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1927

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EMBRACING THE ORGANIC LAWS, THE CONSTITUTION, AND THE STATUTES CONTAINED IN THE GENERAL STATUTES OF 1923, EXCEPT THOSE WHICH HAVE BEEN REPEALED OR SUPERSEDED BY THE SUBSEQUENT LEGISLATION OF 1925 AND 1927

AND ALSO EMBRACING LAWS OMITTED FROM THE GENERAL STATUTES 1923, AND THE LAWS OF THE 1925 AND 1927 SESSIONS OF THE LEGISLATURE UNDER APPROPRIATE CLASSIFICATION.

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9718. Corporation, when dissolved—If the court shall determine that a corporation, by neglect, abuse, or surrender, has forfeited its corporate rights, privileges, and franchises, it shall adjudge that it be excluded therefrom and be dissolved. (4552) [8262]

9719. Costs—If judgment be rendered in such action against a corporation, or against persons claiming to be such, the court may cause the costs therein to be collected by execution against such persons, or by process against the directors or other officers of such corporation. (4553) [8263]

9720. Judgment against corporation—Receiver, etc.—When such judgment is rendered against a corporation, the court may restrain it, appoint a receiver of its property, and make distribution thereof among its creditors, for which purpose the attorney general shall forthwith institute proceedings. (4554) [8264]

9721. Judgment roll—Copy filed—Upon rendition of such judgment against a corporation, or for the vacating or annulling of letters patent, the attorney general shall forthwith cause a copy of the judgment roll to be filed with the secretary of state. (4555) [8265]

CHAPTER 87.

SPECIAL PROCEEDINGS

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MANDAMUS

9722. To whom issued, etc.—The writ of mandamus may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. It may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, but it cannot control judicial discretion. (4556) [8266]

1. **When will lie**—The writ will only lie to compel the performance of acts which the law specially enjoins as a duty resulting from an office, trust or station (92–397, 100+105). It will not lie to control the action of the governor or other executive officers of the state even as to ministerial duties (4–309, 228; 19–103, 74; 20–363, 314; 24–517; 27–1, 6+341; 28–50, 8+902; 29–555, 12+519; 40–174, 41+817. See 3–190). It will not lie to test the right to a public office (2–180, 148; 15–221, 172; 15–455, 369; 17–113, 90; 25–340; 51–355, 53+716); or to enforce rights which are doubtful (9–139, 130; 17–113, 90; 17–429, 406; 18–40, 21; 27–458, 8+768; 32–501, 21+722; 58–514, 60+338; 95–442, 104+556); or to control discretion (32–324, 20+238; 38–397, 37+949; 44–549, 47+163; 60–510, 62+1135; 69–429, 72+705; 72–37, 74+1024; 74–371, 77+221. See as to compelling the exercise of discretion (58–275, 59+1015; 66–266, 68+1081; 77–302, 79+960; 86–350, 90+781); or to compel an officer to do an unauthorized act (2–346, 298; 26–521, 6+337; 27–90, 6+421; 32–275, 20+196; 33–381, 23+545; 92–397, 100+105); or where it would prove unavailing (33–381, 23+545; 43–328, 45+606); or to control internal affairs of foreign corporation (109–168, 123+417). Not a writ of right (95–442, 104+556). It will lie to compel calling of meeting of stockholders of domestic corporation (109–168, 123+417). It will not lie to regulate the affairs of unincorporated societies or associations (119–407, 138+432). Is exclusive remedy of parent county seeking to collect from new county its share of former's indebtedness (109–479, 124+372). Board of regents of university is an inferior tribunal, corporation, or board (104–359, 116+650).

164–49, 204+632.

Mandamus cannot be resorted to for the purpose of reviewing an order of the district court, determining the manner of trial of a civil action. If a jury trial is denied, where a litigant is entitled to it and asserts his right, the error can be reviewed only on appeal. 159–193, 198+453.

The writ may issue to require a court in which an action is pending to hear and determine it, although the clerk may have transmitted the records and files to another court. 159–282, 198+667.

Although mandamus was not intended as a reviewing writ, the practice of using it to settle disputes as to the proper place of trial has become firmly established. 159–282, 198+667.

An application for a writ of mandamus to compel a city council to submit a proposed ordinance to a vote of the people, pursuant to a charter provision, will not be denied because the ordinance binds the city only; it being assumed that the parties are acting in good faith. 163–100, 203+514.

Determination of fitness of soldier for public employment. 164–14, 204+572.

Where, in their answer, defendants attack the resolution, adopted by the voters of a common school district, for the building of a new schoolhouse, and deny authority of the electors in such matter, and make no effort to carry out the mandate of the voters, mandamus is proper to compel action. 164–134, 204+925.

Mandamus to compel the board of public welfare to issue a permit to inter a body in relator's cemetery, where there had been no interments and to the use for burials the city council had not consented, the court

rightly directed the entry of a judgment of dismissal. 167-410, 209+6.

2. **Necessity of demand before suit**—17-429, 406; 28-358, 10+22; 39-426, 40+561; 55-118, 56+585.

3. **Successive applications**—25-460.

See also: 121-182, 141+97; 126-265, 148+67; 126-367, 148+306; 126-501, 148+463; 128-225, 150+924; 132-36, 155+1048; 133-160, 157+1092; 134-355, 159+792; 135-479, 160+486; 150-499, 185+1020.

9723. On whose information, and when—The writ shall issue on the information of the party beneficially interested, but it shall not issue in any case where there is a plain, speedy, and adequate remedy in the ordinary course of law. (4557) [8267]

213+545, note under § 9468.

1. **On whose information**—25-340; 39-426, 40+561; 43-328, 45+606.

2. **Other adequate relief**—15-177, 136; 15-221, 172; 15-455, 369; 17-215, 188, 18+277; 25-340; 31-440; 41-25, 42+548; 77-302, 79+960; 80-108, 83+32; 82-88, 84+654; 92-397, 100+105; 95-442, 104+556; 128-530, 149+1070.

9724. Alternative and peremptory writs—Contents—The writ of mandamus is either alternative or peremptory. The alternative writ shall state concisely the facts showing the obligation of the defendant to perform the act, and his omission so to do, and command him that immediately after the receipt of a copy of the writ, or at some other specified time, he do the required act, or show cause before the court out of which the writ issued, at a specified time and place, why he has not done so, and that he then and there make his return to the writ, with his certificate thereon of having done as commanded. The peremptory writ shall be in similar form, except that the words requiring defendant to show cause shall be omitted. (4558) [8268]

15-221, 172; 39-219, 39+153; 39-426, 40+561; 75-473, 78+87. Requisites of alternative writ to which petition is attached (116-40, 133+67). Cited (119-407, 138+432).

135-277, 160+773.

9725. Peremptory writ—When the right to require the performance of the act is clear, and it is apparent that no valid excuse for non-performance can be given, a peremptory writ may be allowed in the first instance. In all other cases the alternative writ shall first issue. (4559) [8269]

12-382, 261; 42-284, 44+64. See 2-342, 294; 2-345, 297; 2-346, 298.

9726. Writ, how issued—Order—Service—Writs of mandamus shall be issued upon the order of the court or judge, which shall designate the return day, and direct the manner of service thereof, and service of the same shall be by copies of the writ, order allowing same, and petition upon which the writ is granted. (R. L. § 4560, amended '09 c. 408 § 1) [8270]

Constitutional (66-271, 68+1085). Order that writ be served "in the manner provided for by law" held sufficient (111-39 126+404). G. S. 1894 § 5979 cited (98-104. 107+1048).

9727. Answer—When and how made—On the return day of the alternative writ, or such further day as the court shall allow, the party upon whom the writ is served may show cause by answer made in the same manner as an answer to a complaint in a civil action. (4561) [8271]

Cited (119-407, 138+432).

122-163, 142+136.

9728. Default—New matter—Demurrer—If no answer is made, a peremptory mandamus shall be allowed against the defendant. If an answer is made, containing new matter, the plaintiff may demur thereto, or, on the trial or other proceedings, may avail himself of any valid objection to its sufficiency, or may rebut it by evidence either in direct denial or by way of avoidance. (4562) [8272]

Respondent may demur to petition and alternative writ (119-407, 138+432).

9729. Pleadings—Issues, trial, etc.—No pleading or written allegation other than the writ, answer, and demurrer, shall be allowed. They shall be construed and amended, and the issues tried, and further proceedings had, in the same manner as in a civil action. The demurrer need not be noticed for argument, but the issues raised thereby may be disposed of as are other objections to the pleadings. (4563) [8273]

Denials on information and belief and affirmative allegations in same form permissible (58-514, 60+338). Denials in answer of any knowledge or information sufficient to form belief not stricken out as sham (15-221, 172). Amendment of writ—proceeding elastic—relief allowable (39—219, 39+153; 39-426, 40+561; 75-473, 78+87). See also 115-6, 131+792). Sufficiency of pleadings considered (2-346, 298; 15-221, 172; 25-404; 29-440, 13+671; 31-440, 18+277; 55-118, 56+585). Judgment must be entered before writ issues (74-371, 77+221; 92-242, 99+807). Cited (119-407, 138+432). See 129-184, 151+971.

Court is not limited to a consideration of facts and conditions as they existed at the time the proceeding was initiated, but should take into consideration the facts and conditions existing at the time it determines whether a peremptory writ should issue. 156-475, 195+452.

When mandamus is used to review the order of the court on a motion to change the place of trial to promote the convenience of witnesses and the ends of justice, only the matters presented to the trial court can be considered by the Supreme Court. It sits in review and does not try the facts. 161-176, 201+298.

9730. Effect of judgment for plaintiff—Appeal—If judgment is given for the plaintiff, he shall recover the damage which he has sustained, together with costs and disbursements, and a peremptory mandamus shall be awarded without delay. An appeal from the district court shall lie to the supreme court in mandamus as in civil actions. (4564) [8274]

Appeal (92-242, 99+807). Judgment directing issuance cannot be collaterally impeached in proceedings to punish disobedience. If facts arise subsequently rendering modification proper, remedy is by motion in original action (98-102, 107+1048).

9731. Fines for neglect of duty—Whenever a peremptory mandamus is directed to a public officer, body, or board, commanding the performance of any public duty specially enjoined by law, if it shall appear to the court that such officer, or any member of such body or board, without just excuse, has refused or neglected to perform the duty so enjoined, it may impose upon him a fine of not more than two hundred and fifty dollars, which fine, when collected, shall be paid into the state treasury; and the payment thereof shall be a bar to an action for any penalty incurred by such officer or member, by reason of his refusal or neglect. (4565) [8275]

9732. Jurisdiction of district and supreme courts—The district court has exclusive original jurisdiction in all cases of mandamus, except where such writ is to be directed to a district court or a judge thereof in his official capacity, in which case the supreme court has exclusive original jurisdiction. In such case the supreme court, or a judge thereof, shall first make an order, returnable in term, that such district court or judge show cause before the court why a peremptory writ of mandamus should not issue, and upon the return day of such order the district court or judge may show cause by affidavit or record evidence; and, upon the hearing, the supreme court shall award a peremptory writ or dismiss the order. In case of emerg-

ency, a special term of the supreme court may be appointed for the hearing. (4566) [8276]

2-342, 294; 28-40, 8+899; 28-50, 8+902; 30-98, 14+459; 38-281, 37+782; 77-302, 79+960; 104-359, 116+650; 125-522, 146+480; 129-535, 152+654.

9733. Trial of issues of fact—Issues of fact in proceedings commenced in a district court shall be tried in the county in which the defendant resides, or in which the material facts stated in the writ are alleged to have taken place; and either party shall be entitled to have any issue of fact tried by a jury, as in a civil action. In any case commenced in the supreme court, where there is an issue of fact, upon request of either party that court shall transmit the record to the proper district court, which shall try the issue in the same manner as if the proceeding had been there commenced. A change of venue may be granted as in other cases. (4567) [8277]

Jury trial (25-404; 28-40, 8+899). Removal from supreme to district court (28-362, 10+17).

PROHIBITION

9734. Issuance and contents—Writs of prohibition shall be issued only by the supreme court, and shall be applied for upon affidavit, by motion to the court, or to a judge thereof in vacation. If the cause shown appears to the court or judge to be sufficient, a writ shall be issued, commanding the court and party or officer to whom it is directed to refrain from any further proceeding in the action or matter specified until the next term of the supreme court, or its further order therein, and to show cause at the next term thereof, or on some designated day in the same term, if issued in term time, why they should not be absolutely restrained from any further proceedings therein. (4568) [8278]

A writ of prohibition is an extraordinary writ issuing out of the supreme court for the purpose of keeping inferior courts or tribunals, corporations, officers and individuals invested by law with judicial or quasi judicial authority from going beyond their jurisdiction (13-244, 228; 13-493, 454; 15-369, 302; 19-117, 85; 42-30, 43+572; 70-58, 72+825). It is directed to the court or other tribunal and to the prosecuting party commanding the former not to entertain and the latter not to prosecute the action or proceeding (13-244, 228; 13-493, 454). The office of the writ is not to correct errors or reverse illegal proceedings, but to prevent or restrain the usurpation of inferior tribunals or judicial officers and to compel them to observe the limits of their jurisdiction (13-493, 454). The danger of usurpation must be real and imminent (4-366, 275; 13-493, 454). It is not a writ of right, but issues in the discretion of the court, and only in extreme cases where the law affords no other adequate remedy by motion, trial, appeal, certiorari, or otherwise (19-117, 85; 24-143; 26-162, 2+166; 26-233, 2+698; 35-178, 28+217; 44-76, 46+204; 70-58, 72+825; 77-302, 79+960). It is a preventive not a corrective remedy (92-176, 99+636). It is to be used with great caution and forbearance for the furtherance of justice and for securing order and regularity in the subordinate tribunals of the state (4-366, 275; 70-58, 72+825). The exercise of unauthorized judicial or quasi judicial power is regarded as a contempt of the sovereign which should be promptly checked (29-474, 523, 9+737; 42-30, 43+572). Three things are essential to justify the writ: first, that the court, officer or person is about to exercise judicial or quasi judicial power; second, that the exercise of such power by such court, officer or person is unauthorized by law; third, that it will result in injury for which there is no other adequate remedy (29-474, 523, 9+737; 70-58, 72+825; 77-302, 79+960). It is issued only to restrain the exercise of judicial powers. It will not issue to restrain the exercise by individuals or non-judicial parties of political, legislative or administrative functions (13-244, 228; 13-493, 454; 30-29, 14-58; 33-81, 21+860; 35-480, 29+585). It may issue to an officer or municipal body to prevent the unlawful exercise of judicial or quasi judicial power (29-474, 523, 9+737; 35-480, 29+585; 70-58, 72+825); and, in rare cases, it may issue to a person or body of persons not being in law a court, nor strictly officers (29-474, 523, 9+737; 42-30, 43+572). It will only lie where there is a want of jurisdiction of the subject matter (77-405, 80+355; 89-440, 95+211; 92-176, 99+636). But jurisdiction of the subject matter means in this connection jurisdiction of the general class of cases to which the particular case belongs. It does not mean jurisdiction of the subject matter of the particular case. If the court has jurisdiction of the general class of cases to which the particular case belongs and could properly proceed on any possible state of facts prohibition will not lie (see 70-58, 72+825; 89-440, 95+211). In an action proceeding in the ordinary way by summons, pleadings, trial, judgment, etc., where the cause of action is within the jurisdiction of the court, and in the course of the action any matter arises or is presented to the court which requires it to decide upon its jurisdiction, an error in such decision is to be corrected by appeal and not by prohibition (26-162, 2+166; 26-233, 2+698; 35-178, 28+217). A court does not lose jurisdiction of the subject matter by making an erroneous ruling or unauthorized order (77-405, 80+355; 89-440, 95+211). Prohibition does not lie for an excess of jurisdiction committed during the course of trial (24-143, 147). Some cases, however, suggest that prohibition will lie where an inferior tribunal assumes to entertain a cause over which it has jurisdiction but goes beyond its legitimate power and transgresses the bounds prescribed by law (70-58, 72+825; 92-176, 99+636. But see 26-162, 2+166; 26-233, 2+698; 35-178, 28+217; 77-405, 80+355). A court may lose its jurisdiction during the course of an action by reason of the subject matter passing beyond its control (19-117, 85; 44-76. 46+204). Prohibition will not lie to question the jurisdiction of the court over the person of the defendant (26-233, 2+698. See 135-99, 160+198; 136-455, 161+164.

The writ of prohibition is one of discretion and not of right. 210+40

9735. Service and return of writ—Such writ shall be served upon the court and party or officer to whom it is directed in the same manner as a writ of mandamus; and a return to such writ shall be made by such court or officer, the making of which may be enforced by attachment. (4569) [8279]

13-493, 454.

9736. Adoption by party of return—If the party to whom such writ is directed, by an instrument in writing signed by him and attached to such return, shall adopt the same, and rely upon the matters therein contained as sufficient cause why such court should not be restrained as demanded in the writ, such party shall thereafter be deemed the defendant in the proceeding, and the person prosecuting such writ may take issue or demur to the matters so relied upon by such defendant. (4570) [8280]

9737. When return not so adopted—If the party to whom the writ is directed shall not adopt such return, the party prosecuting the writ shall bring on the argument of such return as upon an order to show cause; and he may, by his own affidavit and other proofs, controvert the matters set forth in such return. (4571) [8281]

9738. Judgment—Writ of consultation abolished—If upon final hearing an order is made in favor of the relator, it shall award a writ of prohibition absolute, and it may also direct that all or any of the proceedings theretofore taken in the matter as to which such writ issues be annulled. The writ of consultation is hereby abolished, and the final order, if it be against the relator, shall authorize further proceedings as if the first or alternative writ had not issued. The court may make and enforce such order concerning costs and disbursements, and the amount thereof, as justice shall require. (4572) [8282]

HABEAS CORPUS

9739. Who may prosecute writ—Every person imprisoned or otherwise restrained of his liberty, except persons committed or detained by virtue of the final judgment of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment, may prosecute a writ of habeas corpus to obtain relief from such imprisonment or restraint, if it proves to be unlawful; but no order of commitment for any alleged contempt, or upon pro-

ceedings as for contempt to enforce the rights or remedies of any party, shall be deemed a judgment, nor shall any attachment or other process issued upon any such order be deemed an execution, within the meaning of this section. (4573) [8283]

1. **Unconstitutional law**—If the law under which a person is held is unconstitutional he may be discharged although held under a "final judgment" (43-250, 45+232; 48-236, 51+112, 31 Am. St. Rep. 650; 55-467, 57+206, 57+794).

2. **Want of jurisdiction**—If the court is without jurisdiction, either of the person or subject matter, it is *not a "competent tribunal" within this section (42-147,* 43+845; 54-135, 55+830; 74-518, 77+424; 85-114, 88+415).

3. **Not a substitute for appeal**—Where a person is confined under the final judgment of a court he can be released on habeas corpus only for jurisdictional defects. Habeas corpus cannot be allowed to perform the function of a writ of error or appeal. If a court has jurisdiction of the person and subject matter and could have rendered the judgment on any state of facts, the judgment, however erroneous or irregular or unsupported by the evidence, is not void, but merely voidable, and habeas corpus is not the proper remedy to correct the error (24-87; 39-172, 39+65; 54-135, 55+830; 55-467, 57+206, 794; 68-320, 71+396; 68-465, 71+681; 69-265, 72+79; 69-451, 72+703; 73-77, 75+1029; 74-518, 77+424; 78-377, 81+9; 109-434, 124+11; 112-121, 127+465; 112-428, 128+454; 116-1, 133+86; 117-173, 134+509).

A writ of habeas corpus does not take the place of an appeal or writ of error. 213+56.

3a. **Office of writ.**

The evidence is sufficient to sustain the action of the examining magistrate in holding the relator to answer in the district court to the charge of furnishing intoxicating liquor portable as a beverage to a minor. Writ of habeas corpus discharged. 213+556.

3b. **Custody of children.**

161-532, 201+631.

The findings to the effect that relator, the mother, was fit and suitable and situated financially and in other respects to afford her child proper care, therefore entitled to its custody and control, held sustained by the evidence. 156-178, 194+326.

The evidence warrants the conclusion that relator and his wife, the parents of the child, Irene, temporarily placed in the custody of respondents, are morally and financiallyy fit and able to properly rear and educate their child, and should be awarded custody of the same. *164-573, 205+267.*

3c. **Insane persons.**

Whether the relationship of the petitioner to the alleged defective as relative or guardian, and his residence in the county, are jurisdictional facts, quaere *210+14.*

Jurisdiction of the probate court was not negatived, and no relief could be given on habeas corpus. 210+14.

3d. **Conviction pending appeal.**

A judgment of conviction of the relator in a state court held not void under R. S. U. S § 766 (Mason's Code 28:65), because at the time of the trial of the indictment resulting in the conviction there was pending in the United States Circuit Court of Appeals an appeal from an order of the United States District Court discharging a writ of habeas corpus issued upon the petition of the relator. 158-473, 198+309.

Section 766 of the Revised Statutes of the United States (Mason's Code, 28:365) provides in effect that a judgment in a state court, convicting a person of a criminal offense, cannot be enforced during the pendency of an appeal from an order of a federal court discharging a writ of habeas corpus by which the validity of the judgment was brought into question. The pendency of such an appeal does not stay the enforcement of another judgment of conviction rendered by the *state court in another prosecution for a similar offense,* separate and distinct from the offense involved in the proceeding in the federal court. 167-343, 209+24.

3e. **Denial of change of judge.**

Where a court having jurisdiction of the subject-matter and of the defendant erroneously denies an application for change of judge, the remedy is by appeal. The defendant is not entitled to be discharged on a writ of habeas corpus. 159-403, 199+103.

3f. **Sentence invalid in part.**

A sentence imposing imprisonment as a punishment, and imprisonment to coerce the payment of costs, the two exceeding 3 months, is not void altogether; and one imprisoned is not entitled to his liberty until he has served the valid portion of his sentence. 164-289, 204+955.

4. **Review of evidence**—When a person is restrained under a final judgment the sufficiency of the evidence to sustain the judgment cannot be reviewed on habeas corpus (69-451, 72+703, and cases cited), but the evidence on which a committing magistrate has committed a person may be reviewed for the purpose of determining whether it fairly and reasonably tends to show the commission of the offense charged and whether it fairly and reasonably tends to make a probable cause for charging the prisoner with its commission (31-110, 16+692; 35-283, 28+659; 85-114, 88+415).

5. **How far discretionary**—Although the writ of habeas corpus is a constitutional and imperative writ of right it does not issue as a matter of course to every applicant. The petition for the writ must show probable cause for issuing it and where the petition on its face shows no sufficient prima facie ground for the discharge of the applicant, the writ may be legally refused (64-226, 66+969; 73-126, 75+1132).

6. **Successive applications**—A decision of one court or officer on a writ of habeas corpus refusing to discharge a prisoner is not a bar to the issuance of another writ based on the same state of facts as the former writ, by another court or officer, or to a hearing or discharge thereon (31-110, 16+692; 37-360, 34+334); otherwise in proceedings for the possession of a child (37-360, 34+334; 61-539, 63+1113).

7. **Restraint by guardian**—*86-310, 90+769.*

8. **Restraint in insane hospital**—Where person, tried for crime and committed on ground of insanity, recovers sanity, habeas corpus is proper remedy (116-62, 133+82).

9. **Scope of review in extradition cases**—38-243, 36+*462; 84-237, 87+770; 111-132, 126+482.* See 128-84, 142+1051; 123-508, 144+157; 126-38, 147+708; 132-295, 156+127; 136-332, 162+353.

9740. Petition—To whom and how made—Applica*tion for such writ shall be by petition, signed and veri*fied by the petitioner, or by some person in his behalf, to the supreme court, or to the district court of the county within which the petitioner is detained. Any *judge of the court to which the petition is addressed,* being within the county, or, if addressed to the district court, the court commissioner of the county, may grant the writ. If there be no such officer within the *county capable of acting and willing to grant such* writ, it may be granted by some officer having such authority in any adjoining county. (4574) [8284]

Application to court commissioners (10-63, 45; 17-340, 315; 38-278, 37+338; 64-226, 66+969; 83-252, 86+89; 91-5, 97+371); to judges of the district court (10-63, 45; 64-226, 66+969); to judges of the supreme court (10-39, 22; 31-110, 16+692; 47-518, 50+607); to judge of adjoining county (47-518, 50+607). See 124-456, 145+167; 127-102, 148+896.

9741. Proof in certain cases—Whenever application for such writ is made to an officer not within the county where the prisoner is detained, he shall require proof, by the oath of the applicant or other evidence, that there is no officer in such county authorized to grant the writ, or that all so authorized are absent, or for reasons specified are incapable of acting, or have refused to grant such writ; and, if such proof is not produced, the application shall be denied. (4575) [8285]

On habeas corpus, where evidence did not establish conclusively that relator was ot fugitive from justice of another state, writ was properly discharged. 162-52, 203+226.

9742. Statements in petition—The petition shall state, in substance:

1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so imprisoned or restrained, and the place where; naming both parties if their names are known, or describing them if they are not.

2. That such person is not committed or detained by virtue of any process, judgment, decree, or execution as hereinbefore specified.

3. The cause or pretense of such confinement or restraint, according to the knowledge or belief of the party verifying the petition.

4. If the confinement or restraint be by virtue of

any warrant, order, or process, a copy thereof shall be annexed, or it shall be averred that, by reason of such prisoner being removed or concealed before application, a demand of such copy could not be made, or that such demand was made, and the legal fees therefor tendered to the officer or person having such prisoner in his custody, and that such copy was refused.

5. If the imprisonment is alleged to be illegal, the petition shall state in what the illegality consists. (4576) [8286]

The petition should state in what the illegality of the imprisonment consists and this should be done by stating facts as distinguished from mere conclusions of law. If the confinement is by virtue of a warrant a copy thereof must be annexed or a reason averred for not doing so (23-1; 73-126, 75+1132). The petition must show probable cause for issuing the writ (64-226, 66+969).

167-343, 209+24, note under § 9739.

9743. Form of writ—Every writ of habeas corpus shall be under the seal of the court, and substantially in the following form:

The State of Minnesota, to the Sheriff of, etc. (or to A. B.):

You are hereby commanded to have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said C. D. shall be called or charged, before E. F., judge of the .... court, at ...., on .... (or immediately after the receipt of this writ), to do and receive what shall then and there be considered concerning the said C. D. And have you then and there this writ.

Witness, etc. (4577) [8287]

Seal of court essential (17-340, 315).

9744. When sufficient—Such writ shall not be disobeyed for any defect of form. It shall be sufficient if the petitioner, and the person having him in custody, be designated therein with reasonable certainty, by name, description, or otherwise. Either may be designated by an assumed name if his true name be unknown or uncertain, and any person served with the writ shall be deemed the person to whom it is directed, although the name or description be wrong, or be that of another person. (4578) [8288]

124-457, 145+167.

9745. Refusal to grant — Penalty — If any officer authorized to grant writs of habeas corpus wilfully refuses to grant such writ when legally applied for, he shall forfeit to the party aggrieved one thousand dollars for every such offence. (4579) [8289]

64-226, 66+969.

9746. Return to writ—The person upon whom any such writ is duly served shall state in his return, plainly and unequivocally:

1. Whether he has or has not the party in his custody or under his control or restraint, and, if he has not, whether he has had him in his custody or under his control or restraint at any and what time prior or subsequent to the date of the writ.

2. If he has the party in his custody or under his control or restraint, the authority and true cause of such imprisonment or restraint, setting forth the same at large.

3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return, and the original shall be produced and exhibited, on the return of the writ, to the officer before whom the same is returnable.

4. If the person upon whom such writ is served has had the party in his custody or under his control or restraint at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause, and by what authority, such transfer took place.

The return shall be signed by the person making the same, and, except where such person is a sworn public officer, and makes his return in his official capacity, it shall be verified by oath. (4580) [8290]

9747. Body produced — Exception — The person or officer on whom the writ is served shall bring the body of the person in his custody, according to the command of such writ, except in the case of the sickness of such person, as hereinafter provided. (4581) [8291]

9748. Compelling obedience—If the person upon whom such writ is served refuses or neglects to produce the person named therein and make a full return thereto at the time and place required, and no sufficient excuse is shown, the officer before whom such writ is returnable, upon proof of service thereof, shall forthwith issue an attachment against such person, directed to the sheriff or coroner of any county, and commanding him forthwith to apprehend such person and bring him before such officer; and, on such person being so brought, he shall be committed to the county jail until he shall make return to such writ and comply with all orders made by such officer in the premises. (4582) [8292]

9749. Prisoner held in custody by sheriff—The officer by whom any such attachment is issued may also, at the same time or afterward, issue a precept to the sheriff or other person to whom the attachment was directed, commanding him to bring forthwith before such officer the party for whose benefit such writ was allowed, who shall thereafter remain in the custody of such sheriff or person until he is discharged, bailed, or remanded, as such officer shall direct. (4583) [8293]

9750. Proceedings on return of writ—The officer before whom the person is brought on such writ, immediately after the return thereof, shall examine into the facts set forth in such return, and into the cause of the imprisonment or restraint, whether the same was upon commitment for a criminal charge or not. (4584) [8294]

Cited (101-303, 112+260).
210-110.

9751. Prisoner discharged, when—If no legal cause is shown for such imprisonment or restraint, or for the continuation thereof, such officer shall discharge the petitioner therefrom. (4585) [8295]

9752. Prisoner remanded, when—The officer shall forthwith remand such person, if it appears that he is detained in custody:

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction;

2. By virtue of the final judgment of a competent court of civil or criminal jurisdiction, or of an execution issued upon such judgment;

3. For any contempt, specially and plainly charged in the commitment, by some court, officer, or body having authority to commit for the contempt so charged; or

4. That the time during which such person may be legally detained has not expired. (4586) [8296]

106-138, 118+676.
149-301, 183+670; 153-161, 189+711.
167-343, 209+24, note under § 9739.

9753. Held under process, when discharged—If it appears on the return that the prisoner is in custody by virtue of civil process of any court legally constituted, or issued by an officer in the course of judicial proceedings before him, authorized by law, such prisoner can be discharged only in the following cases:

1. When the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum, or person;
2. Where, though the original imprisonment was lawful, yet, by some act, omission, or event which has taken place afterward, the person is entitled to be discharged;
3. Where the process is defective in some matter of substance required by law, rendering it void;
4. Where the process, though in proper form, has been issued in a case not allowed by law;
5. Where the person having the custody of the prisoner under such process is not the person empowered by law to detain him; or
6. Where the process is not authorized by any judgment or order of any court, or by any provision of law. (4587) [8297]

Legal existence of court organized under color of law cannot be questioned in habeas corpus sued out by person convicted and sentenced (106-138, 118+676). Cited (116-62, 133+82).

9754. Bailed, remanded, etc., when—If it appear that the petitioner has been legally committed for a criminal offense, or if upon hearing it appears by the testimony offered with the return that he is guilty of such offense, although the commitment is irregular, the officer before whom he is brought shall admit him to bail, if the case is bailable and good bail be offered, or, if not, he shall forthwith remand him. In other cases he shall be placed in the custody of the person legally entitled thereto, or, if no one is so entitled, he shall be discharged. (4588) [8298]

156-506, 194+460.

9755. Custody until judgment—Until judgment is given upon the return, the officer before whom such person is brought may either commit him to the custody of the sheriff of the county, or place him in such other custody as his age and other circumstances require. (4589) [8299]

9756. Notice of proceeding—In criminal cases, if the prisoner is confined in a town, village, city or county jail, notice of the time and place at which the writ is returnable shall be given to the county attorney of the county from which the prisoner was committed, if such county attorney is within his county; if the prisoner is confined in a state institution, said notice shall be given to the attorney general, whose duty it shall be to appear for the person named as respondent in said writ; in other cases, like notice shall be given to any person interested in continuing the custody or restraint of the party seeking the aid of such writ. (R. L. '05 § 4590, G. S. '13 § 8300, amended '15 c. 227 § 1)

9757. Traverse of return—New matter—The petitioner, on the return of any writ, may, on oath, deny any of the material facts set forth in the return, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge; and thereupon such officer shall proceed, in a summary way, to hear such allegations and proofs as are legally produced in support of such imprisonment or detention, or against the same, and so dispose of such person as justice requires. (4591) [8301]

Traverse of return (24-87). If the petitioner does not plead, the petition must be disposed of forthwith on the return alone without the introduction of evidence (55-467, 57+206, 794). See 149-437, 183+957.

9758. Proceedings in case of sickness of prisoner—Whenever, by reason of sickness or infirmity, the petitioner cannot, without danger, be brought before the officer before whom the writ is returnable, the person in whose custody he is may state that fact in his return; and if the officer is satisfied of the truth of such statement, and the return is otherwise sufficient, he shall decide upon such return and dispose of the matter. The petitioner in such case may appear by attorney and plead to the return as if he were present, and, if it appear that the petitioner is illegally imprisoned or restrained of his liberty, the officer shall order those having him in custody to discharge him forthwith; but if it appear that he is legally imprisoned or restrained, and is not entitled to be admitted to bail, said officer shall dismiss the proceedings. (4592) [8302]

9759. Order of discharge, how enforced—Obedience to any order for the discharge of a prisoner may be enforced by the officer issuing the writ or granting the order, by attachment, in the same manner as provided for neglect to make return to a writ of habeas corpus; and the person guilty of such disobedience shall forfeit to the person aggrieved one thousand dollars in addition to any special damages sustained by him. (4593) [8303]

9760. Re-arrest of person discharged—No person who has been discharged upon a habeas corpus shall be again imprisoned or restrained for the same cause, unless indicted therefor, convicted thereof, or committed, for want of bail, by some court of record having jurisdiction of the cause, or unless, after a discharge for defect of proof, or for some material defect in the commitment in a criminal case, he shall be again arrested on sufficient proof, and committed by legal process. (4594) [8304]

31-110, 16+692; 37-405, 34+748.

9761. Transfer or concealment of person—Forfeiture—If any one who has in his custody or under his control a person entitled to a writ of habeas corpus, whether a writ has been issued or not, transfers such prisoner to the custody, or places him under the power or control of another person, conceals him, or changes his place of confinement, with intent to elude the service of such writ or to avoid the effect thereof, he shall forfeit four hundred dollars to the party aggrieved thereby, to be recovered in a civil action. (4595) [8305]

9762. Refusal to furnish copy, etc.—Any officer or other person refusing to deliver a copy of any order, warrant, process, or other authority by which he detains any person, to any one who shall demand the same and tender the fees therefor, shall forfeit two hundred dollars to the person so detained. (4596) [8306]

68-509, 71+687.

9763. Service of writ—Bond—The writ can be served only by a legal voter of the state. The officer granting it may require a bond to the state in a sum not exceeding one thousand dollars, conditioned for the payment of all costs and expenses of the proceeding, and the reasonable charges of restoring the prisoner to the person from whose custody he was taken, if he shall be remanded. Such bond shall be approved by the officer issuing the writ, and be filed with the clerk. (4597) [8307]

9764. Service of writ—The writ of habeas corpus may be served by delivering the same to the person to whom it is directed, or, if he cannot be found, by leaving it at the jail or other place in which the prisoner is confined, with any underofficer or other person of

proper age having charge for the time of such prisoner. If the person upon whom the writ ought to be served conceals himself, or refuses admittance to the party attempting to serve the writ, it may be served by affixing the same in some conspicuous place on the outside either of his dwelling house, or of the place where the party is confined. (4598) [8308]

9765. Return to be made, when—If the writ is returnable on a certain day, return shall be made and the prisoner produced at the time and place specified therein. If it is returnable forthwith, and the place is within twenty miles of the place of service, such return shall be made and the prisoner produced within twenty-four hours, and the like time shall be allowed for every additional twenty miles. (4599) [8309]

9766. Power of court not restrained—Nothing herein shall prevent any court from issuing a writ of habeas corpus necessary or proper to bring before it any prisoner for trial, or to be examined as a witness in any action or proceeding, civil or criminal, pending in such court. (4600) [8310]

9767. Appeal to supreme court—Any party aggrieved by the final order in proceedings upon a writ of habeas corpus may appeal therefrom to the supreme court in the same manner as other appeals are taken from the district court, except that no bond shall be required of the appellant. Upon filing notice of appeal with the clerk of the district court, and payment or tender of his fees therefor, such clerk shall forthwith make, certify, and return to the clerk of the supreme court copies of the petition, writ, return of respondent, answer, if any, of the relator thereto, and the order appealed from. (4601) [8311]

61-539, 63+1113; 65-453, 68+77; 66-291, 68+1089; 69-104, 72+53; 77-483, 502, 80+633, 778; 78-166, 80+877; 83-252, 86+89; 84-203 87+489; 84-237, 87+770; 86-310, 90+769; 91-277, 97+972; 93-294, 101+303; 99-49, 108+880; 123-85, 142+1057; 135-321, 160+858; 143-149, 173+414; 148-486, 181+640.

9768. Hearing on appeal—The appeal may be heard before the supreme court whenever it is in session, upon application of either party to said court or a justice thereof. The order fixing the time of hearing, which shall not be less than six nor more than fifteen days from the date of application, shall be served on the adverse party at least five days before the date so fixed. The appeal shall be tried and judgment rendered in the same manner as if the writ had originally issued out of the supreme court, and, if the person in whose behalf the writ is applied for is a child of tender years, the court, as a part of its judgment, shall determine who is entitled to control his education and training. No costs or disbursements shall be allowed any party to such appeal, nor shall any of the papers used on such hearing be required to be printed. (4602) [8312]

Trial de novo (110-103, 124+634). Errors and irregularities occurring on trial below need not be considered (119-368, 138+315). Rules as to service of briefs and assignments of error have no application (116-1, 133+86). Cited (98-533, 107+1134; 99-49, 108+880).

123-509, 144+157; 149-437, 183+956.

After an extended examination and consideration of the evidence as shown by the record in this case, we are satisfied that, for the present, the welfare and best interests of the child demand that she be left with the respondent, and that, for such reason, the writ should be dismissed. 166-423, 208+131.

CERTIORARI

9769. Within what time writ issued—No writ of certiorari shall be issued, to correct any proceeding, unless such writ shall be issued within sixty days after the party applying for such writ shall have received due notice of the proceeding sought to be reviewed thereby. ('09 c. 410 § 1) [8313]

127-519, 148+1082; 129-300, 152+541; 134-191, 158+826; 136-461, 161+714; 137-267, 161+1055; 148-336, 181+858; 194+403.

165-50, 205+691; 167-307, 209+3.

In general.

A writ of certiorari will not lie to a special tribunal which has gone out of existence. 162-251, 202+444.

The determination of the rightfulness of the actions of county official in assessing omitted moneys and credits will not be determined on certiorari. There is an adequate legal remedy by way of defense. 166-414, 208+181.

Time for issuance.

After the period allowed for an appeal from an order or judgment of the probate court, there can be no review on the merits by certiorari. 161-88, 200+848.

Writ of certiorari properly quashed because not issued within 60 days after applicant therefore had admitted due service of notice of order sought to be reviewed. 212+29.

Notice.

Actual notice does not take place of writte nnotice. 163-383, 202+52.

Service of writ. 165-493, 206+718.

Findings of fact. 158-532, 197+257.

Compensation proceedings.

Certiorari to review a judgment awarding compensation to the relator under the Workmen's Compensation Law. The only questions presented are questions of fact not within the province of this court to determine. 131-153, 201+141.

Drainage proceedings.

The order so made on that hearing, finding the facts stated and establishing the proposed ditch, is final as to such questions, reviewable only by certiorari directed to that particular order. 156-95, 194+402.

It cannot be reviewed on certiorari sued out in review of the final order confirming the proceedings had in laying the ditch in compliance with the first order. 156-95, 194+402.

The drainage law does not give the petitioners the right to appeal from an order of the district court dismissing proceedings to establish a ditch. The order may be reviewed by certiorari. 159-140, 198+455.

An order of the district court merging six public drainage systems and several private tile drains, held to be such a final order as may be reviewed by certiorari. 159-428, 199+883.

9770. When served—Such writ must also be served upon the adverse party within said period of sixty days. ('09 c. 410 § 2) [8314]

137-265, 161+714.

165-493, 206+718; 212+29, note under § 9769.

Informal service of the writ of certiorari on the adverse party was made within 60 days from notice of the decision. The conduct of respondents thereafter was such as to lead relator to believe that no advantage would be sought by them because of lack of service. 166-339, 208+18.

9771. Surety for costs in civil case—Each writ of certiorari in a civil case shall be indorsed by some responsible person as surety for costs. ('09 c. 410 § 3) [8315]

149-116, 182+986.

9772. Costs—The party prevailing on a writ of certiorari in any proceeding of a civil nature shall be entitled to his costs against the adverse party; and in case such writ shall appear to have been brought for the purpose of delay or vexation, the court may award double costs to the prevailing party. ('09 c. 410 § 4) [8316]

9773. When dismissed—Costs—If any writ of certiorari shall hereafter be issued contrary to any provision of this act, or shall not be served upon the adverse party within said period of sixty days, the party against which the same is so issued may have the same dismissed on motion and affidavit showing the facts and shall be entitled to his costs and disbursements the same as in other civil actions. ('09 c. 410 § 5) [8317]

129-301, 152+541.