366.
Manufactured articles and stone, how to be sold 7561.
Money earned by convicts on public highways may be paid to dependent wife, child or parent 7600.
Moneys received from sale of articles and labor performed to be paid into state treasury and placed in state prison fund 7573.
State prison—continued.
Number and salaries of officers and employees 7561.
Powers of board of commissioners of 314, 7561.
Punishment for infraction of rules by convicts working on public highways 7599.
Punishment for violation of rules and regulations 7579.
Recapture of convicts escaping through carelessness of warden or officers not to be paid for by state 7595.
Record of convicts, filing of commitments 7565.
Reduction of terms of convicts for good behavior 7581.
Regulations for requirement to labor 7581.
Rent or hire of labor of convicts 7561.
Report of warden to be filed 7565.
Road work expense to be paid from appropriation for 7602.
Rules of warden approved by commissioners to be furnished officers and guards and posted 7584.
Salary of warden and how paid 7593.
Sealed proposals for furnishing supplies to be advertised 7568.
Secretary of board of commissioners to report to controller sums received from articles sold or labor performed 7573.
Selling liquor in vicinity of, penalty 6504.
Sums due state for articles sold or labor performed by convicts to be certified under oath of warden to board of commissioners 7573.
Supplies for, how purchased 7561.
Supplies for, not to be purchased at prices higher than market rates 7566.
Supplies, how furnished, and expenses, how paid, for convicts working on public highways 7602.
Supplies to be furnished for use with labor of convicts 7569.
Vacancy in office of warden to be filled by commissioners 7582.
Warden may issue warrants for escaped prisoners 7594.
Warden to make duplicate statement of articles manufactured and sold and money collected 7588, 7589.
Warden to make rules conducive to reformation of convicts 7584.
Warden to make rules for classification and promotion of prisoners 7584.
Warden to recommend convicts for work on public highways 7598.
Warden to reside at and make monthly requisitions for supplies 7566.
What expenses allowed for transporting prisoners to 7591, 7592.
When warden of, not liable to forfeiture for escape of convicts without prison walls by order of commissioners 7571.
State prison commissioners, on recommendation of state engineer or county surveyor, to determine on what roads convicts shall be employed and to pass upon plans 7601.
Governor president of board 7562.
Quorum of 7562
Secretary of state secretary of 7562.

State prison commissioners—continued.
To pay expense of transporting convicts to state prison 7590.
To pay expenses of transporting indigent insane 7590.
To pay for expense on road work by convicts 7602.
State treasurer, to receive and place in state prison fund sums from labor performed or articles sold at state prison 7573.
Supplies, for state prison, advertising for proposals 7568.
Town marshals, to have charge of prisoners in city and town jails and to work when ordered 7619.
Trustees, of incorporated towns to utilize labor of convicts in jail 7617.
Of towns, may order working of convicts 7619.
United States convicts, to be received at state prison and confined according to sentence 7577.
United States prisoners, county not liable, but sheriff liable, for escape of from jail 7610
Warden of state prison, allowing prisoners to escape, expense of recapture not to be paid by state 7595.
Books and papers of, open to inspection 7575.
Duties and powers of 7565.
How to be elected, chief executive officer of prison, salary of, to reside at prison 7564.
May issue warrants for escaped prisoners 7594.
Not to recommend commutation of convicts who attempt to escape 7581.
Salary of, and how paid 7593.
To certify to board of commissioners accounts for supplies furnished 7567.
To certify to controller expense of keeping U. S. convicts 7577.
To certify under oath to board of prison commissioners sums due for articles sold or labor performed 7573.
To direct work of convicts on public highways 7599.
To estimate one year's supplies 7568.
To execute bond, approved by chief justice 7562.
To make duplicate statement of articles manufactured and sold and money collected 7588, 7589.
To make monthly requisition for supplies 7566.
To make rules conducive to reformation of convicts 7584.
To make rules for separation and classification of prisoners 7584.
To pay convicts twenty-five dollars when discharged 7596.
To recommend convicts for work on public highways 7598.
To separate convicts into three grades 7583.
When not liable for forfeiture for escape of convicts employed without prison walls by order of commissioners 7571.
Warrants, for expenses for road work by convicts, how certified 7602.
Witness, prisoner may be, order for 7349, 7363, 7459.

State railroad commission 4549-4585. See Railroad Commission.
State seal 4402-4404.
Design for 4402.
Constitutional provision for 308.
Great seal of state to be kept by governor 308, 4402.
Motto for 4402.
Secretary of state to procure and use for verification 4403, 4404.
Secretary of state to have access to 4404.
Size of 4403.
To be attached to grants and commissions 309.
State senators. See Legislature.
Election of 2765, 2773.
Nomination papers, what to contain 1740.
State sheep commission 4586-4602. See Sheep Commission, Live Stock.
State superintendent of public instruction 3242, 3243. See Public Schools.
State supplies 4468-4477. See Board of Examiners.
State tax, how apportioned and levied 3617, 3618. See Revenue.
State text-book commission 3398-3412. See Public Schools.
State treasurer. See Officers Generally.
Absence, limited 4360.
Age qualification 2766.
Annual report to governor 2929, 4364.
Board of capitol commissioners, member of 4411.
Board of insane commissioners, member of 2198.
Board of orphans' home directors, member of 4089.
Board of printing commissioners, member of 4328.
Board to determine conflicting applications to purchase land, member of 3208.
Bond, conditions, examiners to approve 404, 4361.
Books, examination of, by board of examiners 4457.
Books open to inspection 4365.
Building and loan association, foreign, duties as to 1361.
Candidates for nomination, fees received from, how disposed of 1743.
Claims, certain not to be paid, when, records to be kept 4373.
Clerk, appointment and compensation 4196, 4197.
Clerk of supreme court, to pay fees to 2034.
Commission and qualifications 4361.
Controller, duties as to form and numbering of warrants and settlement with treasurer 4176.
To certify receipts of money to 4157, 4173, 4174.
To keep account with 4159, 7174.
To receipt to 4363.
County treasurers, school moneys, payment to 3385.
County treasurers, settlements with 1701, 3748.

State treasurer—continued.
Custodian of school securities 3384.
Damages. liable to, when, interest and cost 4371.
Deputy, appointment and salary 4374, 4375, 4398.
Duties, general 315, 4363, 4369.
Other enjoined by law 4369.
Funds, available and when exhausted 4370.
Legislature to prescribe (Const.) 315.
Duty to cause officers to be prosecuted for purchasing or selling claims or warrants, when 2847.
Duty, wilful neglect of, penalty 4367.
Election of 312, 2765, 2773, 2774.
Elections, fees of candidates received, how disposed of 1743.
Eligibility 312.
Fire insurance fund, to keep 1360, 4180.
Foreign building and loan associations, duties as to 1361.
Governor to report to 4364.
Insane commissioners, member of board of 2198.
Insane, transportation of, to pay 7590.
Interest, not allowed, when 4370.
Investment of school moneys 3387.
Legislative officers, warrants, to pay 4117.
Legislature, report to, when 4364.
Misappropriating funds or securities, or other malfeasance or misfeasance in office 6660.
Moneys, bonds and securities, how kept and paid out, not to use 4372.
Controller to certify receipts of to 4157, 4173, 4174.
Prohibited from using unlawfully 4366, 4372.
Restriction as to payment from treasury (Const.) 277.
Monthly report to controller 4365.
Night watchman, to designate 4401, 4420.
Notice of funds, available, when to give 4370.
Oath of office 370, 371, 2891.
Oath, power to administer 4369.
Office at capitol 380, 2774, 4360.
Office, forfeiture of, for neglect 4365.
Office to be kept open 4363.
Old unpaid warrants, how treated 4183-4185.
Orphans' home, a director of 4089.
Orphans' home, school expenses, money to keep 4108.
Payment, for clerical work without appropriation 6661, 6662.
Public lands, money received from occupant for absence under possessory title 5853.
Purchasing or selling warrants or claims, scrip, penalty 2824-2826.
Qualifications 4361.
Record of certain releases of claims against state kept 4373.
Releases of claim against state required, when 4373.
Report, original draft to send to governor, when 2929.
To be published with session laws 4334.
To controller monthly 4365.
State treasurer—continued.
Report, to governor, when 4364.
To legislature, when 4364.
Salary of 4394.
School bonds, coupons, to cut off and pay in presence of board of education 3386.
School funds, custodian of 3383.
School moneys, semiannual payments to county treasurers 3385.
School moneys, to negotiate for investment of, when 3387.
School moneys, to pay over on warrant of controller 3384.
School securities, custodian of 3384.
Seal, secretary of state to provide 4362.
State prison, convicts, road work by, expense to pay 7602.
Convicts, transportation to pay 7590.
Money received for certain sales, to place in fund of 7573.
Successor, election and qualification of 4368.
Surveyor-general, transfers to make for 4359.
Term of office 312, 402, 2774.
Vacancy, governor to appoint 4368.
Warrants, certain not to be paid, when 4373.
Duty in paying 4370.
Old unpaid, how treated 4183-4185.
Or scrip, when may refuse to redeem 2845, 2847.
Or orders of controller, numbered, how 4176.
Scrip, or claims, not to purchase or sell 2824-2826.
State treasury, fines paid into 7463.
Local or special law refunding money paid into, invalid 278.
Money not to be drawn for officer or employee of legislature, except as fixed prior to election or appointment 286.
State university 355-361, 4638-4670. See University of Nevada.
State veterinarian 4376-4390.
Affected districts outside of state, stock from to be inspected, when 4382.
Certificate of health to issue, when 4382.
Compensation, sheriff or other officers, district court to allow 4384.
Bureau of animal industry (U. S.) 4390.
Bureau of animal industry (U. S.), to cooperate with 4379.
Diseased stock, carcasses, disposition of 4381.
Diseased stock, examined and quarantined, to be 4380.
Diseased stock to be examined and quarantined, sheriff and other officers to aid 4380.
Duties, additional, governor to prescribe 4377.
Duties of 4377.
Expense account, to render 4385.
Expenses, how paid 4385.
Fees and expenses, how paid 4382.
Governor, additional duties, may prescribe 4377.
Governor to appoint 4376.
Information, to publish 4386.
Presence and service of, how obtained 4378.
Qualifications of 4376.

State veterinarian—continued.
Report to governor, contents of 4385.
Report to legislature, when 4389.
Salary and expenses, how audited and paid 4388, 4387.
Services, certain county officers may demand 4379.
Term of office 4376.
Violation of act, penalty 4383, 4388.
State weather service bureau 4405-4410. See Weather Bureau.
Statement. See Civil Practice.
Statement, officers of corporation, liable for making false 1175.
Statement on appeal 5331-5341, 5356. See Civil Practice.
Statement on motion for new trial (rules xxiv, xxv, p. 1429) 5321.
State's witness 7168. See Criminal Practice.
Statistics, gathered and reported 1584, 1591, 4352.
Stationary engine, operating without license 3904.
Stationary engineer, licenses for 794(69), 3898-3904.
Stationery, postage and papers, payment of expense of, for members of legislature 291.
Statute, amendment, how to be made by legislature 275.
Enacting clause, how to be made 281.
Statutes and documents, delivered to whom 1015, 2932-2936.
Statutes, legislature to provide for publication of 376.
Statute of frauds 1069-1092. See Conveyances.
Statute of limitations 4946-4985. See Civil Practice.
Application for patent, how affects 2390, 4949-4966.
Claims against estate barred by, rejected 5969.
Foreign corporations applicable to 1355.
Liens on estates of decedents, how affected by 6014.
Not to be pleaded, when 5246.
Public official, does not run during term of 2866.
Restricted as to holders of real estate, how 3603.
Vacancy in administration of estate not reckoned in 5971.
Statutes, printed, presumed correct 5413.
Stay of execution, civil action 5347-5355.
Stay of execution, justice's court 5783, 5793. See Civil Practice, Criminal Practice.
Stealing. See Larceny, Grand Larceny.
Stealing telegraph message, penalty 4608.
Steamboat or boiler, reckless or negligent operation of, causing death 6408.
Steam boilers, city may require inspection of 794(69).
Steam engine, or boiler, permitting excessive steam pressure on 6587.
Stenographers and typists, of attorney, privileged communications 5425.
Of attorney-general, compensation 4398.
Of governor, compensation 4190-4197, 4392.
Of district court 4908, 4913, 6977.
Of preliminary examination, when may be appointed 6977.
Stenographers and typists—continued.
Of public service commission, may appoint to report proceedings 4535.
Of secretary of state, compensation 4195, 4269-4270, 4258.
Of state controller, compensation 4398.
Of state printer 4311-4312.
Of state treasurer, compensation 4196.
Of superintendent of public instruction 4341, 4342, 4398.
Of supreme court 4889-4892.
Of surveyor-general 4347, 4398.
Stipulations of counsel binding, to be in writing, rule xxvii, p. 1429.
Sterilization of convict, when 6293.
Still-birth recorded, how, by whom 2975, 2983-2987.
Stock, live. See Live Stock.
Branding in same place as previous brand 2247.
Confinement on railroads over 36 hours 3572, 3585.
Driving diseased or infected animal on public highway 2266, 2268.
Driving or attempting to drive out of state to evade tax 3856.
Dying of contagious disease, failure to burn 2272, 2273.
Estrays, failure to give notice of 2274-2279.
Herding or grazing without revenue certificate 3857, 3858.
Marking by removing more than one-half of ear 2240.
Mismarking or misbranding not one's own 2240.
Permitting to run at large in towns or cities 2263, 2265.
Quarantine, violation of 2271.
Recording similar brand, one already recorded 2248.
Stock certificate, lost, court may order new 1165.
Stock certificates of mining companies stamped with character of stock 1335. See Corporations.
Stockholders of corporation. See Corporations.
Action, limitation for, penalty or forfeiture 4984.
Majority may dissolve corporation 1240.
Of bank, liability 627.
Receiver, may apply for 1194, 1195.
Trustee on dissolution in quo warranto, duties to 5671, 5677.
Stock in corporation, how attached 5152, 5287.
Stock subscription, signing fictitious name of other without authority or with understanding that terms of subscription are not to be complied with 6721.
Stolen goods, buying or receiving 6648.
Property, disposed of, how, owner may recover 6650, 6651, 7428, 7445-7450.
Stone and timber land entries 3163-3167. See Public Lands.
Stone lands valuable for building material, locatable 2393.
Store account, limitation of actions on 4967.
Stored waters may be conveyed, how 4715.
Storage of explosives. See Explosives.

Storey County, creation, boundaries and seat 390, 1446, 1450.
Streams, pollution of, penalty 2047.
Streets, local or special, for vacating, invalid 278. See Cities, Towns, Franchises.
Street or highway, riding or driving in dangerous manner on 6589.
Street railways 2121-2128, 2130, 2139, 3570. See Franchises.
Eminent domain may be exercised for 2138, 5606.
Streets, eminent domain may be exercised for 5606, 5625.
Stud-horse poker, gambling game, penalty for playing 6518.
Style of process 328.
Subcontractor, when liable under employers' liability act 1924.
Submitting controversy without action 5252-5254.
Subornation of perjury, penalty 6350, 6351.
Subpena. See Civil Practice, Criminal Practice.
Railroad commission may issue 4566.
Subscription, by mark, how made 5475.
Substitution of child, penalty 6371.
Substitution in civil action, corporations consolidated 1148.
Claimant as party 5005.
Death, disability or assignment 5004.
On appeal to supreme court, death of party, rule ix, p. 1423.
Subtenant, right and liabilities, action for unlawful detainer 5591, 5592.
Successor in office, governor to hold until qualified 295.
Successor of justice of the peace 5806, 5807.
Successor of officer removed 2853.
Suffrage, amendment proposed to sec. i, art. ii of the constitution, passed at the legislative session 1911, subject to approval by the legislature 1913 and to ratification by the people, provides that there shall be no denial of elective franchise on account of sex 250.
And office holding, right of, not to be withheld from any male citizen by reason of color or previous condition of servitude 190, 411.
Person who has fought duel or sent challenge since adoption of constitution not entitled 371.
Provision to be made by law regarding exercise of right of 255.
Right of, to be enjoyed by soldiers and sailors 252.
Suicide, penalty 6379.
Aiding, penalty 6381-6383.
Attempt to commit, penalty 6380.
Suit, bringing or instigating false, misdemeanor 6366. See Action, under Civil Practice.
Instituting in name of another without consent 6372.
Provision to be made by general law for bringing against state 280.
Summary administration 6127, 6128.
Summons. See Civil Practice.
Summoning and impaneling grand and petit juries, provide for their compensation, local or special laws are invalid 278.
Sum payable on negotiable instrument, defined 2549.
Sunday, computing time, when excluded 5482.
Glove contest, forbidden on 3886.
Judicial proceedings, what may take place on 6260.
Noisy amusements or racing forbidden on 6608.
Superintendent of hospital for mental diseases, appointment, qualifications, compensation 2203.
Superintendent of public instruction. See State Superintendent of Public Instruction, under Public Schools.
Duties prescribed by law, to be performed 315.
Election of, provision to be made by legislature 353.
Females eligible, when 371.
Superintendent of public schools, female may be 371.
Superintendent of state printing 4305-4340. See State Printer.
Supersedeas, court rules xix, xxii, pp. 1424, 1425.
Supplemental complaint, answer or reply 5075.
Supplementary proceedings in civil action 5308, 5311, 5312, 5314, 5787. See Civil Practice.
Support, adopted child entitled to 5826, 5829.
Support of husband by wife when required 2177, 2178.
Supreme court. See Civil Practice, Court Rules, Criminal Practice.
Absence from state of justice of, for 90 days forfeits office 332, 4868.
Absence, leave of to justices, forbidden 332.
Acknowledgments and affidavits, justices and clerk may take 4883.
Action not affected by vacancy or failure of term of court 4884.
Appeal, power on 4835, 5359.
Appeal, special court fee in 331.
Appellate jurisdiction 319, 321, 4832, 4833. See Civil Practice, Criminal Practice.
Appellate jurisdiction, townsite lot contests 1985.
Appointment of reporter and stenographers 4889-4892.
Associate justices 317, 318.
Attorney, authority of, to bind client 507.
Attorney-general to attend on, duties 4129.
Attorney, judge not act as except when party 4866.
Attorneys, admission of 499-505, rule i, secs. 1-6, p. 1421.
Bailiff of 4888.
Bill of exceptions (criminal) may settle, when 7285.
Board of pardons, justices members of 307.
Business at chambers 4837.
Canvass of election returns by justices 297.
Certiorari, may issue 319, 4834.
Chambers, business at 4837.
Chief justice 317, 318.
Chief justice, how determined 2775, 4829, 4830.
Chief justice, to approve bond of warden of prison 7582.

Supreme court—continued.
Clerk of, bond, amount, approval, filing 4895.
Court fee, to collect 331.
Court, to pay over money 2034.
Costs, taxed by, indorsed on remittitur, rule vi, sec. 4, p. 1423.
Deputy, may appoint, salary of 4900.
Duty to give receipt and pay over money 2033.
Election, term 2765, 2773, 2776.
Eligibility 2766.
Fees of 2006, 2032.
Fees of, paid to treasurer 2034.
Fees, when paid 4894.
Habeas corpus, writ to deliver, when 6231.
Money, to pay over 2034.
Office, must keep at seat of government 380.
Qualifications 2766.
Receipts for money, to give 2033.
Report to legislature 4896.
Reporter of decisions of supreme court, salary 2950.
Salary of 4391.
To collect court fee 331.
Commissions to justices, governor to issue 2775.
Compensation of justices, how and when paid 330.
Constituted how, quorum, concurrence of majority necessary to decision 317.
Contempt to resist process of 2833, 2834.
Control over its officers 4864.
Court fee, to be collected, how applied 331.
Court of record 323, 4861.
Criminal cases precedence over civil 7298.
Decisions to be in writing 4839.
Decisions to be published 376, 4481. See Rules, post.
Decisions, unreasonable delay in 4886.
Delay in decisions, unreasonable 4886.
Deputy clerk 4900.
Disqualifications of judge 4865.
District court, writ of habeas corpus may be made returnable before 319.
Duel, justice failing to prevent 2823.
Duplicate in state library, to set aside 3961.
Election of justices 318, 2765.
Election returns, canvass of, by justices 297.
English language used 4885.
Error, writ of may issue, when, rules xviii-xxii, pp. 1424-1425.
Established 316.
Executive functions forbidden 258.
Fees on appeal to 2032.
Governor to commission justices of 2775.
Governor to fill vacancies 4831.
Governor to fill vacancies in justices 2812.
Habeas corpus, court or judge may issue, returnable, where and when 319, 4834.
Refusal, penalty for 6262.
Suspended, when 234.
Writs to all parts of state 4834. See Habeas Corpus.
How constituted 317.
Judgments and orders, may enforce obedience to 4864.
Supreme court—continued.
Judgment, may affirm, reverse or modify 4835, 5359.
Judgment not effective until opinion filed with clerk 376.
Judicial days 4869.
Judicial department, coordinate 258.
Judicial power vested in what courts 316.
Jurisdiction 319.
Appellate 319, 4832, 4833.
Original 319, 4834.
Justices, age qualifications 2766.
Attorney, must be 525.
Chief justice, justice becomes, how 317, 318, 2775, 4829, 4830.
Compensation, how and when paid 330, 4399, 4886, 4893.
Commission to compile and revise laws 1005-1016.
Commissions, form of 2793.
Each may issue habeas corpus 4834.
Election of 318, 2765, 2773, 2775, 4830, 4831.
Eligibility 371, 2766.
Failing to prevent duel 2823.
Fees and perquisites, forbidden 325.
Forfeiture of office for absence 4868.
Governor to commission 2775, 4829.
Habeas corpus, any justice may issue 319.
Habeas corpus, refusal to issue, penalty 6262.
Impeachment, liable to 335.
Ineligible to other office during term 326.
Leave of absence, forbidden 332.
May command military force, when 2839.
May issue habeas corpus, returnable where 319.
Members of board of pardons 307.
Must be attorney 525.
Not to act as attorney unless party 4866.
Not to have partner in practice 4867.
Number of and designation 317, 2775, 4829, 4830.
Oath of office 370, 2775, 2891.
Oath, to administer to governor and lieutenant-governor 2789.
Quorum may transact business 317, 4837.
Removal by legislature 336.
Resignations of to governor 2798.
Revenue to be set apart for salaries 330.
Salary, amount of, how and when paid 330, 4399, 4886, 4893.
Salary, court fee applied to 331, 2034.
State librarian, to receipt to 3959.
Term of office 318, 2775.
To canvass election returns 297.
Vacancy, how created 2799, 2802.
Vacancy, how filled 406, 2812, 4831.
Vacancy, salary of successor 330.
When chosen 2775.
When disqualified 4865.
Writs, original, may issue 319, 4834, 6228.
Juvenile court law, appeals to 753.
Leave of absence to justices forbidden 352.
Legislative functions forbidden 258.
Mandamus, may issue 319, 4834.
May suspend death sentence 7270.
Military force, justice may command, when 2839.

Supreme court—continued.
Ministerial officers to control 4864.
Necessary room, furniture and supplies, may order, how paid 4838.
New trial, may direct 4835.
Newspaper to publish decisions 4481.
Nonjudicial days 4870.
Number of justices, may be increased 317.
Oath, constitutional, to take 4829.
Oath of justices 370, 2786, 2787, 2891.
Office, term of justices 318.
Official reporter, appointment and compensation 4889, 4890.
Opinions to be in writing 4839.
Order appealed from, may affirm, reverse or modify 4835, 5359.
Order, power to enforce and preserve 4864.
Orders by judge out of court, to enforce 4864.
Original jurisdiction 319.
Original writs, what may issue 319.
Pardons and commutations, may act on 307.
Place of holding changed, when 4873, 4874.
Power on appeal, criminal 7303.
Powers on appeal 4835, 5359.
Power to provide necessaries 4838.
Process, power to enforce 2833-2835.
Resistance of, contempt 2833, 2834.
Style of 328.
Proceedings public 4862.
Prohibition, may issue 319, 4834.
Quorum 317, 4837.
Quo warranto, may issue 319, 4834.
Reargument, failure of quorum to agree 4837.
Record of opinions and decisions 4839.
Referee or commissioner, proceedings before may enforce order 4864.
Reports of decisions, compilation of 4897-4899. See Public Documents.
Reporter, official, appointment and compensation 4889, 4890.
Resistance of process, contempt 2833, 2834.
Restitution, may direct 4835, 5359.
Revenue, to be set apart for salary justices 330.
Rules of, pp. 1421-1435, following sec. 4942.
Rules. [Rules of the supreme court are published as a note to sec. 4942. References are here given to the number of the rule, section thereof and page of this work.]
Advance fee for filing transcript, xxvi, p. 1425.
Appeal, dismissal for failure to file transcript, iii, sec. 1, p. 1421.
Appeal dismissed, restored, when, iii, sec. 2, p. 1422.
Appeal, transcript of record on, when to be filed, ii, sec. 1, p. 1421.
Argument, limitations on, xi, secs. 3, 4, p. 1424.
Argument, submission without, x, sec. 3, p. 1423.
Attorney, examination, time, place and subjects, i, secs. 1-5, p. 1421.
Attorney, fee for admission payable before examination, i, sec. 5, p. 1421.
Attorney, oath of, i, sec. 6, p. 1421.
Supreme court, rules—continued.
Briefs, service and filing, xi, secs. 1, 2, p. 1423.
Briefs, service of, xi, p. 1423; xxv, p. 1425.
Calendar, how made up, x, secs. 1-3, p. 1423.
Cases, how set for hearing, x, secs. 1-3, p. 1423.
Case submitted, when, xi, sec. 6, p. 1424.
Certiorari, writ of, when to issue, xviii, p. 1424.
Change of venue, appeals from orders, notice, xxiii, p. 1425.
Costs of transcripts, settlement, vi, sec. 1-3, p. 1422.
Costs taxed by clerk indorsed on remittitur, vi, sec. 4, p. 1423.
Criminal cases, transcripts, how prepared, iv, sec. 2, p. 1422.
Death of party, substitutions, ix, p. 1423.
Decision, publication of, xv, p. 1424.
Dismissal of appeal for failure to file transcript, iii, sec. 1, p. 1421.
Error, writ of, xviii-xxii, pp. 1424, 1425.
Examination of attorneys, time, place and subjects, i, secs. 1-5, p. 1421.
Exceptions to transcript, when and how to be taken, viii, p. 1423.
Fee for admission, payable before examination, i, sec. 5, p. 1421.
Index to transcript, iv, sec. 3, p. 1422.
Interlocutory order before trial, appeal from, orders, notice, xxiii, p. 1425.
Motion for rehearing, xv, p. 1424.
Motion, notice of time for, xxiv, p. 1425.
Notice of motion, time for, xxiv, p. 1425.
Oath of attorney, i, sec. 6, p. 1421.
Objections to costs, vi, sec. 3, p. 1422.
Objections to transcript, when and how taken, viii, p. 1423.
Oral argument, limitations on, xi, secs. 3, 4, p. 1424.
Order to withdraw papers or transcript, xvii, p. 1424.
Opinion, publication of, xv, p. 1424.
Opinions recorded, xiv, p. 1424.
Opinion, when to be transmitted with remittitur, xvi, p. 1424.
Papers, withdrawal of, order for, xvii, p. 1424.
Party, substitution upon death, ix, p. 1423.
Petition for rehearing, xv, p. 1424.
Printed transcripts and briefs, number to be filed, xiii, p. 1424.
Printing and paper uniform, xii, p. 1424.
Printing transcripts, v, sec. 1, p. 1422.
Publication of opinion or decision, xv, p. 1424.
Record on appeal, when filed, ii, sec. 1, p. 1421.
Rehearing, petitions for, xv, p. 1424.
Remittitur, costs indorsed on, vi, sec. 4, p. 1423.
Remittitur, opinion to accompany, when, xvi, p. 1424.
Remittitur, when to issue, xv, p. 1424.
Setting cases for hearing, x, secs. 1-3, p. 1423.
Service of briefs, xi, p. 1423; xxv, p. 1425.

Supreme court, rules—continued.
Submission without argument, x, sec. 3, p. 1423.
Submitted, when, xi, sec. 6, p. 1424.
Time, extension of, xi, sec. 7, p. 1424.
Transcript, advance fee before filing, xxvi, p. 1425.
Transcript and briefs, when printed, number to be filed, xiii, p. 1424.
Transcript, failure to file dismissal of appeal, iii, sec. 1, p. 1421.
Transcript on appeal, when filed, ii, sec. 1, p. 1421.
Transcript, costs of, settlement, vi, secs. 1-3, p. 1422.
Transcript, error in corrected, how, vii, p. 1423.
Transcript, how prepared, iv, secs. 1-4, p. 1422.
Transcript or briefs, may be typewritten, service, xxv, p. 1425.
Transcript or record, exceptions or objections to diminution, viii, p. 1423.
Transcript, printing of, v, sec. 1, p. 1422.
Transcript, when may be withdrawn, xvii, p. 1424.
Typewritten transcripts or briefs, service of xxv, p. 1425.
Withdrawal of transcripts and papers, xvii, p. 1424.
Writ of certiorari or error, when to issue, xviii, p. 1424.
Writ of error, xviii-xxii, pp. 1424, 1425.
Salary fund created, court fee paid into 331, 2034.
Salary of justices 4893.
Salaries of justices not increased or diminished during term 330.
Salary of justices not paid unless affidavit filed 4886.
Seal, to have 4875.
Seal, to what papers affixed 4879.
Sessions at capitol 322, 4848.
Sheriff of Ormsby County, bailiff of 4888.
State librarian to receipt to justices 3959.
Stenographers, appointment and compensation 4889-4892.
Style of process 328.
Terms 322, 4836.
Term of justices, ineligibility during 326.
Term of office of justice 318, 2775.
Terms, when and where held 322.
Vacancy, how filled 2812, 4831.
Vacancy in office of justice, governor may fill 301.
Vacancy in office of justice, how created 2799, 2802.
Writs, original may issue 319, 4834, 6228.
Writs, what may issue 319.
Supreme law of the land, defined (U. S. Const.) 168.
Supplies for elections. See Elections.
Supplies for state and county officers and institutions. See Public Supplies.
Sureties. See Bonds and Undertakings, Civil Practice.
Surety company. See Bonds and Undertakings.
Bonds and undertakings, may furnish 695-701, 2888-2890, 5486, 7329. See Bonds and Undertakings.
Surety company—continued.
Corporations may be organized as 1105, 1106, 1215, 1242-1248.
Estopped to deny corporate power 700.
Liabilities 1244-1246.
Surety to keep the peace, procedure 6864-6877. See Criminal Practice.
Surface employees of mines, eight-hour day 1941.
Surface waters to be returned to streams, when 4675.
Survey for court proceedings. See Civil Practice.
Surveyor, county 1664-1674. See County Surveyor.
Surveyor-general and ex officio state land register. See Officers Generally, Public Lands.
Surveyor-general. See State Land Register.
Accounts with state printer, to keep, examiners to approve 4356-4358.
Appoint competent surveyors, when 2396.
Auditors to report to on statistics 1584-1591, 4352.
Books and property to preserve and deliver to successor 4350.
Board of irrigation, member of 4706.
Boundary line between counties to run, when 4349.
Boundary maps, custodian of 4355.
Bureau of industry, etc., member of commission 4486.
Chief engineer and commissioner of internal improvements, ex officio 4351.
Circular letter to assessors, auditors and surveyors 1585, 1589, 4352.
Controller and treasurer, transfers to make for 4359.
Commissioner of industry, agriculture and irrigation, member of 4486.
County commissioners may require survey of boundary 4349.
Deputies, appointment and oath of 4347.
Deputy, salary of 4398.
Deputies, surveys by, valid 4347.
Draughtsman, salary of 4398.
Duties, other, legislature may prescribe 4354.
Duties prescribed by law, must perform 315.
Election of 2765, 2773, 2774, 312.
Ex officio state land register 3196-3216.
Expenses, how met 4354.
Governor, to report to 4351.
Legislature, to report statistics to 1588, 4352.
Map of state, to make, when 4349.
Map, railroad and toll-road companies, duty to file 4353.
Mineral surveys, duties concerning 2421.
Office, where may keep, hours 2774, 3196.
Orphans' home, director of 4089.
Printing for state land office 4356-4359.
Qualifications 2766.
Railroads to file maps with 4353.
Reports from assessors, to obtain quarterly 4352.
From county surveyors, to obtain quarterly 4352.
Quarterly, to obtain, failure to comply, penalty 4352.

Surveyor-general—continued.
Salary of 4394.
State board of irrigation, member of 4706.
State boundary, may be required to survey 4348.
State orphans' home, director of 4089.
State printer, account to keep with 4356.
Statistics, reports to, on 1584-1591, 4352.
Stenographer, appointment and salary, paid from school fund 4401.
Surveyors, when may appoint 2396.
Surveys, commissioners may require to be made 4349.
Surveys for water for orphans' home and capitol 4425.
Term of office 2774.
Toll roads, maps, to file with 4353.
Typist, appointment and salary 4389.
Statistics to legislature 1588, 4352.
To governor, when 4351.
Surveys, of mining claims 2421. See Mines and Mining.
Railroads 3533.
Surveyor-general required to make certain 4349, 4425.
Suspended sentence 758-762, 7259. See Criminal Practice.
Sutro tunnel, rights of 2406.
Swan, closed season for 2089.
"Swear," defined 6353.
Swine, permitting to run at large in towns or cities, penalty 2330. See Live Stock.
Swindling, penalty 6463, 6518.

T

Table of fees, officer to post 2025.
Tailings, eminent domain may be used for deposit of 5606.
Taking property from custody of officer, when unlawful, penalty 6337, 7173.
Tally lists 1756. See Elections.
Tampering with or obstructing witness 6359.
Tamping bar, other than wood, penalty for using 4212.
Tanks for oil, eminent domain may be used for purposes of 5606.
Tax. See Revenue.
Actions affecting. See Civil Practice.
Tax deed, possession of property obtained by, how 3666.
Tax receiver, treasurer ex officio, duties 3643, 3648, 3796.
Tax suit, defendant in, to make answer 3664.
Tax suit, proceedings in, judgment obtained, how 3665.
Taxation. See Revenue, Constitution of State.
Actions affecting, procedure. See Civil Practice and Revenue.
Government land exempt from 1950, 1952.
Mortgages, law of 1911, secs. 3786-3790, repealed at special session 1912.
Not to be levied on cemetery property, when 1407.
Not to be levied on hospitals or asylums, when 1396.
Patented or unpatented mines 352.
Uniform and equal 352.
Taxes, action affecting. See Civil Practice, Revenue.
Deduction in, when and how made 3629.
Taxes—continued.
May be levied by county commissioners to pay costs suit prevent pollution of stream, when 4717.
Proof of payment of, not required 1992.
Property transferred to avoid, unlawful 3679.
Unredeemed warrants receivable for 1683.
Teachers. See Public Schools.
Teachers' institute. See Public Schools.
Teachers, oath required to take 357.
Teachers, school for instruction of, established 357, 4639, 4645.
Technical errors in criminal proceedings disregarded 7302, 7469.
Telegraph 4603-4630.
Act for the regulation of the telegraph, and to secure secrecy and fidelity in the transmission of telegraphic messages (approved February 16, 1884) 4603-4623.
Act to provide for construction and maintaining telegraph lines in the State of Nevada (approved February 9, 1866) 4624-4630.
Agent, employee or operator using information message, penalty 4605.
Altering or divulging message, proviso 4603.
Appeal from appraisers' valuation on right of way, taken how, when 4629.
Appraisers appointed, by whom, duties 4629.
Appraisers, valuation on right of way, how, when 4629.
Authenticity message proved, how 4616.
Arrest, authorized by 4618, 6967.
Bribery of agent, employee or operator, penalized, how 4609.
California company deemed Nevada corporation, how, when 4622.
California company granted privileges in Nevada, when 4623.
Certificate of incorporation to file with secretary of state 4625.
Charging higher rates, misdemeanor, when 4627.
Checks, notes, bills, orders and agreements legally transmitted, how 4616.
Company, construct line over public or private lands 4626, 4555.
Company formed, how, procedure 4625.
Company have private or distinguishing mark, filed, where, unlawful to use 4619.
Contracts by, made how 4613.
Copy legal instrument deemed prima facie evidence, when 4617.
Damages against company becomes lien, how, when 4628.
Damages recoverable violation act, how 4611.
Delay unreasonable sending or delivering message, punished, how 4606, 6712, 6713.
Delivering false or forged message, penalty 4604.
Divulging or altering message, penalty 4603, 6825.
Eight-hour law for railroad operators 3597.
Eminent domain may be used for 5606.
Employee exempt from jury or military duty 4612.
Employee using information obtained, penalty 4605.

Telegraph—continued.
Failure keep line in repair forfeits franchise, when 4630.
Failure send messages in order, punished, how 4606.
False or forged message delivered or transmitted, penalty 4604, 6664.
Fees filing corporation papers designated, disposed of, how 4625.
Franchise 2139.
Franchise forfeited through quo warranto proceedings, how, when 4630.
Franchise revoked for failure keep line in repair 4630.
Information obtained from message used by agent, employee or operator, punished, how 4605.
Injury or obstruction to line, punished, how 4610.
Jury duty, employees exempt from 4612.
Larceny of message, penalty 4608.
Legal instruments sent by, when 4615.
Legal instruments sent by, certified how, by whom 4617.
Legal instruments sent by, deemed prima facie evidence, when 4615.
Legal instruments sent by, entitled to be recorded 4615.
Legal proof genuineness of message considered, how 4617.
Lines constructed by whom 4624.
Lines governed by general laws of state 4628.
Lines, to have uniform valuation 3797.
Message aiding criminal or fraudulent acts withheld, when 4606.
Message, altering, destroying, divulging, delaying or opening 6712-6714.
Message, altering or divulging 4603.
Message, deemed communication in writing 4613.
Message, divulged, altered, delayed or destroyed, penalty 4549-4585, 4603, 6712-6714, 6825.
Message, false, when deemed forgery 6664.
Message intercepted, penalized, how 6752.
Message, knowledge of, obtaining unlawfully 6712, 6713.
Messages sent in order received, exceptions 4620.
Messages, time of transmission, must show 6825.
Messages, transmitting false or forged 4604.
Military duty, employees exempt from 4612.
Notice deemed actual notice, when 4614.
Notice of telegram deemed sufficient, when 4614.
Officer or employee using information obtained, penalty 4605.
Opening message wilfully and wrongfully, punished, how 4607.
Operators and dispatchers, eight-hour law to govern work 3597.
Order transmission messages, exceptions 4606, 4628.
Orders of arrest and warrants ordered sent by, when, procedure, 4618, 5371, 5372, 6967.
Original message preserved, when, where 4616.
Preference given messages transmitted, when, to whom 4628, 4620.
Power of railroad commission to regulate transmission of messages 4555.
Proof genuineness message 4617.
Public business sent free, when 4628.
Quo warranto remedy secure forfeiture franchise 4630.
Railroad telegraphers, eight-hour day 3597.
Rates posted, how, where 4627, 4555, 355.
Right of way, may condemn for 2138.
Record incorporation companies constructive notice 4625.
Right of way secured, how 4629.
Route proposed line filed, how, where 4625.
Service of papers by, how made 5371, 5372.
State of Nevada send messages free, when 4628.
Stealing message, punished, how 4608.
Transmitting or delivering false or forged message, penalty 4604.
Terms, defined 4621.
Time of transmission of message, failure to show 6825.
Unlawful use company's distinguishing mark 4619.
Unreasonable delay in delivering or sending message 4606.
Warrants and orders arrest sent by, procedure, when 4618, 6767, 5371, 5372.
Wilful and malicious injury to property of company, penalty 6752.
Wilfully and wrongfully opening message, punished, how 4607.
Telephone 4631-4634.
Act to authorize county commissioners of any of the counties of the State of Nevada to purchase or construct telephone lines 4633, 4634.
Act to define rights and responsibilities of owners of telephone lines in the State of Nevada 4631, 4632.
Companies, rights and responsibilities 4631-4634.
Company may construct or purchase lines 4633, 4634.
County commissioners, power to acquire, when 4633.
Damage to lines, penalty 4632, 4610, 6752.
Delaying or interrupting sending of message 6752.
Eminent domain, may be used for 5606.
Franchise 2139.
Intercepting message, penalized, how 6752.
Interruption of message, penalty 4632, 4610, 6752.
Lines to have uniform valuation 3797.
Messages, power of railroad commission to regulate 4555.
Petition signed by taxpayers, to acquire, filed where 4633.
Privileges, same as telegraph 4603-4631.
Rates may be fixed by railroad commission, when 4555, 4560, 4562.
Restrictions and responsibilities same as telegraph 4603-4631.
Right of way, may condemn for, when, how 2138.
Taxpayers, number, sufficient entitle county commissioners to acquire 4633.

Telephone—continued.
Telegraph, restrictions and privileges same as 4603-4631.
Title acquired by county commissioners vests how 4634.
Wilful and malicious injury to property of, penalty 6752.
Tenant, actions affecting, procedure. See Civil Practice.
Tenancy in common, when created 1055.
Tenants in common, husband and wife may hold as 2162.
Procedure in actions affecting. See Civil Practice.
Tender, in action for recovery of money, when costs not recoverable 5384.
Tender in payment of debt 137.
Tender of appraised value of land on construction of toll road 3052.
Tense, includes the present as well as the future 5475.
Tenure of office, constitutional provision 379.
Term of office, clerk of supreme court 2776.
Constable 2782.
County officers 1501.
Officers irrigation districts 4727.
State officers 392, 394, 402, 2774.
Term of imprisonment, two or more convictions 7256, 6303.
Terms of district and supreme courts 322, 399.
Terms of district court, abolished 4906.
Terms and words in civil practice act, defined 5475.
Territorial debt, state liable for, special tax to provide for 391, 408.
Territorial laws continued in force 386.
Territorial rights transferred to state 385-388.
Territory of Nevada, organization of 192-208.
Territory, when included in word "state" and words "United States" 5475.
Testamentary capacity 6202.
Testify, embraces every oral statement made under oath or affirmation 5475.
Testimony. See Civil Practice, Criminal Practice.
Criminal action, taken by commission 7365-7384.
Judge may state to jury 327.
Perpetuating 5464-5473.
Two witnesses, or confession required to convict of treason 248.
Text-book commission 3398-3412. See Public Schools.
Threatening letters, sending or delivering, penalty 6437, 6438.
Public officer to intimidate, penalty 6364.
To publish libel, penalty 6433.
Threats, for purposes of blackmail, penalty 6739.
For purposes of extortion, penalty 6437, 6438.
For purpose of unlawful coercion, penalty 6740.
Or menaces, crime committed under, penalty 6268.
"Things in action," when included in words "personal property" and "property" 5475.
"Third degree" unlawful, penalty 6807.
Tickets, lottery, sale of, forbidden 282.
Tie vote decided, how 1797. See Elections.
Timber. See Forestry.
And stone entries 3163-3167. See Public Lands.
Cutting unlawfully 2114-2116.
Land, state, not sold on contracts 3203.
May be used by citizens of Nevada, on public domain 2414.
Young trees, selling or offering for sale 2118.
Timber, action in trespass for cutting, treble damages 5506.
Timber, measure of damages for cutting for repair public highway or bridge, what 5507.
Time and place hearing election contest 1808.
Time checks, discounting, when unlawful 6788-6790.
Time, computation of bankruptcy 573.
Time, filing various papers in actions. See Civil Practice.
Time holding election school trustees 3281.
Time, how computed 5482.
Time of commencing criminal actions 6921-6926.
Time when trial must be commenced in justice's court 5756.
Title, action and papers affecting procedure. See Civil Practice.
Title acquired to private lands for mining purposes, proceedings 2459, 2460, 2461, 5606-5629.
Title from tax sale to pass to property, when 3652.
Title of bill or statute, one subject 275.
Title, subject of laws to be expressed in 275. See Constitution of State.
Tobacco, sale of to minors, prohibited, penalty 3874, 3875, 6502, 6503.
Toll, legality of, jurisdiction of courts to determine 319, 321.
Toll on water in irrigation district, how levied and collected 4767.
Toll rates, may be regulated by legislature 278.
Toll roads and bridges. See Public Highways.
Toll roads, eminent domain may be used for 5606.
Franchise of, action to forfeit 3757-3759, 3049.
Franchise, violation of, commissioners, duties as to 3759.
Legislature may regulate 278.
Map, to file with surveyor-general 4353.
Owners to pay percentage to treasurer, report to controller 3055.
Persons constructing may condemn private land 3052.
To forfeit franchise to 3757, 3759.
Tort, making of claim under employers' liability act, operates as assignment of assignable cause of action in, when 1927.
Town marshal, prisoners in city or town jail, to have charge of 7619.
Towns. (Town Government Act.)
Accounts, inspection 983.
Action against, summons, how served 5023.
Action, bond not required of 5487.
Actions affecting, procedure. See Civil Practice.

Towns—continued.
Annual revenue reports 982.
Applicable to what towns 892.
Auditor, annual report of 982.
Bonded indebtedness, redemption 883-885.
Bonds for public utilities 940-944.
Bond for sewerage systems 984-990.
Boundaries, how fixed 877.
Chief of police, duties and salary 888.
Claims, audit and allowance 877(15).
Claims, how paid 880.
Claims, rejected, action on 881.
Commissioners, meeting, quorum 891.
Condemnation of property 877(5, 15).
Contracting debt without funds 977.
Costs, delinquent tax suit 999.
County clerk, duties and liability 890.
County commissioners, powers of government 877, 878.
County commissioners, policemen in towns, appointment of 916.
County officers, ex officio city officers 890.
County treasurer, duties and liabilities 889.
County treasurer, moneys paid to 879.
Dangerous riding or driving in streets 6589.
Debt, funded, payment of 882, 883.
Debt in excessive funds, unlawful 977.
Delinquent tax suit, costs 999.
Disincorporation, indebtedness, how paid 882, 883.
Disincorporation, provisions for 967, 974.
District attorney, duties of 887.
Disturbance in streets 6589.
Explosives, storage of, in 877.
Fire department 877.
Fire department fund 894, 902.
Fire protection 895-907.
Fire wardens 903, 907.
Floating debt tax 981.
Funds 879.
Funds of, not to be used for sectarian purposes 362.
Funds of transfer of surplus 894.
Emergency tax 979.
Incorporation, petition for 892.
Health, board of 877.
Justice of peace, jurisdiction 886.
Leases, limited to 20 years 1092.
Licensed taxes 877(9, 10).
Live stock not to run at large in 2328-2331.
Light systems, provisions for 940-953.
Lots or property in, leases limited to 20 years 1092.
Lots, sale of without plat filed, penalty 959.
Maps and plats, recording of 965, 966.
Moneys, received by any officer paid to county treasurer 879.
Municipal improvements, bonds for 991-998.
Nuisances 877.
Nuisances in, abatement of 919-921.
Officer, failing to prevent stock running at large in 2265.
Officer refusing information to examiner, penalty 983.
Ordinances, adoption and violation of 877.
Peace officers 888.
Petition for incorporation 892.
Towns—continued.
Plat of land by private owner, provisions for 955-966.
Plat of land, vacation of 960-964.
Police department fund 911.
Policemen, how appointed 916.
Provisions for 908-918.
When fire warden 903.
Property, control of 877.
Redemption of bonded indebtedness 883-885.
Revenue and taxes 975-983.
Revenue, duty of state board of revenue 982-983.
Salaries and expenses, how paid 880.
Sewerage systems, provisions for 940-953, 984-990.
Sheep not to be grazed within three miles of 2317.
Sheep not to run at large in 2328-2331.
Special assessment, improvement of streets and alleys 929-939.
Special assessment, municipal improvements 992-998.
Streets, alleys and public places, dedication of 958.
Streets and alleys 877.
Streets and alleys, fast riding, driving or disturbance upon 6589.
Streets and alleys, franchise may use 2129.
Streets and alleys, improvement of 922-939.
Streets and alleys, obstructing or flowing water on 3009.
Street improvement bonds 991-998.
Suits by and against 877.
Swine, goats or sheep not to run at large in 2328-2331.
Tax levy and collection 877.
Taxes, levy and collection 878.
Tax rate limited 975, 976.
Town government, general act 877-893.
Water system, provisions for 940-953.
Towns, constitutional provisions, corporations, other than railroad, forbidden to take stock in 347.
Indebtedness or liability to, local or special law releasing, invalid 278.
Legislature to provide for organization of, and restrict powers 345.
Provide for support of officers 405.
Railroads, may loan credit to or become stockholder in 347.
State not to assume debt of, unless for public defense 351.
Taxation, legislature to restrict powers of 345.
Township, boundaries changed, effect 2784.
Business, local or special law regulating, not to be passed 278
Commissioners to determine 2782.
Commissioners to specify 1508.
Coroner's district 7542, 7559.
Creation and division 1508.
Established, how, change of boundaries 2782-2785.
Government, legislature to establish uniform system of 283.
Justice court, action in, what 5715.
Justice court, to have 323.
Officers elected, by whom 2773.

Township—continued.
Officers' fees, legislature may regulate 278.
Officers, law books to receive 2934.
Officers, local or special law regulating elections 278.
Officers, soldiers, pension fees, not to charge 3914.
Plats, state land register to procure 3197.
Townsites. See Federal Townsite, Civil Practice.
County-seats, federal 1953.
Federal, district judge may enter as trustee 1961.
On mineral land authorized, how 2418. See Mines and Mining.
Town trustees, convicts, labor of, may utilize 7617, 7619.
Train crew, number of, regulated 3588, 3592, 3593.
Transacting business under assumed name, when unlawful 6728-6731.
Transcript, papers in and pertaining to. See Civil Practice, Criminal Practice.
Transfer of case, from justice's court to district court 5721, rule xxxviii, p. 1430.
Transfer of mines 1102.
Transfer of property to avoid taxes, unlawful 3679.
Transfer of stock 657.
Transfer of voter, how secured. See Elections.
Transient stock, certificate 3846, 3847.
Transient stock, duties of commissioners as to taxes on, suit for 3853, 3855, 3859.
Transient stock, taxes on 3850.
Translators, fees of 2016.
Transported free, certain property may be 3583.
Trademarks 4635-4637.
Counterfeiting of, damages for 4646, 4637.
Counterfeiting of, damages for, attorney's fees 4636.
Counterfeiting of, may be enjoined 4636.
Counterfeiting of, damages for 4636, 4637. 6689-6694.
Evidence, certificate of record to be 4635.
Exclusive use of 4636.
Filing fee 4635.
Protection of 4635.
Stamps, labels or designs, counterfeiting 4619, 6437, 6689-6694.
To be filed with secretary of state 4635.
Traveling expenses, district judge 4907.
Treason, constitutional provisions concerning 248, 250, 306, 308.
Defined 248, 6308-6310.
Governor, power to suspend sentence 306.
Levying war, what deemed 6309.
Legislature, when may exercise power concerning 306.
Misprision of 6310.
Of what consists, evidence, requisite 157.
Pardoning power restricted 307.
Treasurer. See County Treasurer, State Treasurer.
Accounts, to keep with state controller 4174.
Accounts, to receipt to controller 4174.
Action against, commissioners may direct 3650.
Annual settlement with commissioners 1686.
Treasurer—continued.
Bond of commissioners, to approve 1675.
Commissioners, may examine books and money of 1680.
Commissioners to allow certain compensation to 3671.
Delinquent, commissioners may remove 1685.
Fee or salary of public officer, if garnished may pay into court 2865.
May be removed or suspended and another appointed to perform duties pending charges 3753.
Of corporation, deposition may be taken 5454.
Report of, original draft may be sent to governor 2929.
Report, to include with session laws 4334.
State, county or city, misappropriating funds or securities or other malfeasance or misfeasance in office 6660.
To report to commissioners quarterly 3746.
Treasury, county. See County Treasurer.
Treasury, state, amount of money in, board examiners to file and publish affidavit 4456.
Treasury, state, money drawn from, how 4175, 4370, 4372. See State Treasurer.
"Treasury stock," defined 1334.
Treaties, published by Little & Brown, are evidence 529.
Trees, action in trespass for cutting or injuring, treble damages 5506.
Measure of damages for cutting, for repair of public highway or bridge 5507.
Trespass, action for 5504-5513. See Civil Practice.
For cutting timber, action for, treble damages 5506.
Measure of damages for extraction of ore from mine 5509.
Of animals on grounds enclosed by lawful fence, damages 2332.
Of live stock, damages and attorney's fees recovered 2335-2337.
On mine, application for underground survey 5511.
On real property, action for may be commenced within 3 years, but if in underground mine within 3 years after discovery of facts 4967.
Upon church or school property 6760, 6761.
When unlawful 6765-6769.
Trial, civil 5195-5229. See Civil Practice.
Criminal 7159-7226. See Criminal Practice.
By jury guaranteed 232.
Of indictment, conviction of lesser degree or attempt 6290.
Place of. See Criminal Practice.
Tribunal, inferior, appeal from, district court has final jurisdiction 321.
When writ may be directed to, and how returnable 5686.
Truancy of school child 3444, 3448.
Trust company, bank may do business of 620.
Trust company, how taxed 3790.
Trust, property held in 3667, 3668, 3670.
Trusts. See Statute of Frauds under Conveyances.
Trustee, actions affecting, procedure. See Civil Practice.
Trustee, duties of in relation to estates 5955.

Trustee in bankruptcy 575.
Trustees may discharge trust after going out of office 1988.
Trustees of corporations. See Corporations.
Trustees of schools 3278-3313. See Public Schools.
Truth may be given in evidence in actions for libel and slander 5074.
Tunnel, buildings at mouth of, regulations 4224, 4225.
Tunnel companies, legislature may fix rates 278. See Corporations.
Tunnel exit to surface 4225.
Tunnel, location of 2440-2443.
Tunnel right, how located 2440, 2381. See Mines and Mining.
Twenty-one, gambling game, penalty for playing 6518.
Two or more convictions, imprisonment on 6003, 7256.
Typewriting, included in writing 5475.
Typewriting or printing of statement on appeal, costs not allowed for surplusage 5333.
Typewriting testimony in statement on appeal, costs of, not allowed in certain cases 5333.
Typewritten or printed transcript, may be furnished on appeal 5357.
Typists and stenographers. See Stenographers and Typists.

U

Unappropriated waters, prior right to, how acquired 4678.
Unborn quick child, killing 6403.
Unclaimed estate, disposition of 6092.
Unclaimed freight, sale of 537-542.
Underground mines, eight hours day's work 1941, 1942, 6554, 6556. See Mines and Mining.
Underground waters, rulings of state engineer relative to appropriating 4695.
Undertakers. See Board of Embalmers 4445-4454.
Must register with local health officer, when 2967.
Undertakings on appeal, and for writs, and when otherwise required. See Civil Practice.
Undertakings. See Bonds and Undertakings.
Undue influence at elections, legislature to pass laws preventing 285.
Unfenced and unimproved lands held in private ownership, subject to exploration and condemnation for mines 2458-2462.
Union label, counterfeiting of 4637.
Union label on state printing 4309.
Union school 3322-3325. See Public Schools.
United States, agricultural experiment stations, aid to by 4655.
Armed force, may employ 231.
Army officer may call militia, when 3982.
Bankruptcy law, 543-615. See Bankruptcy.
Bonds, school moneys, investment in 355.
Bureau of animal industry 4390.
Constitution 86-191. See Constitution of United States.
Consul, minister or embassador, to certify to judicial record of foreign country 5411.
Convicts, to be received at state prison and confined, when 757.
United States—continued.
Convicts, when escape from county jail, who liable for 7610.
Deputy surveyor, may be employed by applicants for mineral land, when 2396, 2377. See Mines and Mining.
District attorney, duty bring action for unlawful enclosure public lands 3174.
District attorney, duty set aside naturalization decrees, when 2528. See Naturalization.
Federal jurisdiction concurrent with state 1949.
Geological survey, records to be consulted by state engineer, when 4688.
Government officers, jurisdiction ceded over 1951.
Governor not to hold office under 305.
Land exempt from taxation 1950, 1952.
Land grants to state 3179-3195. See Public Lands.
Land grants to state, dedicated to educational purposes 355.
Land laws 3063-3178.
Land office to determine contest, mineral or agricultural character of land 2397.
Laws published by Little & Brown to be evidence, when 529.
Marshals, may call militia, when 3982.
Mining laws 3375-2421. See Mines and Mining.
Naturalization laws 2506-2544.
Officers, restrictions as to holding state office 267, 305.
Postoffice, federal jurisdiction of 1949.
Postoffice, land for, jurisdiction ceded over 1951.
Powers not delegated to, reserved to states 180.
Prisoners, to receive in prisons or jails 7610.
Property exempt from taxation 228, 3621. See Revenue.
Public buildings of, jurisdiction ceded over 1951.
Public uses, eminent domain may be exercised for, when 5606.
Records of, how may be proved 5408, 5409.
Revised statutes of, relating to authentication of records 526-529.
Senator, age of 95.
Senator, election of 292, 1896-1914, 2765. See Elections.
Senator, election of, Congress may regulate 109.
Senator, qualifications of 95, 107.
Statutes, relating to naturalization 2506-2544.
When not bound by judgment in action to determine adverse claim to real property 5524.
Unknown defendants, how to be described in complaint to determine adverse claim to real property 5522.
Unknown heirs, may be made parties in action regarding real property 5009, 5010.
Owners of property, how assessed 3624.
Service of summons of publication 5028.
Unknown owners, disposition of proceeds belonging to, in actions for partition 5566, 5567.

Unknown parties, may be served with summons by publication 5030.
University of Nevada 4638-4670.
Academic degree, diploma, cause for revocation of 4645.
Academic degree, diploma of 4645.
Acts of Congress in aid of agricultural college 4655.
Affairs of, president to manage 4646.
Agricultural college established 4656.
Agricultural colleges and agricultural experiment station, act of Congress in aid of 4655.
Agricultural experiment station, acceptance of federal aid 460, 461, 464.
Board of control 457-463.
Board of control to report to governor 2929.
Federal act establishing 4655.
Funds, disposition of 458, 462.
Pure food and drug act, duties concerning 3497-3506. See Pure Food and Drug Law.
Reports, publication of 459, 463.
Agricultural school established in 356, 4639, 4656.
Annual report, president to make 4644.
Annual report to governor 4641.
Assistant teachers, president to employ 4646.
Board of examiners to pass on expenses 4650.
Board of regents, board of control of agricultural experiment station 457.
Chairman to be appointed 4642.
Clerk, duties, qualifications, salary 4642.
Compensation, none 4642.
Constitutional provisions concerning 359.
Election of 4640.
Expenses of 4642.
Governor, annual reports to 4641, 4658.
Meetings of 4642, 4643.
Number of 4640.
Oath of 4640.
Powers and duties of 4641, 4657.
Quarterly and special meetings 4643.
Record of proceedings open to public inspection 4642.
Register, to submit to governor 2929.
Reports to governor 2929, 4641, 4658.
State hygienic laboratory, to appoint director and assistant in 3942, 3943.
Term of office 4640.
Vacancy, governor to fill 4640.
Board of visitors, chief justice, chairman 4666.
Composed of 4666.
Duties of 4668.
Expenses allowed 4670.
Governor to appoint 4667.
Meetings of 4668.
No compensation 4670.
Notice of annual meeting, to be given 4669.
Term of office 4666.
To report to governor 4668.
Books, duplicate copies in state library transferred to 3961.
Branches of learning required to be taught in 4639.
Cadets, liable to call for service 4665.
Cadets, officers of and commissions 4664.
Cadets may resign, when 4665.
University of Nevada—continued.
Cadet commissions, governor to issue 4664.
Cadet commissions, revocation of 4664.
Clerk of regents, qualifications and duties, salary 4642.
Color, no discrimination as to 4647.
Constitutional provisions, departments of 356.
Controlled, how 359.
General provisions concerning 356-362.
Fund for support, restrictions 355, 357.
Interest on school fund, apportionment 355.
Oath of professors and teachers in 357.
Regents, first board of 359.
Sectarian instruction prohibited 361.
Special tax for 358.
Students, residence, not to gain or lose 251.
Contracts, regents not to be interested in, penalty 4651, 6331.
Corporate name 4638.
Course of study to be prescribed 4641.
Degrees and diplomas conferred 4645.
Diplomas of graduation, what may issue 4645.
Diplomas, revocation of, for cause 4641.
Discrimination in admission of pupils on account of sex, race or color, forbidden 4647.
Duplicate copies of books transferred to, from state library 3961.
Election of board of regents 4640.
Expenses, board of examiners to pass upon 4650.
Expenses of board of regents 4642.
Experiment stations (U. S.) established, how 4655(1).
Free, tuition shall be 4648.
Governor, annual report to 2929, 4641, 4658.
Cadet commission, to issue 4664.
Honorary board of visitors, to appoint 4667.
Register, regents to submit to 2929.
Vacancies in regents, to fill 4640.
Graduates, diplomas, to receive 4645.
Graduation, standard of, to be prescribed 4641.
Honorary board of visitors 4666-4670. See Board of Visitors, supra.
Hygienic laboratory established [at 3941-3945.
Irreducible university fund, land grant, sale of 4653.
Inspector of mines to furnish specimens to mining school 4201.
Irreducible fund, created 4653.
Land grants, accepted 4659.
Land grants, proceeds of 4657.
Legal corporate name 4638.
Library, transfer of books to and from state library 3961.
Location of 4652.
Mechanic arts, school of, established in 4639, 4656, 356.
Meetings of regents, when 4642.
Minerals, analysis of 4660.
Minerals, analysis of, duplicate sent, when 4661.
Minerals, analysis of, record of to be kept 4660.

University of Nevada—continued.
Minerals, samples analyzed in order received 4662.
Mining school established in 4639, 4656, 356.
Monthly statements to regents 4646.
Nevada state normal school 4645.
Normal school established 357, 4639-4645.
Normal school graduates, teachers' certificates 4645.
Normal school graduates, to report to president 4645.
Permanent establishment of 4654.
President of, affairs of, to manage 4646.
Analysis of minerals, to cause to be made 4660.
Annual report regents, to transmit to governor 4641.
Annual report, to make 4643.
Board of education, member of 3239.
Commission of cadets, to assent to 4664.
Degrees and diplomas, to recommend 4645.
Normal graduates to report to 4645.
Notice to be given to honorary board of visitors 4669.
Qualifications and indorsements 4641.
Regents to appoint 4641.
State board of education, member of 3239.
State text-book commission, member of 3398.
Training and model schools to be established 4641.
Public inspection, records, accounts and proceedings open to 4641-4642.
Race, no discrimination as to 4647.
Records, public 4641, 4642.
Regents. See Board of Regents, supra.
Removal, effect of 4654.
Reno, located at 4652.
Report, president to make annual 4644.
Report to governor, regents to make 4658, 4641.
Sample assays for gold and silver, how returned 4663.
Schools to be established 4639.
Sex, no discrimination as to 4647.
Specimens of ore, inspector of mines to furnish 4201.
State hygienic laboratory established at 3941-3945. See Hygienic Laboratory.
Students, no discrimination to be made 4647.
Students, qualifications of 4647.
Students, residence not gained or lost 358.
Superintendent of public instruction, to report to regents 4649.
To visit 4649.
Tax levy for 3617.
Teachers, school for instruction of, established in 3649, 4645, 357.
Tuition, to be free 4648.
University established 4656.
Vacancy in regents, governor to fill 4640.
Unlawful assembly, defined 6595.
Unlawful assembly, destruction of property by 6612.
Unlawful assembly, duty of officers to disperse 2836-2838.
Unlawful certification of bank check or draft 647.
Unlawful detainer, action in, procedure 5601. See Civil Practice.
Unlawful detainer, jurisdiction courts 321, 323.
Unlawful dispossession 6806.
Unlawful entry and detainer, evidence regarding may be given in justice's court 5721.
Unlawful fees, taking of, penalty 2024.
Unlawful holding office, penalty for 1814, 1815.
Unlawful to loan on stock of stockholders 658.
Unprofessional conduct medical profession, defined 2369.
Unreasonable delay in rendering decision by courts, 4886.
Unwholesome substance, depositing or keeping near highway or stream 6546.
Use of water, existing rights thereto, to be respected 4673.
Use of water, limited to beneficial uses 4674, 3105, and note preceding 4672.
Users of water failing to install headgates and weirs, punished 4709.
Uses, for which eminent domain may be used 5606.
Usufructuary right to water, defined 4674, 3105, and note preceding 4672.
Usurping office. See Elections.
Utilities, public, public service commission to control 4515-4548. See Public Service Commission.
Uttering, offering or disposing as true or having in possession with such intent, any forged writing or instrument 6667.
Uttering or passing fictitious check, bill or other paper 6665.

V

Vacancy, appointee to hold until next election 301.
Caused by removal, filled how 334-336, 2801.
County clerk to certify to 2795.
County commissioners to declare and fill 1518, 1607, 2802, 2805, 2813, 2853, 2874, 2892. See County Commissioners.
Directors of corporation, in, how filled 1223.
How filled 301, 1518, 1607, 1837, 2709, 2802, 2805, 2812, 2813, 2853, 2854, 2874, 2882.
How occasioned 2799, 2802.
In governor's office, who succeeds 310.
In legislature, governor to issue writ to fill 270.
In office, governor to fill, when 301, 406.
In office of judge or failure of term, not to affect action 4884.
In office, to be filled pending appeal from judgment removing officer for malfeasance 2854.
Irrigation district officers, how filled 4729.
Judicial officer removed by legislature, member not eligible for 336.
Justice of supreme court, governor may fill 301, 2812, 4831.
Officers, on whom devolve power to fill, duties of 334-336, 2801.
Pertaining to officers elected and elections 1837.
School trustees filled, how 3301, 3302.
Vacating roads, streets or public squares, local or special laws for, invalid 278.
Vacation of judgment, order or proceeding not to be made in district court unless upon notice within six months, rule xlv, p. 1431.
Vacation, powers of district court in 4842, 4850.
Vagrancy, defined 6619.

Vagrants, and disorderly persons, city may regulate 794(73, 74, 75).
Employment of 6620-6623.
Refusal to work, punished, how 6622.
Validation of restored records 5639.
Valuations, how placed on property 3838. See Revenue.
Valuations, how placed on property, and basis of determining value of land condemned for mines, and mining purposes 2462.
Valuations, list of property prepared by assessor, how, when 3632. See Revenue.
Variance in pleadings, civil 5080-5086. See Civil Practice.
Vein or ledge cannot be followed beyond end lines, when 2425-2426, 2380. See Mines and Mining.
Vending without license, prohibited, when 6808, 6810. See Licenses, under Revenue.
Venire, alias, for jurors in civil action in justice's court 5768.
Justice of the peace to issue, in action for abuse apprentices 491.
Of trial jurors, open to inspection 4930.
Sheriff to summon, when, how 4930. See Jury, Grand Jury.
Ventilation of mines 4231.
Venue. See Civil Practice, Criminal Practice.
Legislature not to pass local or special law for change of 278.
Verdict of jury. See Civil Practice, Criminal Practice.
Verdict, legislature may require unanimous, in civil cases 232.
Verification of pleadings. See Civil Practice.
Civil action, district court 5060-5064.
Civil action, justice's court 5721, 5770.
Tax suit, answer in 3664.
Vermin, inspectors, appointment of and duties 454-455.
Vested mining rights in irrigation districts not disturbed by irrigation projects 4788. See Water.
Veto power of governor, legislature may pass act over 293.
Vice-president of corporation, deposition of may be taken 5770.
Vice-president of United States, qualifications, term, eligibility, election of 97, 140, 142, 145.
Vicious animal, allowing at large, prohibited, when 6591.
Vicious dog, unlawful to keep, when 6441.
View by jury, when allowed, duty of officer in charge 7191, 5211.
Viewers, to be employed in proceedings for erection of partition fences 3604-3608.
Village property, exempt from taxes, when 3621. See Revenue.
Violation of laws. See Crimes and Punishments, and the several subjects indexed.
Virginia school of mines, creation and control of 4671.
Salary of principal 4671.
Voluntary manslaughter, defined 6387-6389. See Manslaughter.
Volunteer corps, legislature to encourage 363.
Volunteers, votes, manner of taking 1889. See Elections.
Volunteer weather stations 4406, 4409.
Vote. See Elections.
Lieutenant-governor as president of senate has casting 310.
Of legislature, viva voce 254.
Of people, by ballot 254.
Plurality constitutes choice 382.
Soldiers and sailors, right to, without paying poll tax 252.
Voters. See Elections.
Approval or rejection of law by, on submission to people, effect 413.
Corrupting, intimidating or deceiving, prohibited 6802, 6803.
Qualifications of 250.
Ten per cent may petition for referendum 412.
Voting, manner of 1753. See Elections.
Voting places 1865. See Elections.
Voting power of stockholders in corporation 1121. See Corporations.
Vouchers for claims against state to be sent by county treasurer to controller for final settlement, when, how 3749. See Revenue.

W

Wages, employee of insolvent corporation has preferred lien 1187.
Liable for poll tax, when 3718.
May be garnished for poll tax, how and when 3718. See Revenue.
Preferred claims against, attachment, action on 5493-5494.
Preferred claim against estates deceased persons 6145.
Preferred claim against, when 5493, 5494.
Preferred claim, lien by employee against insolvent corporation, when 1034.
Procedure for recovery as preferred claim against execution or attachment 5494.
Waiver of right to move for new trial 5328.
Waiver, what constitutes, how and when made. See Civil Practice.
War. See Constitution of United States.
Compensation to be made for property taken for public use in 237.
Soldiers not to be quartered on citizen 241.
When suspends statute of limitations 4979.
Ward, actions affecting, rights, privileges, obligations. See Guardians.
Action for seduction of or injury to 4995, 4996.
Action to be commenced on guardian's bond within 3 years 6185.
Guardian may join, in partition of real estate 6166.
Warden, fish and game, appointment, duties and removal 2052-2054. See Fish and Game.
Warden of state prison. See State Prison and Jails.
Allowing prisoners to escape, expense of recapture not to be paid by state 7595.
Books and papers of, open to inspection 7575.
Death sentence, when to execute 7274, 7281.
Duties and powers of 7565.
How to be elected, chief executive officer of prison, salary of, to reside at prison 7564.
May issue warrants for escaped prisoners 7594.

Warden of state prison—continued.
Not to recommend commutation of convicts who attempt to escape 7581.
Salary of and how paid 7593.
To advance funds to paroled prisoners 7632.
To certify to board of commissioners accounts for supplies furnished 7567.
To certify to controller expense of keeping United States convicts 7577.
To certify under oath to board of prison commissioners sums due for articles sold or labor performed 7573.
To direct work of convicts on public highways 7599.
To estimate one year's supplies 7568.
To execute bond, approved by chief justice 7562.
To make duplicate statement of articles manufactured and sold and money collected 7588, 7589.
To make monthly requisition for supplies 7566.
To make rules conducive to reformation of convicts 7584.
To make rules for separation and classification of prisoners 7584.
To pay convicts $25 when discharged 7596.
To recommend convicts for work on public highways 7598.
To separate convicts into three grades 7583.
When not liable for forfeiture for escape of convicts employed without prison walls by order of commissioners 7571.
Warehouseman, carrier liable as 538.
Warrant of arrest. See Civil Practice, Criminal Practice.
Bench 7037, 7246-7250.
Form of 7473.
May be sent by telegraph, when 4618, 5371, 5372, 6767.
To be shown, when 6959.
Warrant, search 247. See Criminal Practice 7415-7433.
Warrants, state or county. See State Controller, County Auditor.
Washoe County, creation, boundaries and seat 390, 409, 1444, 1447, 1450, 1483-1485.
Waste, actions for 5504-5513. See Civil Practice.
Waste ditches, right of way through private lands, how acquired 4712-4714. See Water.
Waste, during foreclosure may be enjoined 5519, 5520.
Waste, during period allowed for redemption of real property sold under execution, defined 5304.
Waste on real property, action for may be commenced within three years 4967.
Waste of water not permitted, when 4675.

WATER

[See Artesian Wells and Bounties, Mines and Mining, Public Lands.]
Action against user across highway 3024.
Action for damages against those polluting streams exists, when 4719.
Action to restore lost will or deed to water rights 5633, 5639.
Act of Congress of 1866, 2401.
Acts of Congress, note preceding section 4672.
Adjacent lands, how annexed to irrigation district 4771.
Administrators and guardians may sign petition annex lands to irrigation district when 4772.
Agent for state, state engineer, select Carey act lands, compensation 3090.
Appeal allowed from findings appraisers setting valuation private lands appropriated by ditch or flume builders 4711.
Appeal, parties aggrieved engineer's rulings or suit resulting therefrom, how 4690, 4701.
Applicant must furnish map of location irrigated lands and ditches to engineer's office, when 4702.
Application for injunction in water suits, opposing party may demand bond for damages 5195.
Application for water, when to be refused or approved 4697.
Application to state engineer to appropriate or divert, contain what 4695.
Aportionment of benefits from sale of bonds irrigation district, divided, how 4747.
Appraisers, how appointed to set valuation private lands appropriated by ditch, flume builders, when 4711.
Appraisers to set value lands private owners when appropriated by ditch or flume builders, how, when 4711.
Appropriate private lands, right given ditch and flume builders 4711.
Appropriation for desert lands 3150.
Appropriation, law and decisions relating to right by, note preceding section 4672, p. 1333.
Appropriation, what waters subject to 4672.
Appropriators every stream, list to be prepared by state engineer, how, when 4685.
Appropriators must obtain permission state engineer to divert, how 4695.
Aqueducts, injury to, penalty 6757.
Artesian wells, bounties for 702-717.
Assessment book irrigation district, prepared, kept by whom 4755.
Assessment declared on irrigation district, proportional, notice of 4747-4748.
Assessment erroneously made irrigation district, corrected, how, when, where 4756-4757.
Assessment irrigation district, how and when levied and collected 4755-4763.
Assessment may be levied against petitioners asking annexation lands to irrigation district, how, when 4775.
Assessment, payment of, where, to whom made 4760.
Assessment preferred lien, when, for how much, irrigation district 4759.
Assessment, semiannual statement of, made how, when, where 4767.
Assessment, special, board directors, how levied, by whom, when 4740.
Assistant state engineer appointed, how, salary, duties 4682.
Attorney-general, member state board of irrigation 4706.
Ballots for election irrigation district bonds, contain what 4745.
Ballots irrigation district election, by whom counted, disposed of, how 4730, 4731.

Belonging to others, paid for before diverting to irrigation scheme 4790.
Beneficial use 3105, 4674. See Ownership, p. 1337.
Beneficial uses, certain water subject to appropriation 4672.
Bids for construction work, notice of given and dispensed with, how, when 4764, 4765.
Board, correction for adjustment assessments, who 4757.
Board irrigation, determine number and compensation water commissioners 4694.
Board directors irrigation district to file with clerk district court petition confirming their action, how, when 4749.
Bond, for damages, may be demanded by opposing party for damages if injunction be issued in water suit 5145.
Bond fund irrigation district created, how 4758.
Bonds, form of, irrigation district, what 4746.
Bonds of irrigation district, how issued and disposed of, when, where 4745-4747.
Bonds irrigation district, may be withdrawn from sale, how, when 4752.
Bonds irrigation district, officers,' what, how approved, where recorded 4727.
Bonds irrigation district redeemed, how, when, where 4754.
Bonds irrigation district, sale of authorized, by whom, when 4752.
Boundaries irrigation district, how changed or extended 4771.
Boundaries of water districts fixed by county commissioners, how, when 4725.
Boundary, order for changing irrigation district made, how, when, by whom 4779.
Bounties for artesian wells 702-717.
Canals, acts of Congress, pp. 1435, 1436. See Ditches, Rights of Way.
Cancelation of permit, when, made by engineer 4697.
Canvass votes and election irrigation district officers, how conducted, when, where 4725-4733.
Canvass votes officers election district made public, how, when 4732, 4733.
Carey act lands, state engineer agent for state, to select, compensation 3090.
Certificate building ditch or flume issued, how, when 4710.
Certificate building ditch or flume recorded, where 4710.
Certificate election irrigation district officers, how and by whom issued, when 4729.
Certificate prior rights to be issued to appropriators, when 4689.
Certificate right to water applied for, to be issued applicant by engineer, when recorded, where 4703.
Changes in boundaries irrigation district recorded, by whom, when, where 4785.
Changing boundaries irrigation districts, accomplished, how 4771-4786.
Cities, supply of for 794(5, 28, 29, 39-44).
Claimants right to use water, must certify under oath to state engineer, what and when 4686, 4687.
Claimants to ownership of appropriators on streams, supply data to state engineer 4685.
Commissioners, apportion, according list priorities 4691.
Commissioners, interference with or resisting, misdemeanor 4704.
Commissioners, state board of, duties and powers 4693.
Company may condemn right of way 2138.
Compensation, officers and directors irrigation district, what 4738.
Compensation paid owners private lands when appropriated by ditch or flume builders, what 4711.
Compensation water commissioners, how fixed, and paid by whom 4694.
Condemnation of lands, how proceeded with secure right of way for ditches, waste ditches, flumes 4712, 4714.
Consolidation irrigation districts effected, how, when, where 4786.
Construction work and acquirement property for irrigation district, how contracted 4764-4770.
Contract for construction work irrigation district, how let, published, completed 4764.
Cost per acre state land within irrigation district improved thereby, what 4787.
Costs suit brought by aggrieved party against engineer, by whom, how paid 4690, 4701.
Costs survey excluding lands from irrigation district, what 4784.
County commissioners authorized levy tax for payment suits commenced prevent pollution streams, when 4717.
County commissioners define boundaries of water districts, how, when 4725.
County commissioners may examine books irrigation district directors, when 4744.
County commissioners may institute suit prevent pollution streams, when 4716.
County commissioners order election to determine consolidation mining districts, how, when 4786.
County recorder receive and record certificate appropriators' rights, fees 4689.
Damages, p. 1336.
Dams, injury to, penalty 6757.
Damages, action for, against those polluting streams, what 4719.
Debts, power to incur by board directors irrigation district, limited, how 4741.
Decree for indefinite quantity, p. 1337.
Deed lost or will lost affecting water rights, action to restore 5633, 5639.
Defective application appropriator for water rights, how corrected 4695.
Delinquent list of assessments published how, when, where 4761-4762.
Desert land laws, irrigation requirements 3150, 3154.
Directors and officers irrigation district have no interest in contract, when 4739.
Directors board of irrigation district, who, chosen, how 4725.
Districts, boundaries of, fixed by county commissioners, when 4725.
Districts, irrigation, how organized, by whom, when 4723.
Districts, irrigation, in existence before law creating irrigation districts, governed, how 4791.
Ditch, claim to record 4712.

Ditch and flume builders given right appropriate private lands, how, when 4711.
Ditch and flume owners entitled undisturbed right to ditch and flow, when 4712.
Ditch and flume, law extends to ditches and flumes already constructed or to be extended 4713.
Ditch and flume owner must make and record certificate of construction 4710.
Ditch and flume, proportional liability for repair, p. 1338.
Diversion unlawfully considered, what 4721.
Division or districts in state created, how, by whom 4693.
Drainage, p. 1336.
Duties state engineer designated 4679, 4681.
Election determine changing boundaries election district, held how, when, where 4778.
Election determine consolidation irrigation districts, held when 4786.
Election determine irrigation bonds to be issued, conducted how, when, where 4745.
Election directors irrigation district, conducted how, when, where 4725-4734.
Election officers by board directors irrigation district, how, when 4734.
Eminent domain granted by Nevada to irrigation projects, how, when 4770.
Eminent domain may be exercised on water rights, when 5606.
Erecting or maintaining unlawful structures in streams 6752.
Evidence of work adduced before engineer 4697.
Exclusion of lands from irrigation district, how accomplished 4782-4785.
Existing rights to be respected and preserved 4673.
Expenses state engineer and assistants paid, how, what 4683.
Failure claimant to make sworn statement to engineer when required, punished how 4687.
Federal laws, p. 1333.
Fees allowed county recorders to record certificates appropriators issued by engineer, what 4689.
Fees and charges of state engineer disposed of, how 4698.
Fees collected by state engineer to be paid into state treasury 4698.
Fees, recording certificate of engineer to applicant for right to water, what 4703.
Financial statement board directors irrigation district to be published, how, when, where 4742.
Forests, protection of to preserve water supply 2114-2119.
Form bonds irrigation district recorded, where 4746.
Form, sample of, for application for permit appropriate water 4695.
Franchises for 2139.
Guardians and administrators may sign petition annex land to irrigation district 4772.
Governor member state board of irrigation 4706.
Headgates and weirs to be installed by users, how, when 4707.
Hearing petition for annexation lands to irrigation district, set, when 4774.
Hearings and special proceedings confirming report irrigation commission, what 4751.
Highways, injury and damage to by, action for 3024, 3045, 3046, 6757, 6770, 6771.
Hydraulic engineer and experts may be employed by court, when 4690.
Improvements accruing to state lands in irrigation district appraised, how 4787.
Impure, furnishing for domestic use, penalty 6540.
Injunction, when issued in water suit, bond for damages, may be required 5145.
Injury to aqueducts or dams, penalty 6757.
Interest and irrigation bonds, how, when paid 4753.
Interest on irrigation district bonds, how, when, where paid 4746.
Interfering with commissioners or rules board irrigation, punished, how 4704.
Irrigating season. (See Twaddle v. Winters, 29 Nev. 88.)
Irrigation district directors to submit proposed plans irrigating district state engineer, how, when 4745.
Irrigation districts may be consolidated, how, when 4786.
Irrigation districts, officers' duties, powers, compensation 4734-4745.
Irrigation districts, officers, who, chosen, how 4725.
Irrigation districts organized, how, by whom, when 4723.
Irrigation ditches, duties as to 4724, 4725, 4744.
Irrigable lands and ditches to be platted by engineer, how, when 4688.
Issuance and sale of irrigation district bonds, conducted, how 4745-4747.
Instructions and forms issued by state engineer to claimants water rights 4688.
Land excluded from irrigation district by whom, how, when 4782-4785.
Land ordered annexed to irrigation district must be described 4777.
Lien assessment preferred, when on irrigation lands 4579.
List of priorities of appropriation prepared by state engineer 4685, 4689.
Levy and collection assessments irrigation districts made how, when, where 4755-4763.
Levy of assessments on irrigation lands, when made, how, by whom 4758.
Map and plats irrigable lands and ditches applied for furnished by applicant, when 4702.
Map irrigation district lands, provided how, when kept 4747.
Maximum quantity water allowed to be appropriated, what 4676.
Measurement of, what deemed standard 4677.
Method and procedure confirming report irrigation commission, what 4750.
Mining, vested rights not affected by irrigation projects, when 4788.
Notice application for appropriation, published when, where, at whose expense 4696.

Notice assessment on irrigation district, how, when, where given 4747, 4748.
Notice correction of assessment, given how, when, where 4756, 4757.
Notice creation irrigation district, where published, how long 4724.
Notice election consolidation irrigation districts how, when given and published 4786.
Notice election directors irrigation district, given how, published, how long, where 4725.
Notice election irrigation bonds, issuance of, how, when, where given 4745.
Notice letting of contracts for construction work, published and given, how, when, where 4764.
Notice for bids construction work irrigation district dispensed with, when 4765.
Notice of petition to annex lands irrigation district, must be published, how long, when, where 4773.
Notice, publication of, relative certain matters affecting irrigation districts, made how, when, where 4789.
Number and compensation commissioners determined how and paid 4694.
Oath and bond state engineer approved, how, amount of 4680.
Oath claimant's rights required 4686.
Obstruction and pollution streams not allowed 4718, 4716, 6547.
Office state engineer created, salary, qualifications, duties 4679.
Officers irrigation district, how chosen, who 4725.
Order changing boundaries irrigation districts, made how, when, by whom 4779.
Order changing boundaries irrigation districts, recorded, by whom, when, where 4780.
Order refusing or granting petition to annex lands to irrigation district may be made by directors 4776.
Organization irrigation districts, how and when effected 4723.
Overflow, p. 1337.
Ownership, beneficial use, p. 1337.
Owners private lands to be compensated for lands appropriated by ditch or flume builders, how 4711.
Parties aggrieved engineer's action refusing application may institute suit against, how, when 4701, 4696.
Parties aggrieved engineer's rulings have right of action 4690, 4701.
Patented lands subject to water rights and rights of way, p. 1337.
Payment assessments levied irrigation district must be made, how, when, where 4760.
Payment bonds and interest irrigation district paid, how 4753.
Payment claims against irrigation district, when authorized 4766.
Payment expenses acquiring property irrigation district, met how 4767.
Penalty unlawfully diverting for waste, designated 4722.
Penalty violations of law polluting streams, designated 4720.
Percolating waters, p. 1337.
Petition annexation adjacent lands irrigation district, made how, by whom 4771.
Petition and order changing boundaries irrigation district recorded in minutes, by whom, when 4781.
Petition for organization irrigation district, how prepared, contain what 4724.
Petitioners desiring annexation of lands may be assessed, by whom, how, when 4775.
Plans of headgates and weirs to be supplied users, when 4707.
Plat, measurement of, ditches and irrigable lands, engineer must make, when 4688.
Pollution of streams 4716-4720, 6546, 6547.
Prescriptive rights, p. 1337.
Prior or existing rights to, cannot be interfered with by ditch or flume builders 4712.
Prior right to unappropriated, acquired, how 4678.
Priority of newly appropriated rights, to be reckoned from, when 4703.
Property acquired for irrigation district, by whom, how, when 4735-4737.
Protection of supply by forests 2119.
Protest may be interposed to appropriator's application, when 4696.
Powers and duties board directors irrigation district designated 4734-4745.
Publication delinquent assessment list, made how, when, where 4782.
Publication notice irrigation district certain purposes 4789.
Publication notice to petitioners to create irrigation district 4724.
Punishment violations act to appropriate 4705.
Punishment users failing to install headgates and weirs 4709.
Purity of streams not to be polluted, how, when 4716, 4718, 6757.
Qualifications state engineer designated 4679.
Qualifications those entitled to vote to create irrigation districts designated 4723.
Quantity, maximum allowed to be appropriated 4676.
Rates chargeable, p. 1337.
Rates may be fixed by public service commission 4533, 4535.
Reclaiming of waters mingled with stream allowed, when 4715.
Reclamation act lands, right appurtenant to 3105.
Records or papers certified by state engineer admissible in evidence, when 4699.
Records of water rights lost or destroyed, validated, how 5630-5639.
Redemption of irrigation district lands and bonds, made how, when, where 4763.
Redemption of irrigation district bonds made, how, when, where 4754.
Repair of ditches, p. 1338.
Reports of state engineer, to make to whom, when 4684.
Reservoirs, 3170-3172, and p. 1336, and sections 4715, 4735.
Resisting or interfering with state engineer or assistants 4704.
Right conferred to enter and appropriate private lands for ditches or flumes 4711.
Right of way acquired through private lands by ditch or flume holders 4712, 4714.

Right of way across public lands 3169, 3171, 3172.
Right of way and condemnation for waste ditches, obtained, how 4712, 4714.
Right of way, irrigation ditches, acquired, how 4768, 4769.
Right of way, public lands 2401, 2417, 3169-1336.
Right of way over state lands, irrigation projects, given 4769.
Right of way reserved from patents 2401, 3169.
Right to use depends on putting to beneficial use 3105, 4674; see note preceding 4672.
Rights, action to restore lost will or deed to water right 5630, 5633, 5639.
Rights, eminent domain may be exercised for 4770, 5606.
Rights, vested by priority of possession 2401.
Riparian doctrine, p. 1338.
Rivers, erecting or maintaining unlawful structure on 6752.
Rule determining right to use, what 4674, 3105, and note preceding 4672.
Rules issued by state engineer followed by applicants to appropriate and divert 4695.
Running on highway 3024, 3045, 3046, 6757, 6770, 6771.
Salary state engineer designated 4679.
Sale bonds irrigation district, authorized, how, when, where 4752.
Sale delinquent assessment stock irrigation district, conducted how 4762.
Sawdust not allowed deposited in, when 4716, 4718, 6547.
Schedule of acts of Congress, p. 1333; of state statutes, p. 1338.
Seal of state engineer, how provided, contain what 4700.
Secretary interior to cooperate with state engineer, how, when 4681.
Seepage and evaporation, p. 1338.
Standard of measurement, what 4677.
State board of irrigation created 4706.
State board of irrigation, direct expenditures irrigation investigations 4706, 4692.
State board of irrigation, state engineer member and secretary thereof 4692, 4706.
State board commissioners duties and powers designated 4693.
State divided into districts by whom, how, when 4693.
State engineer, agent for state to select Carey act lands, compensation 3090.
Appoint assistants when, salary of, duties 4682.
Bureau of industry and irrigation, member of commission of 4486.
Carey act lands, agent to select for state, compensation 3090.
Cooperate with secretary of interior how, when 4681.
File report on plans irrigation district submitted to him, how, when 4745.
Furnish plans to users for headgates, weirs, how, when 4707.
Issue certificate, right to appropriate to applicants, when 4703.
Issue certificate to appropriators and county recorders to record same, when 4689.
Issue certified copies records, to whom 4699.
State engineer—continued.
Made defendant by applicant how, when 4701.
Make measurement, plat of ditches and irrigable lands, when 4688.
Make reports to whom, when 4684.
May install headgates and weirs, if users do not, when 4708.
Member and secretary state board irrigation 4692, 4706.
Office of, created, salary, duties, qualifications 4679.
Time within which ditch or flume must be commenced after making certificate required 4710.
Time within which headgates and weirs must be installed 4707.
Time within which owners must set valuation on lands desired by ditch or flume builders before appraisers will be appointed 4711.
Time within which parties aggrieved by engineer's rulings may bring action 4690, 4701.
Time within which parties aggrieved may bring action, reverse or modify engineer's rulings 4701, 4690.
Time within which state engineer must report on plans submitted to him by irrigation district directors 4745.
Tolls in irrigation districts levied, how, and collected 4767.
Towns, supply of, for 940-953.
Unappropriated, prior right acquired, how 4678.
Underground, rulings of state engineer relative to appropriating 4695.
United States geological survey records to be consulted by state engineer, when 4688.
United States laws, note preceding 4672.
Unlawful diversion and use of, what 4721.
Use of, existing rights thereto to be respected 4673.
Use of, limited to beneficial use, when 4674, 3105, and note preceding 4672.
Users, association 3110.
Users, failing install headgates and weirs, punished, how 4709.
Users, install headgates and weirs, how, when 4707.
Usufructuary right to, defined 4674, 3105, and note preceding 4672.
Vacancies office directors irrigation district, filled how 4729.
Valid appropriation, p. 1338.
Vested mining rights in irrigation districts not disturbed by irrigation projects 4788.
Vested rights, p. 1338. See Appropriation.
Vested rights not impaired by failure to protest against appropriator's application, when 4696.
Waste, unlawful diversion of 4722.
Waste ditches, right of way acquired through private lands, how, when 4714, 4712.
Waste of, not permitted, when 4675.
Water right, action to restore lost will or deed to 5633.
Water rights, eminent domain may be exercised for 5606.
Water rights, records of, lost or destroyed, validated, how 5639, 5630.
Water-users' association 3110.

Water company, may condemn for right of way, when 2138. See Water.
Watercraft, injury or interference with 6756.
Water pipes, public utility, refusing to connect 6844-6846.
Wearing dangerous hatpin 6829, 6830.
Weather bureau, annual report, to make 4407.
Central weather station established 4405.
County auditors, reporters, to be 4410.
Director, governor to appoint 4408.
Director, salary, how paid 4408.
Monthly report, to make 4408.
Secretary of state, necessary stationery to furnish 4407.
State printer, printing, to do 4407.
Stations, volunteer, instruments for, cost of, state property 4406, 4409.
Weights and measures 4792-4827.
Acre and square mile, defined 4798.
Act regulating measurement charcoal 4824-4827.
Action by party injured under act fixing standard 4812.
Appropriation for carrying out provisions weights and measures' act 4823.
Barrel and bushel of certain commodities, weight of 4802.
Barrel, contains how many gallons 4800.
Berries and fruit, standard measure, what 4806.
Bread, loaf of, standard measure, what 4803.
Bushel and fractions, standard measure of 4801.
Bushel, standard of charcoal, what 4824.
Butter, standard package of, contain what weight 4804.
Charcoal, act regulating measurement of 4824-4827.
City may regulate, 794(50-51).
Coal, how measured and weighed 4808.
Congress may regulate 115.
Contract as to weight and measure various commodities, construed how 4810.
County surveyor, duties of 4826.
Damages, right of action for by party injured by reason of act 4812.
Defining rod, mile and chain, what 4794.
Definition yard and fraction as unit of measure 4793.
Deputy sealer, obstructing, penalty 4817.
Director Nevada agricultural experiment station, official sealer of weights, duties 4814-4815.
District attorney to prosecute violations weights and measures act 4813.
Duties county surveyor, defined 4826.
Duty sealer prosecute violations, and other duties defined 4815.
False or short weight unlawful, punished how 4811-4812, 6708, 6709.
Firewood, standard cord of, what 4807.
Fruit and berries, standard measure, what 4806.
Gallon and fractions, unit of measure and capacity, defined 4799.
Hogshead, contains how many barrels 4800.
Metric system of weights and measures, not barred, when 4792.
Milk or cream or liquids, labeled, how, weight 4805.
Weights and measures—continued.
Neglect of duties of sealer or deputies, punished, how 4819.
Obstructing sealer or deputy, penalty 4817.
Official sealer, who, duties 4814-4815.
Package and container, defined 4821.
Packages, articles and merchandise, labeled, how 4809.
Penalty to obstruct or delay sealer or deputies in discharge of duties 4817.
Penalty for violating the act pertaining to charcoal 4827.
Perch of mason work or stone, defined 4796.
Person, defined 4822.
Pound, avoirdupois, ton, ounce, troy, defined 4798.
Powers and duties of sealer and deputies, defined 4816.
Rod, mile and chain, definition of 4794.
Sealed measures kept by persons dealing in charcoal, where 4825.
Sealer must test before condemning, penalty, what 4818.
Sealer, official, who, duties 4814-4815.
Sealer to keep records and report to governor, when 4820.
Sealer, powers of, defined 4816.
Square mile and acre, defined how 4795.
Standard bushel of charcoal, what 4824.
Standard loaf of bread, labeled, how 4803.
Standard weights and measures adopted 4792.
Terms, defined 4821.
Ton of coal, standard, what 4808.
Ton, ounce, troy 4798.
Units of measure gallon and fractions 4799.
Units of standard measure, length and surface, what 4793.
Units of weight, what 4797.
Weights, short or false on commodities sold, punished, how 4811-4812.
Wood, measured, how, standard cord, what 4807.
Wharves, eminent domain may be exercised for, when 5606.
White Pine County, creation, boundaries and seat 1486-1488.
"White slavery." See Houses of Prostitution 6445.
Widow. See Estates of Deceased Persons, Husband and Wife.
Estate of, heirs of deceased husband to inherit, when 6140.
Estate not exceeding $500, set apart to 5961, 5962.
Exemptions allowed to 2165, 3621.
Homestead, may retain 5956.
Rights under federal homestead law 3130, 3131.
Widower, estate of, heirs of deceased wife to inherit, when 6141.
When entitled to damages for wife 5650.
Wife, rights and liabilities. See Husband and Wife, Civil Practice, Married Woman.
Homestead not to be alienated without consent of 288, 2160. See Homestead 2142-2150.
Separate property of, defined 289, 2155.
Wife or child, abandonment of, penalty 6446.
Wife or child, failure to support, penalty 6481-6483.

Wild cat, bounty for 718-722.
Wild duck and other birds, game, closed season for 2089.
Wild game. See Game.
Wills, advancement considered in distribution 6120-6124.
Advancement, court to determine 6089.
Advancement, effect of 6218.
After-acquired property, how affected by 6221.
After-born children, share in estate 6215, 6218.
Agreement of testator to convey devised property 6213.
Attestation of witnesses 6204.
Bond or agreement to convey devised property, effect on 6213.
Cancelation of second does not revive first, exception 6210.
Certified copy of, to be admitted in evidence 5877.
Children born after, effect on 6215, 6218.
Children or issue of, when unprovided for 6216, 6218.
Codicil included in 6222, 5475.
Competency to make 6202.
Contest, in probate of will, issue of fact, how tried 5874.
Contest, who may make 5872, 5874.
Conversion, not applicable to 1070.
Creditor as witness 6205.
Debts not affected by 6202, 6005.
Delivery for probate 5859-5861.
Decedents of devisee, inherit share of 6219.
District court, power to probate 4849.
Estates settled according to 6005.
Executor, present for probate 5859.
Executor, renunciation of trust 5860.
Foreign, probate 5878, 5879.
Gifts or grants, when deemed advancement 6122.
Guardian named in 6150, 6161.
Holographic 2223-2225.
Holographic, how made and executed 6224.
Proved as other wills 6225.
Validity of 6223.
Witnesses not required 6224.
Implied revocation 6209.
Inheritance by decedent of devisee 6219.
Invalid, may not be validated by special law (Const.) 278.
Land, devise of construed 6220.
Lost or destroyed, probate 5880-5882.
Marriage, effect on 6211, 6212.
Married woman, power to make, alter or revoke 6203.
Mortgage not revocation 6214.
Neglect to file 5861.
Nuncupative 6204, 6206, 6208.
Nuncupative will, contest, who may make 6208.
Estates of $1000 or less, limited lo 6206.
Notice of probate 6208.
Probate of, procedure 6208.
Proof of 6206, 6297.
Three months for proof 6207.
Witnesses to 6206.
Order for, production 5864, 5865.
Persons competent to make 6202.
Petition for probate 5860.
Probate of 5857-5893.
Wills—continued.
Probate, petition for 5865.
Probate, proof 5871.
Probate, proof, sufficiency of 5873.
Probate, who may petition for 5862, 5863.
Production required 5954.
Proof of, to have court seal affixed 4879.
Provisions for debts or expenses 6005, 6202.
Refusal to produce, penalty 5865.
Requisites of, valid 6204.
Revival of earlier 6210.
Revocation, how affected 6509.
Revoked by marriage 6211, 6212.
Sale of property authorized by 6006, 6007.
Schedule of sections relating to 6202.
Statute of frauds not applicable to 1070.
Subscribing witness, subpena for 6870.
Testamentary capacity 6202.
Who may make 6202.
Witness, provision in favor, when void 6204.
Witnesses, attestation of 6204.
Winzes, in mines, to be protected 4221.
Withdrawal of papers from court records, permission, how obtained, rule xix, p. 1428.
Witness. See Civil Practice 5419-5449, Criminal Practice 7348-7384, 7451-7456.
Accepting bribe, penalty 6322.
Accused, not required to be, against self 237, 6857, 7161, 7451.
Attorney, client or attorney's secretary, when not to be 5425.
Fees of 2000, 2012, 2038.
Fees of, may be demanded, when 5431.
Husband or wife, against other 5422, 5424, 7452.
Judge or juror may be called as 5429.
Physician as, when 5427.
Prisoner may be, when 7349, 7363, 7459.
Religious belief, not to disqualify 233.
Subpena issued for, how 5432.
Sworn, refusal to be or answer, contempt, punished, how, when 5394.
Treason, two required for conviction 248.
Unreasonable detention forbidden 235.
Who may be 5409-5424, 5842, 5874.
Witness fees, attorney in case not entitled to 2038.
In civil action, to be taxed as costs, affidavit 2012.
In civil cases, to be taxed as costs, affidavit 2000.
In counties polling over 450 votes 2012.
May be recovered as costs although not actually paid 5387.
Not to be allowed for more than two witnesses to same fact 2012.
When paid garnishee 5189.
When not over 450 votes in county 2000.
Wolf, bounty for 718-722.
Woman, attempting to produce miscarriage 6405.
Forcing to marry, conviction for operates as divorce 6444.
Slander of 6434-6436.
Women. See Husband and Wife 2155-2194.
Eligibility to school offices 371.
Sole trader act 2190-2194.
Woman's Christian Temperance Union 1434-1439. See Corporations.
Wood. See Forests.

Woodchoppers have right of action and lien, when 2230.
Woodcock, closed season for 2089.
Words and terms, civil practice act, defined 5475.
Words and terms, crimes and punishments act, defined 6294.
Words and terms, criminal practice act, defined 7457.
Workhouses, city and town 794(77)
Workhouses, county, may be established 2924.
Working domestic animals without consent, penalty 6744.
Workman, defined 1916.
Injured, entitled to recover compensation 1915, 1924, 1925, 1932, 1938. See Employer and Employee.
Worship, freedom of religious guaranteed 233.
Writing, defined 6294(8).
Writing, instruments in, larceny of 6645.
Writings, inspection and proof of 5416-5418. See Civil Practice.
Lost, contents, how proved 5417.
Public or private, admission, inspection or proof of 5408-5418. See Civil Practice.
Writs, action in requiring various kinds of, procedure. See Civil Practice.
Assistance, issued how, when, by whom 4843.
Attachment, issued how, when, by whom 4870, 5150-5153, 5751, 5752, 5800, 3856. See Revenue.
Certiorari, issued how, when, by whom 4834, 4840, 5684-5686, 5690, 4843, 5711.
District court or judge, what may issue 321, 4840, 4843.
Election, issued how, when, by whom 2787-2798(U. S. Const. 91). See Elections.
Error, rules xviii-xxii, pp. 1424, 1425.
Error, bankruptcy 567.
Execution 1651, 5281, 5289.
Garnishment 5171-5272, 5190.
Habeas corpus, issued how, when, by whom (Const.) 234, 319, 4834, 6226. See Habeas Corpus.
Writs—continued.
Injunction, issued how, when, by whom 4840, 5145.
Mandamus, issued how, when, by whom (Const.) 319, 1710, 1712, 5701-5711, 5694-5699, 4834.
Or summons, when "process" if issued in judicial proceedings 5475.
Prohibition, issued how, when, by whom (Const.) 319, 5708-5711, 4840.
Quo warranto, issued how, when, by whom (Const.) 319, 4834, 4840, 4844, 5656-5682.
Restitution, issued how, when, by whom 5605.
Service of 1648-1651, 5150.
Supreme court, what may issue 320, 3191, 4834.
When may be served by telegraph 5371.
Written instruments, fraudulently or maliciously injuring or destroying, penalty 6671.
Written instruments copied in answer deemed genuine unless denied by affidavit 5063.
Written instruments when deemed admitted 5062, 5770.
Wrongful act, action for damages, by whom may be brought 5647, 5652.
Wrongful act, death by 5647.
Wrongful act, death by, judgment for damages not liable for debts 5648.
Wrongful act, death or injury by, contract for insurance, indemnity or relief benefit will not bar recovery 5652.
Wrongful act, jury may give damages, pecuniary and exemplary 5648.

Y

Yeas and nays, in legislature, to be entered at desire of three members 272.
To be entered on final passage of bill in legislature 276.
To be taken in each house on amendment to constitution 383.
Two-thirds of each house necessary to pass bill over governor's veto 293.
Young Men's Christian Association, property exempt from taxation, when 3842.

O


TYPOGRAPHICAL
UNION
LABEL
WASHOE

Service of Attachment 5152
Do & C — 5751
Undertaking on Attachment 5149
Publication of Summons — 5028
Session Laws 1913 - Page — 360
Attachment How Served 5152
Personal Injury — — 5649
Notice of Trial J & C. 5 days 5733
J & J Judgment Entered at Close of Trial 5774
Judgment Entered by Default — 5236
Exemption — — 5288
Misdemeanors — — — — — 6741
Crimes & Punishment — — — 6266
Common Law Marriage — — 6456
Advertising Divorce — — 6462
J. C. Criminal Practice — — 7470
Appeal to S. C. - Criminal Cases. 7512
Certificate on Summons when Served out of County — 5730
Notice How Given — — — 5364
Costs When Allowed — — — 5377
Rule on Execution — — — — 529

Unwritten — — — 6471-

Settlement no bar to action 5652

Undertaking Appeal — 079

Verdict Entered — 5266.
Execution dism 5898 — 5273
Judgment Roll — 5270
Judgment Book — 5283
Execution When Returned — 5288
Interest + Cost Entered on Judgm — 5278
Sales on Execution — 5292
Who may Redeem Property Sold — 5299
New Trial — 5320
Attorney has Lien on Case — 5376
[illegible] — 5475
[illegible] — 5482
[illegible] that constitutes — 6619
[illegible] — 6829
[illegible] to Arrestards — 6836
Posting Bills — 6753-6754
[illegible] — 6434
[illegible] — 5300
[illegible] — 5288
[illegible] not to have Pastures — 4867
Costs [illegible] Taxed By J.P. — 5778
[illegible] + Tenant Holding — 5588
[illegible] — 5806
[illegible] — 5592
[illegible] — 5493

Repealed — Page 2115

Notice Served By Mail — 5378

Action How Dismissed 5237

Quieting Title — 5514

Permitting Wife to Live in House of 4644

D. H. Kehoe,

Undertaking on Attachment 5147

J. P. Deputy — 7524

Posting Bills 745

Vagrancy — 6618

Invoking Jurisdiction 6578

Crimes Against Morality 6442

Eminent Domain 5606

Complaint What to Contain 5038

Answer — 5046

Reply — 5057

Bill of Particulars 5067

Order of Arrest 5744

Lewdness — 6460

Assault to Rape 6413

Libel — 6428-6433

Gross — 6264

Misdemeanor Defined — 6266