Chapter 34

Writs

34.010 to 34.100

CASE CITATIONS: Wing v. Eugene, (1968) 249 Or 367, 437 P2d 836.

34.010

NOTES OF DECISIONS

The writ of review in this state is substantially the common-law writ of certiorari. Dayton v. Bd. of Equalization, (1898) 33 Or 131, 136, 50 P 1009; Ferguson v. Byers, (1902) 40 Or 468, 470, 67 P 1115, 69 P 32; McAnish v. Grant, (1903) 44 Or 57, 74 P 396; Oregon R. Co. v. Umatilla County, (1905) 47 Or 198, 81 P 352; Hall v. Dunn, (1908) 52 Or 475, 97 P 811, 25 LRA(NS) 193; Crowe v. Albee, (1918) 87 Or 148, 169 P 785; California & Ore. Land Co. v. Gowen, (1892) 48 Fed 771.

The object of a writ of review is to keep inferior tribunals within their jurisdiction and compel them to proceed regularly in the disposition of matters brought before them for determination. Garnsey v. County Court, (1898) 33 Or 201, 54 P 539, 1089; Oregon R. Co. v. Umatilla County, (1905) 47 Or 198, 206, 81 P 352.

The proceeding by writ of review is a special proceeding. Hall v. Dunn, (1908) 52 Or 475, 97 P 811, 25 LRA(NS) 193.

The record of the proceedings is the only evidence necessary to be examined by the reviewing court. Curan v. State, (1909) 53 Or 154, 99 P 420.

Except as provided in ORS 157.010, the use of the writ of review in criminal cases has been abolished by ORS 138.010. State v. Etling, (1970) 256 OR 3, 470 P2d 950.

Writ of review is not appropriate means to obtain review of the denial of a motion for a change of judge. Id.

FURTHER CITATIONS: Farrow v. Nevin, (1904) 44 Or 496, 75 P 711; Hager v. Knapp, (1904) 45 Or 512, 78 P 671; Bechtold v. Wilson, (1947) 182 Or 360, 186 P2d 675; School Dist. 68 v. Hoskins, (1952) 194 Or 301, 240 P2d 949; Strawn v. State Tax Comm., (1962) 1 OTR 98.

34.020 to 34.040

ATTY GEN. OPINIONS: Review of metropolitan service district proceedings, (1970) Vol 34, p 959.

34.020

NOTES OF DECISIONS

A taxpayer failing to obtain redress before the board of equalization, should seek it by writ of review. Oregon & Wash. Mtg. Sav. Bank v. Jordan, (1888) 16 Or 113, 17 P 621.

A writ of review did not furnish an adequate remedy for the refusal of the county court to grant a license to sell spirituous liquors so as to prevent mandamus proceedings. McLeod v. Scott, (1891) 21 Or 94, 26 P 1061, 29 P 1.

The right of the state to review any proceeding in a criminal action is not given by this statute. Portland v. Erickson, (1900) 39 Or 1, 62 P 753.

A resident in the vicinity of a certain road and a remonstrator against a change in the location thereof may petition for the issuance of a writ of review. Fisher v. Union County, (1903) 43 Or 223, 230, 72 P 797.

Neither the county court nor judge is a necessary party to a writ to review the action of that court in a probate matter. Farrow v. Nevin, (1904) 44 Or 496, 75 P 711.

The question presented by the proceeding is one of law in the examination of which the parties are not entitled to a jury trial, so that the existence of a remedy by writ of review does not necessarily exclude a remedy in equity. Hall v. Dunn, (1908) 52 Or 475, 97 P 811, 25 LRA(NS) 193.

A writ of review will not lie from an interlocutory order such as the decision on a motion to strike out part of a pleading or bring in a new party, but will lie only from the determination of the matter. Holmes v. Cole, (1909) 51 Or 483, 94 P 964.

The return of the writ must show that the petitioner is an interested party or the remedy will not lie. Raper v. Dunn, (1909) 53 Or 203, 99 P 889.

One who did not appear before the county court in proceedings upon an order declaring prohibition cannot bring writ of review against the determination thereon. Castel v. Klamath County, (1910) 56 Or 188, 108 P 129.

The decision of the circuit court as to ballot titles of acts to be submitted under initiative and referendum act is final, and writ of review does not lie to the Supreme Court. State v. Kozer, (1926) 118 Or 556, 247 P 806.

A writ of review presents questions of law alone arising on the record of the inferior tribunal; the sufficiency of the evidence to warrant the order is not subject to review. Stowe v. Ryan, (1931) 135 Or 371, 296 P 857.

FURTHER CITATIONS: Gaines v. Linn County (1891) 21 Or 430, 28 P 133; Southern Ore. Co. v. Coos County, (1897) 30 Or 250, 47 P 852; Fisher v. Union County, (1903) 43 Or 223, 72 P 797; Title Guarantee & Abstract Co. v. Nasburg, (1911) 58 Or 190, 113 P 2; State v. Siemens, (1913) 68 Or 1, 133 P 1173; Williams v. Henry (1914) 70 Or 466, 142 P 337; Petition of Reeder, (1924) 110 Or 484, 222 P 724; Bechtold v. Wilson, (1947) 182 Or 360, 186 P2d 675; Smith v. County of Washington, (1965) 241 Or 380, 406 P2d 545; Wing v. Eugene, (1968) 249 Or 367, 437 P2d 836.

34.030

NOTES OF DECISIONS

1. In general

The decision of the inferior court and the errors therein must be described with certainty. Fisher v. Union County, (1903) 43 Or 223, 72 P 797; Ah Poo v. Stevenson, (1917) 83 Or 340, 163 P 822.

The petition must state facts which, if taken as true, disclose to the court that the plaintiff is entitled to the writ. Holmes v. Cole, (1909) 51 Or 483, 486, 94 P 964; Elmore Packing Co. v. Tillamook County, (1909) 55 Or 218, 223, 105 P 898.

The writ must be tried on the record brought from the inferior court. Silva v. State, (1966) 243 Or 187, 412 P2d 375; Wing v. Eugene, (1968) 249 Or 367, 437 P2d 836.

Copies of the record objected to should not be attached to the petition as exhibits. Gaston v. Portland, (1906) 48 Or 82, 85, 84 P 1040.

Only when the petition is not attacked by the proper motion, or if so assailed is found to state sufficient facts, may the court look into the record to ascertain whether the errors assigned are well taken. Drummond v. Miami Lbr. Co., (1910) 56 Or 575, 109 P 753.

In case of proceedings to review division of school district, service of the petition must be made on the members of the boundary board. Williams v. Henry, (1914) 70 Or 466, 142 P 337.

The circuit and county courts are authorized to allow the writ of review. State v. Kozer, (1926) 118 Or 556, 247 P 806.

2. Specifications of error

Errors not assigned in the petition cannot be considered. (Alaska) Bennett v. Forrest, (1895) 69 Fed 421.

Where errors are not set forth in the petition as prescribed by this statute, the court acquires no jurisdiction to review the decision or determination. School Dist. 116 v. Irwin, (1899) 34 Or 431, 56 P 413.

An averment that a claim was barred by limitation is a sufficient specification of error. Farrow v. Nevin, (1904) 44 Or 496, 498, 75 P 711.

The petition must set forth the errors alleged to have been committed. Birnie v. La Grande, (1916) 78 Or 531, 153 P 415.

Motion to quash a writ of review is the proper proceeding to question the sufficiency of the petition. Bechtold v. Wilson, (1947) 182 Or 360, 186 P2d 525, 187 P2d 675.

A petition for review of road proceedings, alleging that the road described in the notice of application for vacation of the road was not the same road as that which was specified in the petition for vacation, sufficiently showed that the county court erred in not dismissing the proceedings to vacate the road for want of jurisdiction. Fisher v. Union County, (1903) 43 Or 223, 233, 72 P 797.

FURTHER CITATIONS: Ferguson v. Byers, (1902) 40 Or 468; 67 P 1115, 69 P 32; Kinney v. City of Astoria, (1911) 58 Or 186, 113 P 21; Holland-Wash. Mtg. Co. v. County Court, (1920) 95 Or 668, 188 P 199.

34.040

NOTES OF DECISIONS

1. In general

Appeal and review are concurrent remedies by virtue of this section. Forbis v. Inman, Paulson & Co., (1892) 23 Or 68, 71, 31 P 204; Garnsey v. County Court, (1898) 33 Or 201, 54 P 539, 1089; Elmore Packing Co. v. Tillamook County, (1909) 55 Or 218, 105 P 898; Lechleidner v. Carson, (1937) 156 Or 636, 68 P2d 482.

Inferior courts within this section are all courts and tribunals over which the circuit courts are given appellate jurisdiction and supervisory control by the Oregon Constitution. Kirkwood v. Wash. County, (1898) 32 Or 568, 52 P 568; Garnsey v. County Court, (1898) 33 Or 201, 206, 54 P 539, 1089.

A writ of review cannot be used as a substitute for an appeal. Garnsey v. County Court, (1898) 33 Or 201, 54 P 539, 1089; McAnish v. Grant, (1903) 44 Or 57, 74 P 396; Farrow v. Nevin, (1904) 44 Or 496, 75 P 711; Oregon R. Co. v. Umatilla County, (1905) 47 Or 198, 206, 81 P 352; Lechleidner v. Carson, (1937) 156 Or 636, 68 P2d 482.

A writ of review is allowed where an inferior court, officer or tribunal has exercised judicial functions erroneously, or has exceeded his or its jurisdiction to the injury of some substantial right of plaintiff. Hochfeld v. Portland, (1920) 97 Or 572, 190 P 725, 192 P 911; Kamm v. Portland, (1930) 132 Or 311, 285 P 240.

Initiation of an appeal is not an election of remedies; the appeal may be abandoned before being perfected and the other remedy adopted. Feller v. Feller, (1901) 40 Or 73, 77, 66 P 468.

Election to proceed by writ of review bars a subsequent appeal. Cooper v. Bogue, (1919) 92 Or 122, 179 P 658, 180 P 103.

Appeal and review may not be availed of at the same time, notwithstanding the fact that the two remedies are concurrent. Kamm v. Portland, (1930) 132 Or 311, 285 P 240.

The amendment making a writ of review concurrent with appeal did not empower the circuit court to treat a proceeding on writ of review as though it were an appeal. Asher v. Pitchford, (1941) 167 Or 70, 115 P2d 337.

The only effect of the 1899 amendment to this section making the writ of review concurrent with the right of appeal was to preserve the writ, if otherwise proper, independent of the existence of a right of appeal. Bechtold v. Wilson, (1947) 182 Or 360, 186 P2d 525, 187 P2d 675.

The writ of review is not interchangeable with the right of appeal, but lies only to correct errors in jurisdiction and irregularity in procedure and not every error of law. Id.

Where a charter or statute sets out a procedure whereby an administrative agency must review its own prior determination, that procedure must be followed before judicial review is available. Miller v. Schrunk, (1962) 232 Or 383, 375 P2d 823.

2. Reviewable decisions and proceedings

A writ of review is allowed only if the inferior tribunal exercised its judicial functions erroneously or exceeded its jurisdiction. Miller v. Schrunk, (1962) 232 Or 383, 375 P2d 823; Vollmer v. Schrunk, (1965) 242 Or 196, 409 P2d 177.

Where a misjoinder of causes of action does not appear on the face of the complaint, and the defect does not become apparent until the judgment has been entered, a writ of review will lie to correct the error. Hayden v. Pierce, (1898) 33 Or 89, 52 P 1049.

Certiorari lies only to review judicial or quasi judicial proceedings, and not ministerial acts. Hodgdon v. Goodspeed, (1911) 60 Or 1, 118 P 167.

Where a judgment has been vacated, a writ of review will not lie. Clubine v. Merrill, (1917) 83 Or 87, 163 P 85.

Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion was reached. Evans v. Schrunk, (1971) 4 Or App 437, 479 P2d 1008.

Since the 1965 amendment, arbitrariness is a ground for allowance of a writ. Id.

3. County court and justices' decisions

Any person whose lands are directly affected by a proceeding to lay out, vacate or alter a county road, may have the proceeding reviewed for errors therein. Gaines v. Linn County, (1891) 21 Or 430, 28 P 133.

A writ of review will not lie to revise the action of a probate court in passing on a claim presented against an estate, provided the proceedings are in due form. Garnsey v. County Court, (1898) 33 Or 201, 205, 54 P 539, 1089.

Instructing the jury, even if unauthorized, does not afford

ground for disturbing the judgment on writ of review. Long v. Thompson, (1899) 34 Or 359, 55 P 978.

Disallowance of a claim against the county, involving questions of law, may be reviewed by writ of review. Berridge v. Marion County, (1916) 81 Or 391, 159 P 628.

A writ to review a criminal proceeding before a justice of the peace is not a criminal action. Davenport v. The Justice Court, (1921) 101 Or 507, 199 P 621.

County court, in apportioning road taxes due city, exercises no judicial function reviewable by writ of review. Oregon City v. Clackamas County, (1926) 118 Or 546, 247 P 772.

Where no right of appeal existed in regard to a default judgment granted in the justice's court, a writ of review was proper. Union County v. Slocum, (1888) 16 Or 237, 17 P 876.

Where the probate court refused to take proof of a will, a substantial right was affected. Malone v. Cornelius, (1898) 34 Or 192, 55 P 536.

Where the jury did not assess the amount due the plaintiff but merely returned a verdict for the plaintiff, the justice was without jurisdiction in making an assessment and his action was subject to review. Goyne v. Tracy, (1919) 94 Or 216, 185 P 584.

4. Procedure for writ of review

The sufficiency of the petition is tested by motion to quash the writ and not by demurrer. McCabe-Duprey Tanning Co. v. Eubanks, (1910) 57 Or 44, 102 P 795, 110 P 395; Miller v. Schrunk, (1962) 232 Or 383, 375 P2d 823.

Joinder of the county or corporation whose acts are to be reviewed is proper in a proceeding to review the action of a county court in granting or refusing a license to sell spirituous liquors at retail. Wood v. Riddle, (1886) 14 Or 254, 12 P 385.

Objections and defenses should be presented in the form of a return to the writ. Gaston v. Portland, (1906) 48 Or 82, 85, 84 P 1040.

If the judge finds the petition insufficient, he should disallow the writ; but, if he has inadvertently issued the writ, the adverse party is not precluded thereby from questioning the sufficiency of the petition before it comes on for rehearing on the merits. Holmes v. Cole, (1909) 51 Or 483, 488, 94 P 964.

A writ of review will not lie from an interlocutory order or to remove a cause for rehearing in another court but only from the decision or determination of the proceeding. Id.

The petition must state every fact bearing upon the errors claimed, so that from an inspection thereof, assuming the facts stated to be true, the court can say there has been error upon which to issue the writ. Raper v. Dunn, (1909) 53 Or 203, 99 P 889.

The cause is tried upon the return in review proceedings. Curran v. State, (1909) 53 Or 154, 99 P 420.

The reviewing court must determine whether the jurisdiction had been originally obtained, and also ascertain if enough appears from the record to uphold the judgment. Gue v. Eugene, (1909) 53 Or 282, 100 P 254.

The writ is properly dismissed where the record does not disclose that county court exercised its functions erroneously or exceeded its jurisdiction to the injury of any substantial right of the plaintiff in ordering establishment of county road in question. Giesy v. Marion County, (1919) 91 Or 450, 178 P 598.

A petition for a writ of review must state facts sufficient to authorize its issuance and not mere conclusions. Andrews v. City of Corvallis, (1954) 200 Or 632, 268 P2d 361.

5. Matters outside the record

The court will not try any questions not disclosed by the record. Dayton v. Bd. of Equalization, (1898) 33 Or 131, 139, 50 P 1009; Garnsey v. County Court, (1898) 33 Or 201, 206, 54 P 539, 1089; Mitchell v Portland, (1909) 53 Or 547, 99 P 881, 101 P 388.

The return constitutes the only evidence of whether the inferior tribunal has exercised its jurisdiction or acted erroneously to the prejudice of plaintiff's substantial rights. Gay v. Eugene, (1909) 53 Or 289, 100 P 306, 18 Ann Cas 188.

A stipulation is not competent to contradict a recital in the return. Id.

Evidence outside the record will not be considered unless it was submitted to the inferior tribunal previous to its decision. Curran v. State, (1909) 53 Or 154, 99 P 420.

6. Questions of fact

A question as to the admissibility of evidence will not be determined. Barton v. City of La Grande, (1889) 17 Or 577, 581, 22 P 111; Smith v. Portland, (1894) 25 Or 297, 35 P 665.

The court will not examine the evidence to determine whether questions of fact have been properly decided; it is only when there is an entire absence of proof of some material fact found that the finding becomes erroneous as a matter of law. Smith v. Portland, (1894) 25 Or 297, 301, 35 P 665; Oregon Coal & Nav. Co. v. Coos County, (1897) 30 Or 308, 310, 47 P 851.

The court reviews the decision of the inferior tribunal only upon the ultimate facts appearing by the record; questions of fact upon which that tribunal acted will not be considered. Oregon Coal & Nav. Co. v. Coos County, (1897) 30 Or 308, 47 P 851; California & Ore. Land Co. v. Gowen, (1892) 48 Fed 771.

Only law questions arising on the record can be determined on a writ of review. Hall v. Dunn, (1908) 52 Or 475, 479, 97 P 811, 25 LRA(NS) 193; Curran v. State, (1909) 53 Or 154, 99 P 420.

The burden is cast upon the plaintiff to show that jurisdiction was exceeded or that the proceedings were erroneous. Heuel v. Wallowa County, (1915) 76 Or 354, 358, 149 P 77.

The findings of the agency will not be disregarded unless the record contains no substantial evidence in their support. Mundt v. Peterson, (1957) 211 Or 293, 315 P2d 589. **Distinguished in** Hicks v. Schrunk, (1964) 238 Or 181, 393 P2d 771.

FURTHER CITATIONS: Oregon & Wash. Mtg. Sav. Bank v. Jordan, (1888) 16 Or 113, 17 P 621; Hill v. State, (1893) 23 Or 446, 32 P 160; Fanning v. Guilliland, (1900) 37 Or 369, 61 P 636, 62 P 209; White v. Mears, (1904) 44 Or 215, 74 P 931; Applegate v. Portland, (1909) 53 Or 552, 90 P 890; Cookinham v. Lewis, (1911) 58 Or 484, 114 P 88, 115 P 342; Williams v. Henry, (1914) 70 Or 466, 142 P 337; Stadelman v. Miner, (1917) 83 Or 348, 155 P 708, 163 P 585; Demitro v. State Ind. Acc. Comm., (1924) 110 Or 110, 223 P 238; Brown v. Portland, (1926) 120 Or 76, 249 P 819; Stowe v. Ryan, (1931) 135 Or 371, 296 P 857; School Dist. 68 v. Hoskins, (1952) 194 Or 301, 240 P2d 949; Draper v. Mullennex, (1960) 225 Or 267, 357 P2d 519; Baker v. Steele, (1961) 229 Or 498, 366 P2d 726; State v. Etling, (1970) 256 Or 3, 470 P2d 950.

34.050

NOTES OF DECISIONS

The judgment is only stayed under this section by the undertaking which operates as a supersedeas. Feller v. Feller, (1901) 40 Or 73, 77,66 P 468.

The statutory amount of the undertaking is sufficient to protect the defendant against all reasonable pecuniary expense. Gaston v. Portland, (1906) 48 Or 82, 84, 84 P 1040.

The undertaking may be examined to identify the judg-

ment sought to be reviewed in order to sustain the sufficiency of the notice of appeal. Keady v. United Rys. Co., (1910) 57 Or 325, 100 P 658, 108 P 197.

FURTHER CITATIONS: State v. Kozer, (1926) 118 Or 556, 247 P 806.

34.060

NOTES OF DECISIONS

The return, showing the jurisdiction of the lower court, forms part of the judgment roll and is properly included in the transcript without a statement or bill of exceptions. Johns v. Marion County, (1870) 4 Or 46.

Evidence should not be included in the return to the writ. California & Ore. Land Co. v. Gowen, (1892) 48 Fed. 771.

The testimony of witnesses was not part of the certified copy of the record returned by the justice. Tyler v. State, (1895) 28 Or 238, 42 P 518.

A writ to review the action of a county court in vacating a road is properly directed to the county clerk whose duty it is to keep the records, files and other books and papers appertaining to said court. Fisher v. Union County, (1903) 43 Or 223, 72 P 797.

In proceedings to review the action of a city council in attempting to reassess property for a street improvement, all the proceedings for the improvement of the street should be required to be returned by the writ. Morgan v. Portland, (1909) 53 Or 368, 100 P 657.

FURTHER CITATIONS: Dayton v. Bd. of Equalization, (1895) 33 Or 131, 50 P 1009; Gaston v. Portland, (1906) 48 Or 82, 84 P 1040; Holland-Wash. Mtg. Co. v. County Court, (1920) 95 Or 668, 188 P 199.

34.080

NOTES OF DECISIONS

In a will probate proceeding there are no adverse parties to be notified and where a writ of review is brought in regard to such proceedings, no one is entitled to notice as a matter of right. Hubbard v. Hubbard, (1879) 7 Or 42; Malone v. Cornelius, (1894) 34 Or 192, 55 P 536.

A writ sued out by remonstrators in a proceeding before a district boundary board should be served on the petitioners who initiated the proceeding. Williams v. Henry, (1914) 70 Or 466, 468, 142 P 337.

An order for the issuance of a writ of review need not prescribe the manner in which it is to be served nor need the order recite the statute. Holland-Wash. Mtg. Co. v. County Court, (1920) 95 Or 668, 188 P 199.

The circuit judge has authority to extend the time beyond the original return day in which return might be made and service of copy of writ be had upon respondent. Id.

A writ of review may be served on the county by delivering the writ to the clerk. Id.

The county clerk served with writ of review may admit service thereof in his official capacity. Id.

Where the writ is not served upon the opposing party in proceedings to review the decision of the Secretary of State, the circuit court is without jurisdiction. Maizels v. Kozer, (1929) 129 Or 100, 276 P 277.

34.090

NOTES OF DECISIONS

Only when the return does not comply with the writ should a further return be allowed. Morgan v. Portland, (1909) 53 Or 368, 100 P 657.

An order for a further return is a proper remedy if the writ is incomplete. Fay v. Portland, (1921) 99 Or 490, 195 P 828.

34.100

NOTES OF DECISIONS

Where the lower court lacked jurisdiction to make the order in dispute, the circuit court must be held not to have had power to dismiss the writ and affirm the proceedings. Woodruff v. Douglas County, (1889) 17 Or 314, 21 P 49; Cameron v. Wasco County, (1895) 27 Or 318, 41 P 160.

The granting of relief by certiorari rests in the sound discretion of the court, especially where the matters in controversy are of a public nature. Oregon R. Co. v. Umatilla County, (1905) 47 Or 198, 81 P 352; Reiff v. Portland, (1914) 71 Or 421, 141 P 167, 142 P 827, LRA 1915D, 772.

The merits of the case cannot be considered on appeal where the only ruling made by the court below was upon a motion to dismiss a writ of review for insufficiency of the petition. Holmes v. Cole, (1909) 51 Or 483, 486, 94 P 964.

Where a writ of review was improper and respondent contested on the merits instead of moving to quash the writ, the parties did not thereby confer jurisdiction on the circuit court to review the case. Bechtold v. Wilson, (1947) 182 Or 360, 186 P2d 525, 187 P2d 675.

On a writ of review, any evidence whatever will sustain the findings of fact. Portland v. Garner, (1960) 226 Or 80, 358 P2d 495.

FURTHER CITATIONS: Turner v. Hendryx, (1917) 86 Or 590, 167 P 1019, 169 P 109; Davenport v. Justice Court, (1921) 101 Or 507, 199 P 621.

34.110 to 34.240

ATTY. GEN. OPINIONS: Failure to appoint arbitrator, 1962-64, p 124.

LAW REVIEW CITATIONS: 4 WLJ 58.

34.110

NOTES OF DECISIONS

1. In general
2. Certainty of dispute
3. Acts that may be compelled
4. Judicial acts and functions
5. Taxation
6. Licenses required by law
7. Election affairs
8. School and corporate affairs
9. Exercise of discretion
10. When remedy at law is sufficient

1. In general

A legal obligation to perform the act which is sought to be compelled must exist on the part of the defendant. State v. Malheur County Court, (1905) 46 Or 519, 81 P 368; State v. Ringold, (1921) 102 Or 401, 202 P 734; Johnson v. City of Astoria, (1961) 227 Or 585, 363 P2d 571.

A mandamus proceeding is an action at law. Beard v. Beard, (1913) 66 Or 512, 521, 133 P 797, 134 P 1196; City of Cascade Locks v. Carlson, (1939) 161 Or 557; 90 P2d 787.

The obligation must be peremptory and plainly defined. State v. Multnomah County, (1917) 82 Or 428, 161 P 959; Putnam v. Kozer, (1926) 119 Or 535, 250 P 625.

The writ will be issued only to compel the performance of an act which the law specifically enjoins. State v. Reid, (1956) 207 Or 617, 298 P2d 990; Lawton v. State Acc. Ins. Fund, (1971) 5 Or App 539, 485 P2d 1104. State v. Reid, supra, **distinguished in** Realty Dev. Corp. v. Mt. Scott Water Dist., (1965) 242 Or 287, 409 P2d 181.

The material facts showing petitioners' clear right to the relief demanded must appear from the writ. Johnson v.

Craddock, (1961) 228 Or 308, 365 P2d 89; International Trans. Equip. Lessors, Inc. v. Bohannon, (1969) 252 Or 356, 449 P2d 847.

Generally before mandamus will lie a relator must have demanded performance of the act or duty which he asserts it is the defendant's clear duty to perform but when it appears the demand would be unavailing, demand is unnecessary. State ex rel. So. Pac. Co. v. Duncan, (1962) 230 Or 179, 368 P2d 733, 98 ALR2d 617; State ex rel. Pearcy v. Long, (1963) 234 Or 630, 383 P2d 377.

An officer cannot be required by this writ to arrest a person believed to be guilty of a misdemeanor not committed in the presence of the court or officer. State v. Williams, (1904) 45 Or 314, 77 P 965.

A determination in mandamus requiring a defendant to execute a contract and approve a bond is a judgment, and not a decree. In re Vinton, (1913) 65 Or 422, 426, 132 P 1165.

An express demand that the duty be performed and refusal on the part of the defendant are not as a general rule essential to issuance of the writ. State v. Hare, (1916) 78 Or 540, 549, 153 P 790. **But see,** State v. Beals, (1914) 73 Or 442, 144 P 678.

The writ will not ordinarily issue before time for performance, but if there has been a refusal to perform and there is no probability of performance within the time required, the issuance will not be premature. State v. Stannard, (1917) 84 Or 450, 156 P 566.

The review of questions of fact is not the province of mandamus. Lyons v. Gram, (1927) 122 Or 684, 260 P 220.

The relator must have performed all of the acts which are conditions precedent to his or her right to the relief sought, and he must show the existence of all facts necessary to put the defendant in fault. Ross v. County Court, (1934) 147 Or 695, 35 P2d 484.

While mandamus is classed as a legal remedy in the nature of an action at law, it is an extraordinary remedial process which is awarded not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principles. Buell v. County Court, (1944) 175 Or 402, 152 P2d 578, 154 P2d 188, 155 ALR 1135.

Mandamus is not within the operation of the statute of limitation, but is nevertheless subject to the equitable doctrine of laches. Id.

Mandamus is a special proceeding the requirements of which differ from the pleading and practice prescribed for ordinary actions. State v. Reid, (1956) 207 Or 617, 298 P2d 990.

The writ has the same function as a complaint in other actions. Johnson v. Craddock, (1961) 228 Or 308, 365 P2d 89.

The writ must state all material facts and show a clear right to the relief demanded. Id.

In an otherwise proper case, mandamus may be used to decide disputed and difficult questions of law. State ex rel. Maizels v. Juba, (1969) 254 Or 323, 460 P2d 850.

Mandamus may be used to decide disputed and difficult questions of law. Henkel v. Bradshaw, (1970) 257 Or 55, 475 P2d 75.

2. Certainty of dispute

The legal right which is sought to be enforced must be certain and clearly made out by the facts. Ball v. Lappius, (1868) 3 Or 55; Equi v. Olcott, (1913) 66 Or 213, 133 P 775; Florey v. Coleman, (1925) 114 Or 1, 234 P 286.

Unless the duty has been legally defined, mandamus will not issue to enforce it, State v. Kay, (1915) 74 Or 268, 278, 145 P 277.

A constable will not be compelled to serve an execution where the record upon which the execution was issued is so defective that the jurisdiction of the court making it does not appear. Canuto v. Weinberger, (1916) 79 Or 342, 155 P 190.

When the question is one of public right and the object of the writ is to enforce the performance of a public duty, the relator need not show that he has any legal or special interest in the result; but the proceedings should nevertheless be authorized by a law officer of the state. Putnam v. Norblad, (1930) 134 Or 433, 293 P 940.

3. Acts that may be compelled

The writ lies to compel the incumbent of an office to deliver to his successor the appurtenances thereof, but cannot be issued as a means of determining the ultimate rights of the parties to an office. Warner v. Myers, (1870) 4 Or 72; Biggs v. McBride, (1889) 17 Or 640, 652, 21 P 878, 5 LRA 115; Stevens v. Carter, (1894) 27 Or 553, 40 P 1074, 31 LRA 342; Beard v. Beard, (1913) 66 Or 512, 519, 133 P 797, 134 P 1196.

The auditing of a claim for service to the state may be compelled where the nature and amount of the services rendered are definitely fixed and ascertained, and the compensation therefor is regulated by law. Shattuck v. Kincaid, (1897) 31 Or 379, 49 P 758; Croasman v. Kincaid, (1897) 31 Or 445, 49 P 764; Irwin v. Kincaid, (1897) 31 Or 478, 49 P 765, 60 Am St Rep 832, 36 LRA 593.

The execution of municipal bonds may be compelled. Portland v. Albee, (1913) 67 Or 221, 231, 135 P 516, 897; City of Cascade Locks v. Carlson, (1939) 161 Or 557, 90 P2d 787.

The county court may be compelled to provide a wife with assistance where she, by proper application under oath, has brought herself within the terms of the statute. Zachary v. Polk County Court, (1914) 74 Or 58, 144 P 1182; Badura v. Multnomah County, (1918) 87 Or 446, 170 P 938.

The performance by the Governor of a duty which is purely ministerial and not political and not otherwise objectionable may be enforced by mandamus. Putnam v. Norblad, (1930) 134 Or 433, 293 P 940.

Where the county court assessed a road tax under a statute which gave it exclusive authority to fix the rate, the right of the city to a portion of the tax could only be determined from an appeal from the award of the county court, not by mandamus. Oregon City v. Moore, (1896) 30 Or 215, 46 P 1017, 47 P 851.

Writ of mandamus was the proper remedy to compel county to make up underpayment in amount determined to be the county's proportionate share of public assistance funds. State v. Malheur County, (1949) 185 Or 392, 203 P2d 305.

4. Judicial acts and functions

The settlement and allowance of a bill of exceptions by a circuit judge may be compelled by the Supreme Court as incident to and in aid of its appellate jurisdiction. Ah Lep v. Gong Choy & Gong Wing, (1886) 13 Or 205, 9 P 483; Che Gong v. Stearns, (1888) 16 Or 219, 223, 17 P 871; National Council v. McGinn, (1914) 70 Or 457, 469, 138 P 493, Kubik v. Davis, (1915) 76 Or 501, 147 P 552.

While mandamus will lie to compel a circuit judge to sign a bill of exceptions, the Supreme Court cannot dictate to the trial judge what the contents of such bill shall be. McElvain v. Bradshaw, (1897) 30 Or 569, 48 P 424; National Council v. McGinn, (1914) 70 Or 457, 465, 138 P 493; Kubik v. Davis, (1915) 76 Or 501, 503, 147 P 552; State v. Stapleton, (1932) 139 Or 402, 10 P2d 600.

Where court declines jurisdiction by reason of mistake of law, mandamus will lie to compel a determination of the case. State v. Tazwell, (1927) 123 Or 326, 262 P 220; State v. Kanzler, (1929) Or 85, 276 P 273.

The superior court may compel entry of judgment if the case has proceeded to that point but the terms of the judgment may not be prescribed. State v. Bradshaw, (1911) 59 Or 279, 117 P 284.

An exercise of judicial functions by a subordinate tribunal

is a proper subject of mandamus. In re Clark, (1916) 79 Or 325, 154 P 748, 155 P 187.

The granting of a change of venue by a justice of the peace will not be compelled where there is no showing as to prejudice on the part of the justice except the conclusion of the party applying for the change. Best v. Parkes, (1916) 82 Or 171, 161 P 255.

The collection of debts is not a proper subject of mandamus. Dryden v. Daly, (1918) 89 Or 218, 173 P 667.

Mandamus is available to challenge trial court's refusal to quash service of summons. State v. Kanzler, (1929) 129 Or 85, 276 P 273; State ex rel. Knapp v. Sloper, (1970) 256 Or 299, 473 P2d 140.

A writ of mandamus will not lie to compel a trial judge to put into a bill of exceptions a particular statement which he honestly believes does not belong there. State v. Ekwall, (1931) 135 Or 439, 296 P 57.

To compel a clerk to approve an undertaking on appeal, mandamus is the appropriate remedy. Riesland v. Bailey, (1934) 146 Or 574, 31 P2d 183, 92 ALR 1207.

Writ of mandamus is proper remedy to challenge the denial of a motion for a change of judge. State v. Etling (dictum), (1970) 256 Or 3, 470 P2d 950.

Mandamus was proper remedy where respondent denied motion to quash service on corporation in county other than that designated as the principal office or place of business in articles of incorporation. Willamette Nat. Lbr. Co. v. Circuit Court, (1949) 187 Or 591, 211 P2d 994.

5. Taxation

The levying of a tax may be required where the obligation to levy it is imposed by statute. Kollock v. Barnard, (1926) 116 Or 694, 242 P 847.

The collection of income taxes by the sheriff will be compelled by mandamus in a proper case. State v. Slusher, (1926) 119 Or 141, 248 P 358.

If the law specially enjoins upon county courts the duty of publishing fully itemized budget estimates in connection with the calling of a meeting of the taxpayers for the purpose of discussing a proposed tax levy, the county court may properly be subjected to mandamus to compel the performance of such act. Vinton v. Hoskins, (1944) 174 Or 106, 147 P2d 892.

The state may mandamus the county court on the part of the State Public Welfare Commission [now Public Welfare Division] to require the county to budget and set aside money for state welfare. State v. County Court, (1949) 185 Or 392, 203 P2d 307.

6. Licenses required by law

If the county court improperly refuse to grant a liquor license to a person who complies with the prerequisites of the statute on that subject, mandamus will lie to compel such license to issue. McLeod v. Scott, (1891) 21 Or 94, 106, 26 P 1061, 29 P 1.

The issuance of a license by the Commissioner of Labor to operate an employment agency may not be compelled by mandamus, issuance thereof being discretionary. Lyons v. Gram, (1927) 122 Or 684, 260 P 220.

The granting or denial of a liquor license by the Liquor Control Commission is reviewable by mandamus only where there is a clear abuse of discretion. Olds v. Kirkpatrick, (1948) 183 Or 105, 191 P2d 641.

7. Election affairs

See also annotations under ORS 246.810 to 246.830.

A county court may be required to declare the result of a vote under the local option act. State v. Richardson, (1906) 48 Or 309, 85 P 225, 8 LRA(NS) 362.

In a proceeding to compel the Secretary of State to file an initiative petition for a local law for a county where the proposed law is not in the record, the court will not determine whether it is a local law but will issue a peremptory writ. Schubel v. Olcott, (1912) 60 Or 503, 120 P 375.

Issuance of a certificate of election by the Governor to a duly elected circuit judge may be required by mandamus. Gantenbein v. West, (1915) 74 Or 334, 345, 144 P 1171.

Mandamus to require the Governor to issue a writ of election to fill a vacancy in the Senate is in excess of the authority of the courts. Putnam v. Norblad, (1930) 134 Or 433, 293 P 940.

It is equally inadmissible to inquire into the constitutionality of a proposed initiative measure when the remedy sought is mandamus to compel submission as when the proceeding is by injunction to restrain its submission. Johnson v. City of Astoria, (1961) 227 Or 585, 363 P2d 571.

Possibility of unconstitutionality of an initiative measure does not excuse officer's refusal to perform mandatory duty if preliminary statutory requirements have been complied with. Id.

8. School and corporate affairs

Companies furnishing light, water or heat to the public may be compelled by mandamus to supply all persons along their conduit who comply or offer to comply with their rules and regulations. Haugen v. Albina Light & Water Co., (1891) 21 Or 411, 28 P 244, 14 LRA 424; Mackin v. Portland Gas Co., (1900) 38 Or 120, 61 P 134, 62 P 20, 49 LRA 596.

Reinstatement of a teacher who is holding under a statutory tenure and who has been removed either without proper proceedings or for an insufficient reason may be compelled by mandamus. Richards v. Dist. Sch. Bd., (1916) 78 Or 621, 153 P 482, 641, Ann Cas 1917D, 266, LRA 1916C, 789; Walker v. Bd. of Directors, (1938) 159 Or 177, 78 P2d 618.

Where the corporation is insolvent, there is no adequate remedy at law, and mandamus will issue to compel a transfer of the stock to a purchaser at an execution sale. Slemmons v. Thompson, (1892) 23 Or 215, 31 P 514.

A school board may be compelled to permit children to attend the public schools and be instructed therein. Crawford v. Sch. Dist. 7, (1913) 68 Or 388, 391, 137 P 217, Ann Cas 1915C, 477, 50 LRA(NS) 147.

An inspection of books of a corporation may be compelled by a stockholder. Davidson v. Almeda Mines Co., (1913) 66 Or 412, 416, 134 P 782, 48 LRA(NS) 847.

To compel a transfer of shares of a corporation on the stock book, mandamus is not the proper remedy as the plaintiff has an adequate remedy at law by an action against the corporation for the value of the stock. Id.

The corporation commissioner may be required to file the articles of a proposed corporation on payment of fee of $5. Carson v. Schulderman, (1916) 79 Or 184, 154 P 903.

A corporation seeking to recover corporate records in the possession of a former officer of the corporation may do so by mandamus as replevin or claim and delivery would be inadequate. Hunt v. Ketell, (1953) 197 Or 659, 253 P2d 272.

Where mandamus lies to reinstate a civil service employe who has been dismissed in violation of civil service laws, reasons or causes for dismissal are immaterial. Myers v. Bd. of Directors, (1971) 5 Or App 142, 483 P2d 95.

Mandamus may be invoked to reinstate a civil service employe. Id.

9. Exercise of discretion

An officer may be compelled to exercise discretion although the court may not determine how he shall exercise it or control his judgment. Croasman v. Kincaid, (1897) 31 Or 445, 49 P 764; Irwin-Hodson Co. v. Kincaid, (1897) 31 Or 478, 49 P 765; Benson v. Withycombe, (1917) 84 Or 652, 166 P 41; Trippeer v. Couch, (1924) 110 Or 446, 220 P 1012.

Control of the performance of an act which involves an

exercise of discretion is not a proper subject of mandamus. State v. Malheur County Court, (1909) 54 Or 255, 263, 101 P 907, 103 P 446; State v. Siemens, (1913) 68 Or 1, 8, 133 P 1173; Putnam v. Norblad, (1930) 134 Or 433, 293 P 940; Riesland v. Bailey, (1934) 146 Or 574, 31 P2d 183, 92 ALR 1207; School Dist. 1 v. Shull, (1938) 160 Or 225, 84 P2d 479.

Judicial discretion cannot be controlled by mandamus. State v. Kanzler, (1929) 129 Or 85, 276 P 273; State v. Ekwall, (1933) 144 Or 672, 26 P2d 52; State v. Crawford, (1938) 159 Or 377, 80 P2d 873; State v. Duncan, (1951) 191 Or 475, 230 P2d 773; Ruonala v. Bd. of County Comm. (1957) 212 Or 309, 319 P2d 898; State ex rel. Nilsen v. Cushing, (1969) 253 Or 262, 453 P2d 945.

Mandamus can be invoked to correct an arbitrary abuse of discretion, in the absence of other adequate remedy, though it results in the court's review of the officer's exercise of discretionary power. Riesland v. Bailey, (1934) 146 Or 574, 31 P2d 183, 92 ALR 1207; Johnson v. Craddock, (1961) 228 Or 308, 365 P2d 89; Sowell v. Workmen's Comp. Bd., (1970) 2 Or App 545, 470 P2d 953.

Judicial discretion as used in this section means the option which a judge may exercise either to do or not to do that which is proposed to him that he shall do; it is the right to choose between the doing and not doing of a thing, the doing of which cannot be demanded as an absolute right of the party asking it to be done; it is the exercise of the right legally to determine between two or more courses of action. State v. Bain, (1952) 193 Or 688, 240 P2d 958.

In an action upon an implied contract for the direct payment of money, the plaintiff, by force of statute, has an absolute right to attach property of the defendant provided he make and file the necessary affidavit and undertaking for attachment, and the trial judge has no discretion to do other than apply the law. Id.

Mandamus will never lie to compel a court to decide a matter within its discretion in any particular way. State v. Reid, (1956) 207 Or 617, 298 P2d 990.

"Discretion" refers to the power or privilege to act unhampered by a legal rule. State ex rel. Maizels v. Juba, (1969) 254 Or 323, 460 P2d 850.

10. When remedy at law is sufficient

The writ will not be issued where an adequate remedy at law is shown to exist. Ball v. Lappius, (1868) 3 Or 55; Durham v. Monumental Silver Min. Co., (1880) 9 Or 41; Wadhams & Co. v. San Francisco & Portland Steamship Co., (1916) 80 Or 64, 156 P 425; Brewster v. Springer, (1916) 80 Or 68, 156 P 433; State v. Beveridge, (1924) 112 Or 19, 228 P 100; State v. Circuit Court, (1925) 114 Or 6, 233 P 563, 234 P 262; State v. Norton, (1929) 131 Or 382, 283 P 12; State v. Ekwall, (1931) 135 Or 439, 296 P 57; Nelson v. McAllister Dist. Imp. Co., (1936) 155 Or 95, 62 P2d 950; State v. Dobson, (1943) 171 Or 492, 135 P2d 794, 137 P2d 825; Mt. Hood Stages, Inc. v. Haley, (1969) 253 Or 28, 453 P2d 435; State ex rel. Knapp v. Sloper, (1970) 256 Or 299, 473 P2d 140.

A return of property which has been seized by a sheriff may be compelled by mandamus. Neither an action of replevin nor an action against the sheriff for neglect of duty is an adequate remedy at law. Coos Bay R.R. & Nav. Co. v. Wieder, (1894) 26 Or 453, 38 P 338.

Propriety of the issuance of the writ is determined by the inadequacy, and not the mere absence, of other legal remedies. Mt. Hood Stages, Inc. v. Haley, (1969) 253 Or 28, 453 P2d 435.

Appeal is a speedy and adequate remedy to test the trial court's denial of petitioner's right to appointed counsel in a contempt proceeding. Henkel v. Bradshaw, (1970) 257 Or 55, 475 P2d 75.

The possible benefits to be bestowed by mandamus were too minimal to constitute sufficient reason to deviate from established methods of testing the legality of similar police activity in criminal cases. State ex rel. Maizels v. Juba, (1969) 254 Or 323, 460 P2d 850.

FURTHER CITATIONS: McWhirter v. Braiward, (1875) 5 Or 426; Haberhsam v. Sears, (1884) 11 Or 431, 5 P 208; Smith v. King, (1886) 14 Or 10, 12 P 8; Morrow County v. Hendryx, (1887) 14 Or 397, 12 P 806; Henrichsen v. Smith, (1896) 29 Or 475, 42 P 486, 44 P 496; State v. Grant (1897) 31 Or 370, 49 P 855; Peterson v. Lewis, (1916) 78 Or 641, 154 P 101; Kellaher v. Kozer, (1924) 112 Or 149, 228 P 1086; State v. Biggs, (1953) 198 Or 413, 255 P2d 1055, 38 ALR 2d 720; State v. Wilkinson, (1957) 212 Or 236, 319 P2d 893; MacEwan v. Holm, (1961) 226 Or 27, 359 P2d 413; Boyd v. Latourette, (1962) 231 Or 400, 373 P2d 418; Union High School Dist. 3 v. Jaross, (1962) 231 Or 489, 373 P2d 608; State ex rel. Heinig v. City of Milwaukie, (1962) 231 Or 473, 373 P2d 680; Holmes v. Appling, (1964) 237 Or 546, 392 P2d 636; State ex rel. Sprague v. Straub, (1965) 240 Or 272, 400 P2d 229, 401 P2d 29; State ex rel. Cady v. Allen, (1969) 254 Or 467, 460 P2d 1017; Nielson v. Bryson, (1970) 256 Or 179, 477 P2d 714.

ATTY. GEN. OPINIONS: Whether a county court must levy a school tax, 1928-1930, p. 81; the remedy employed when an assessor fails to perform his duties, 1928-30, p 320; whether a district attorney may be compelled by mandamus to prosecute, 1930-32, p 252; whether mandamus may be employed when a court refuses to pay over fines to the proper authorities, 1936-38, p 110; power of school district to sue a county court for failure to levy a tax, 1948-50, p 421; failure to appoint arbitrator, 1962-64, p 124; duty of board, lacking funds, to act, (1970) Vol 34, p 1114.

LAW REVIEW CITATIONS: 36 OLR 66, 67; 48 OLR 375; 1 WLJ 269; 1 EL 55, 78.

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NOTES OF DECISIONS

Prior to the 1965 amendment, this section gave exclusive jurisdiction in mandamus to the circuit court, except for the jurisdiction of the Supreme Court in certain cases. Phy v. Wright, (1915) 75 Or 428, 436, 146 P 138, 147 P 381; City of Woodburn v. Domogalla, (1964) 238 Or 401, 395 P2d 150, rev'g 1 OTR 292.

Proceeding in mandamus was instituted in Supreme Court to determine length of term of county judge. State v. Hopkins, (1958) 213 Or 669, 326 P2d 121, 327 P2d 784.

FURTHER CITATIONS: State v. Jacobs, (1884) 11 Or 314, 8 P 332; State v. Imbler, (1964) 236 Or 493, 389 P2d 918; Holmes v. Appling, (1964) 237 Or 546, 392 P2d 636.

LAW REVIEW CITATIONS: 4 WLJ 57.

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NOTES OF DECISIONS

The petitioner must show a legal right in himself to have the act done which is sought by the writ, and that it is the duty of the defendant to perform the act without discretion to do or refuse it. State v. Malheur County Court, (1905) 46 Or 519, 81 P 368; Crawley v. Munson, (1929) 131 Or 428, 283 P 29.

An order of allowance must be sufficiently specific so that the clerk will understand what directions to include in the writ. Cockrum v. Graham, (1933) 143 Or 233, 21 P2d 1084.

The fact that the relator was a taxpayer and beneficially interested in the execution of the duties of the county clerk was sufficient to entitle him to the writ. State v. Grace, (1890) 20 Or 154, 25 P 382.

When defendants appeared and filed demurrers to the ultimate writ, the court acquired jurisdiction of the defendants. Crawford v. School Dist. 7, (1913) 68 Or 388, 137 P 217.

An order that the writ issue, returnable at a date specified, and that defendant show cause why the writ should not issue amounted to a direction to serve notice on defendant. Canuto v. Weinberger, (1916) 79 Or 342, 155 P 190.

FURTHER CITATIONS: State v. Kay, (1915) 74 Or 268, 271, 145 P 277; State Capitol Reconstr. Comm. v. McMahan, (1938) 160 Or 83, 83 P2d 482; Makinson v. Sch. Dist. 4, (1956) 209 Or 232, 304 P2d 1076.

ATTY. GEN. OPINIONS: Authority to exact fee for performance of duties of clerk, (1971) Vol 35, p 454.

34.140

NOTES OF DECISIONS

An omission from an order granting a writ of peremptory mandamus that the same be served upon the defendant is immaterial. Cockrum v. Graham, (1933) 143 Or 233, 21 P2d 1084.

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NOTES OF DECISIONS

The writ must be sufficient in itself to show what is claimed and the facts upon which the claim is made; it stands for the complaint and may be demurred to or answered in the same manner as a complaint in an action. McLeod v. Scott, (1891) 21 Or 94, 111, 26 P 1061, 29 P 1; Elliott v. Oliver, (1892) 22 Or 44, 29 P 1; Shively v. Pennoyer, (1895) 27 Or 33, 39 P 396.

The writ must point out the acts to be done. Sears v. Kincaid, (1898) 33 Or 215, 218, 53 P 303.

When the alternative writ is amended, the petition and original writ cannot be considered for any purpose on an appeal from a judgment sustaining demurrers to the amended writ. Crawford v. Sch. Dist. 7, (1913) 68 Or 388, 393, 137 P 217, Ann Cas 1915C, 477, 50 LRA(NS) 147.

The court may allow the writ of mandamus either in the alternative or peremptory form. Canuto v. Weinberger, (1916) 79 Or 342, 155 P 190.

The writ must clearly indicate a present unperformed duty on the part of the defendant requisite for the preservation of the rights of the plaintiff. Dryden v. Daly, (1918) 89 Or 218, 173 P 667.

The writ is not aided by the petition either in the original or supplemental form. Id.

An alternative writ must contain a statement of all the facts which shall show with certainty the right of the plaintiff to the order demanded. Crawley v. Munson, (1929) 131 Or 428, 283 P 29.

The alternative writ of mandamus is regarded as the complaint, and must state a legally sufficient cause of action so that the mandatory portion of the writ follows as a conclusion of law from the facts alleged. Olds v. Kirkpatrick, (1948) 183 Or 105, 191 P2d 641.

If any exhibit, such as a copy of the complaint in the original action, is material, it must be attached to and made a part of the writ, or in lieu thereof, pleaded therein, but where defendant's answer refers to the complaint, the court is entitled to refer to the complaint to determine the issues. State v. Bain, (1952) 193 Or 688, 240 P2d 958.

FURTHER CITATIONS: State v. Barbur, (1914) 73 Or 10, 144 P 126; State v. Stannard, (1917) 84 Or 450, 165 P 566; State v. Pierce, (1926) 118 Or 533, 247 P 812; State ex rel. Venn v. Reid, (1956) 207 Or 617, 298 P2d 990.

34.160

NOTES OF DECISIONS

A mandatory writ performs the office of an execution and is collateral to the judgment sought to be enforced. Schmid v. Portland, (1917) 83 Or 583, 163 P 1159.

An alternative writ must show a right in the relator to have the thing done which he seeks to enforce, must allege the performance of conditions precedent and negative facts which might defeat the right to maintain the action, must recite facts on which a legal duty of defendant to act is based and must allege that the defendant has power to perform the act demanded. Crawley v. Munson, (1929) 131 Or 428, 283 P 29.

City officers are entitled to notice before a peremptory writ is issued against them so that a defense may be prepared. Seufert v. Stadelman, (1946) 178 Or 646, 167 P2d 936.

Before ordering a peremptory writ, the court should issue an order vacating its previous order sustaining defendants' demurrer to an alternate writ. Id.

The allowance of a claim by the county court against the enforcement fund rested upon the exercise of discretion, and a peremptory writ of mandamus could not require the county court to allow it. Linklater v. Nyberg, (1963) 234 Or 117, 380 P2d 631.

FURTHER CITATIONS: Morgan v. Portland Traction Co., (1958) 222 Or 614, 331 P2d 344, 353 P2d 838.

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NOTES OF DECISIONS

The writ may be demurred to or answered in the same manner as a complaint in an action. McLeod v. Scott, (1891) 21 Or 94, 26 P 1061, 29 P 1; Elliott v. Oliver, (1892) 22 Or 44, 29 P 1.

A defect of parties plaintiff shown on the fact of an alternative writ is waived if not raised by demurrer. Portland v. Coffey, (1913) 67 Or 507, 509, 135 P 358.

A demurrer admits all of the material allegations to be true. Crawford v. School Dist. 7, (1913) 68 Or 388, 393, 137 P 217, Ann Cas 1915C, 477, 50 LRA(NS) 147.

Alternative writ and demurrer constitute the record for consideration by Supreme Court which cannot look to petition to enlarge or support writ. Id.

Where the defendant demurred to the petition instead of the writ, the Supreme Court, owning to the exigency of the case, considered the matter as if the writ had been attacked. State v. Barbur, (1914) 73 Or 10, 144 P 126.

A writ directing delivery of a warrant in payment of a judgment cannot be collaterally attacked by interposing defenses available in the original action. Schmid v. Portland, (1917) 83 Or 583, 163 P 1159.

A demurrer to a writ admits only the facts stated in the writ, and not conclusions of law. State v. Beveridge, (1924) 112 Or 19, 228 P 100.

FURTHER CITATIONS: Dryden v. Daly, (1918) 89 Or 218, 173 P 667; Olcott v. Hoff, (1919) 92 Or 462, 181 P 466; Sandblast v. Ore. Liquor Control Comm., (1945) 177 Or 213, 161 P2d 919.

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NOTES OF DECISIONS

When a person demurs to a complaint because of defect of parties, the demurrer should state the name of the omitted party. Crawford v. Sch. Dist. 7, (1913) 68 Or 388, 137 P 217.

FURTHER CITATIONS: Olcott v. Hoff, (1919) 92 Or 462, 181 P 466; State v. Beveridge, (1924) 112 Or 19, 228 P 100;

Sandblast v. Ore. Liquor Control Comm., (1945) 177 Or 213, 161 P2d 919; State ex rel. Lovell v. Weiss, (1967) 250 Or 252, 430 P2d 357.

34.190

NOTES OF DECISIONS

The effect of sustaining a demurrer to a complaint for a misjoinder of several causes is entirely to obliterate the pleading and the party must plead over or be nonsuited. State v. Williams, (1904) 45 Or 314, 334, 77 P 965, 67 LRA 166.

The court exercises a wide discretion in allowing amendments to pleadings in mandamus proceedings. State v. Richardson, (1906) 48 Or 309, 85 P 225.

When the alternative writ is amended, the petition and original writ cannot be considered for any purpose on an appeal from a judgment sustaining demurrers to the amended writ. Crawford v. Sch. Dist. 7, (1913) 68 Or 388, 393, 137 P 217, Ann Cas 1915C, 477, 50 LRA(NS) 147.

The writ of mandamus constitutes the only initiatory pleading on the part of the plaintiff. Dryden v. Daly, (1918) 89 Or 218, 173 P 667.

The pleadings in a proceeding by mandamus are the alternative writ, the demurrer or answer to the same, and the demurrer or reply to the answer, and they are to have the same effect, be construed and amended in the same manner as pleadings in an action. Olcott v. Hoff, (1919) 92 Or 462, 514, 181 P 466.

A stipulation to the effect that a demurrer to the writ should be waived, that the writ should be considered as having been amended, and that the Supreme Court in passing upon a motion to quash should confine itself to the record in the case and to the facts as admitted in the stipulation, was improper practice. State v. Ekwall, (1933) 144 Or 672, 26 P2d 52.

A writ which contains none of the material allegations set up in a petition is fatally defective. Id.

The facts alleged in the alternative writ must, on demurrer, be taken as true. Riesland v. Bailey, (1934) 146 Or 574, 31 P2d 183, 92 ALR 1207.

In a proceeding to compel a clerk to approve an undertaking on appeal, an allegation in the alternative writ that the sureties were worth in excess of $50,000 is not subject to the objection that it is a mere opinion. Id.

FURTHER CITATIONS: Sandblast v. Ore. Liquor Control Comm., (1945) 177 Or 213, 161 P2d 919.

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CASE CITATIONS: Wallace & Co. v. Ferguson, (1914) 70 Or 306, 140 P 742, 141 P 542.

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NOTES OF DECISIONS

The right of a plaintiff in a mandamus proceeding to recover costs does not depend on his claiming or recovering damages therein as he is entitled to costs as a matter of course upon obtaining the relief sought. Bush v. Geisy, (1888) 16 Or 355, 362, 19 P 123.

Where the Supreme Court assumes original jurisdiction in mandamus, costs are taxed and allowed as if commenced originally in the circuit court. Phy v. Wright, (1915) 75 Or 428, 436, 146 P 138, 147 P 381.

Without an allegation of damages in the writ, an award of damages in mandamus proceedings cannot be sustained. Taggart v. Sch. Dist. 1, (1920) 96 Or 422, 188 P 908, 1119.

Mandamus is an extraordinary remedy which cannot be used to control judicial discretion. State v. Duncan, (1951) 191 Or 475, 230 P2d 773.

FURTHER CITATIONS: State v. Hodgin, (1915) 76 Or 480, 146 P 86, 149 P 530.

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NOTES OF DECISIONS

Where the trial court fails to impose a fine, it will be presumed that the court found that the officer's conduct was caused by ignorance of law and was not prompted by bad faith or a disregard of duty. Burgtorf v. Bentley, (1895) 27 Or 268, 41 P 163.

Mandamus is an extraordinary remedy which cannot be used to control judicial discretion. State v. Duncan, (1951) 191 Or 475, 230 P2d 773.

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NOTES OF DECISIONS

An appeal will be dismissed where it has not been taken until after the appellant has complied with the terms of the writ. Jacksonville Sch. Dist. v. Crowell, (1898) 33 Or 111, 52 P 693.

Where the appellant has done everything commanded by the writ, the appeal will be dismissed notwithstanding a contention that the real issue involved is the construction of a statute. State v. Fields, (1909) 53 Or 453, 101 P 218.

Where a peremptory writ of mandamus has been awarded, a compliance with the command necessarily prevents an appeal, because a reversal would have nothing upon which to operate. Eilers Piano House v. Pick, (1911) 58 Or 54, 56, 113 P 54.

Affidavits will not be received on appeal if they were not introduced in the lower court. Union Pac. Life Ins. Co. v. Ferguson, (1913) 64 Or 395, 403, 129 P 529, 130 P 978, 43 LRA(NS) 958.

Findings should not be set aside on appeal where there is any evidence to sustain them. Beard v. Beard, (1913) 66 Or 512, 520, 136 P 797, 134 P 1196.

An order granting a peremptory writ is a judgment although directing the writ to issue as prayed for in the petition and the prayer included further relief as might seem meet and proper. Cockrum v. Graham, (1933) 143 Or 233, 21 P2d 1084.

Where all the facts presented to the Supreme Court upon appeal were stipulated in the lower court, there was no "finding" of the lower court with which to contend. Buell v. County Court, (1944) 175 Or 402, 152 P2d 578, 154 P2d 188.

To confer appellate jurisdiction, an appealable order, judgment or decree must be rendered by the trial court. Sandblast v. Ore. Liquor Control Comm., (1945) 177 Or 213, 161 P2d 919.

FURTHER CITATIONS: Turner v. Hendryx, (1917) 86 Or 590, 167 P 1019, 169 P 109; Johnson v. City of Astoria, (1961) 227 Or 585, 363 P2d 571.

LAW REVIEW CITATIONS: 1 WLJ 269.

34.310

NOTES OF DECISIONS

1. In general
2. When available
3. Child custody

1. In general

The purpose of the writ is to inquire into the legality of imprisonment, not supervise the administration of the prison. Gibbs v. Gladden, (1961) 227 Or 102, 359 P2d 540, cert. denied, 368 US 862, 7 L Ed 2d 58, 82 S Ct 105; Newton

v. Cupp, (1970) 1 Or App 645, 465 P2d 734. **But see,** Newton v. Cupp, (1970) 3 Or App 434, 474 P2d 532.

The return of the writ may be treated as an answer and cross-bill. Bartlett v. Bartlett, (1944) 175 Or 215, 152 P2d 402.

Recitals in a judicial record showing what was done in court import absolute verity and therefore cannot be collaterally attacked in habeas corpus. Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289. **Distinguished in** State v. Huffman, (1956) 207 Or 372, 297 P2d 831.

In an attack by habeas corpus upon a judgment of conviction, where the plaintiff expressly or by implication admits that the recitals in the record as to what was actually said and done in open court are true, he may present evidence outside of the judicial record which tends to invalidate but does not directly contradict the essential recitals of the judicial record. Id.

2. When available

Normally, the remedy of habeas corpus is not available to those who neglect appeal. Barber v. Gladden, (1957) 210 Or 56, 298 P2d 986, 309 P2d 192; Anderson v. Britton, (1957) 212 Or 1, 318 P2d 291, cert. denied, 356 US 962, 78 S Ct 999, 2 L Ed 2d 1068. Anderson v. Britton, supra, **distinguished in** Delaney v. Gladden, (1962) 232 Or 306, 374 P2d 746.

Failure of an indictment to allege facts sufficient to constitute a crime cannot be raised in a habeas corpus proceeding. Jensen v. Gladden, (1963) 233 Or 439, 378 P2d 950; State v. Cloran, (1963) 233 Or 400, 374 P2d 748, 377 P2d 911, 378 P2d 961, 98 ALR2d 732.

The writ cannot be used to determine whether a person lawfully confined in the penitentiary is entitled to talk privately with an attorney. Long v. Minto, (1916) 81 Or 281, 158 P 805.

The only question which a petitioner, confined pursuant to the judgment of a competent court, can raise is whether the judgment or commitment was void. Garner v. Alexander, (1941) 167 Or 670, 120 P2d 238.

Questions concerning errors which would render the judgment merely voidable may not be raised. Id.

Person on parole is not entitled to bring habeas corpus against warden of state penitentiary. White v. Gladden, (1956) 209 Or 53, 303 P2d 226.

The constitutionality of a statute under which a person has been convicted upon a plea of guilty may be tested by habeas corpus. Barber v. Gladden, (1957) 210 Or 46, 298 P2d 986, 309 P2d 192.

If defendant in state criminal proceedings loses, on the merits, an appeal to state Supreme Court, and certiorari is denied, he is not required to seek collateral relief through state habeas corpus proceedings in order to establish exhaustion of remedies so he may file petition in federal court for habeas corpus. Daugharty v. Gladden, (1957) 257 F2d 750.

Adjudication upon a writ of habeas corpus precludes petitioner from bringing another petition upon the same grounds or any other grounds upon which the petition could originally have been brought. Barber v. Gladden (dissenting opinion), (1958) 215 Or 129, 332 P2d 641, cert. denied, 359 US 948, 79 S Ct 732, 3 L Ed 2d 681.

Extradition proceedings may be attacked by habeas corpus only in the asylum state. Knowles v. Gladden, (1961) 227 Or 408, 362 P2d 763, cert. denied, 368 US 999, 82 S Ct 627, 7 L Ed 2d 537.

Writ of habeas corpus will not issue because of an assault on a prisoner by a prison guard, even if the assault is unlawful, unless petitioner shows his constitutional rights will probably be violated. Grenfell v. Gladden, (1965) 241 Or 190, 405 P2d 532, cert. denied, 382 US 998.

Habeas corpus is available in Oregon to test the constitutionality of treatment afforded an inmate of a penal institution. Newton v. Cupp, (1970) 3 Or App 434, 474 P2d 532.

Where an arrest under a body execution was not substantiated by a showing that the cause of action was also a cause for arrest, the prisoner could secure a release by habeas corpus. In re Teeters, (1929) 130 Or 631, 280 P 660.

3. Child custody

The employment of the writ in cases of child custody is not pursuant to, but independent of, statute. Bartlett v. Bartlett, (1944) 175 Or 215, 152 P2d 402. **But see** Lorenz v. Royer, (1952) 194 Or 355, 241 P2d 142, 242 P2d 200.

The remedy by habeas corpus pursuant to statute is available to test the legality of the custody of a child in certain circumstances where the question of jurisdiction, rather than the welfare of the child, is of primary importance. Lorenz v. Royer, (1952) 194 Or 355, 241 P2d 142, 242 P2d 200.

The relief administered in habeas corpus in child custody cases has been largely extended beyond the scope of the writ when employed in criminal cases. Bartlett v. Bartlett, (1944) 175 Or 215, 152 P2d 402.

Jurisdiction under the writ is not limited to the award of legal custody; having granted custody to one parent, the court can provide in some detail for rights of visitation by the other parent. Id.

In habeas corpus proceedings, the court, subject only to a change in the form of the petition, has the power of equity not only to award custody but to require of a father that he support his minor children whose custody has been awarded to the mother. Id.

FURTHER CITATIONS: In re Application of Boalt, (1927) 123 Or 1, 260 P 1004; Quinn v. Hanks, (1952) 196 Or 283, 248 P2d 832; State ex rel. Gladden v. Lonergan, (1954) 201 Or 163, 269 P2d 491; State v. Huffman, (1956) 207 Or 372, 297 P2d 831; Greenwood v. Gladden, (1962) 231 Or 396, 373 P2d 417; Holland v. Strawn, (1962) 233 Or 64, 377 P2d 1; Thomas v. Gladden, (1964) 239 Or 293, 397 P2d 836; State ex rel. Mietzner v. Johnson, (1965) 240 Or 109, 400 P2d 254; Newton v. Brooks, (1967) 246 Or 484, 426 P2d 446; Miller v. Shufeldt, (1970) 2 Or App 243, 467 P2d 971.

LAW REVIEW CITATIONS: 38 OLR 163; 39 OLR 338; 4 WLJ 76-78.

34.320

NOTES OF DECISIONS

Habeas corpus proceedings cannot be used to review judgments or decrees of a court of competent jurisdiction, but the jurisdiction of the court over the person and subject-matter may be questioned in such proceedings. Harrington v. Jones, (1909) 53 Or 237, 99 P 935.

FURTHER CITATIONS: Ex parte Jerman, (1910) 57 Or 387, 112 P 416; Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289; Wix v. Gladden, (1955) 204 Or 597, 284 P2d 356; White v. Gladden, (1956) 209 Or 53, 303 P2d 226; Ex parte Sherwood, (1960) 177 F Supp 411.

LAW REVIEW CITATIONS: 4 WLJ 77.

34.330

NOTES OF DECISIONS

No relief can be had under the writ of habeas corpus unless the order or process upon which the petitioner is detained is utterly void. Ex parte Foster, (1914) 69 Or 319, 138 P 849; Kelley v. Meyers, (1928) 124 Or 322, 263 P 903, 56 ALR 661; Wemme v. Hurlburt, (1930) 133 Or 460, 289

P 372; Smallman v. Gladden, (1956) 206 Or 262, 291 P2d 749; Barker v. Ireland, (1964) 238 Or 1, 392 P2d 769.

Mere errors or irregularities which render the proceedings merely voidable cannot be reached by habeas corpus. Smallman v. Gladden, (1956) 206 Or 262, 291 P2d 749.

Where the petitioner was imprisoned under a judgment of a competent tribunal exercising criminal jurisdiction, a writ did not lie. Long v. Minto, (1916) 81 Or 281, 158 P 805.

FURTHER CITATIONS: Benson v. Gladden, (1965) 242 Or 132, 407 P2d 634; White v. Gladden, (1956) 209 Or 53, 303 P2d 226.

LAW REVIEW CITATIONS: 39 OLR 337, 340, 342, 363.

34.340

NOTES OF DECISIONS

Generally the petition is not considered as part of the pleadings. State v. Baird, (1954) 201 Or 240, 269 P2d 535.

FURTHER CITATIONS: Ex parte Hibbs, (1886) 26 Fed 421.

LAW REVIEW CITATIONS: 4 WLJ 77.

34.360

NOTES OF DECISIONS

Writ of habeas corpus will not issue where the petition does not conform to the requirements of this section. Long v. Minto, (1916) 81 Or 281, 158 P 805. **But see** Ashbaugh v. McKinney, (1948) 182 Or 652, 189 P2d 583.

The writ of habeas corpus in child custody cases is independent of the statutory writ and need not conform to the requirements of this section. Ashbaugh v. McKinney, (1948) 182 Or 652, 189 P2d 583.

Dismissal of appeal because of petitioner's financial inability to furnish bond, filing fees or transcript is deprival of equal protection under Federal Constitution. Daugharty v. Gladden, (1957) 257 F2d 750.

Adjudication upon a writ of habeas corpus precludes petitioner from bringing another petition upon the same grounds or any other grounds upon which the petition could originally have been brought. Barber v. Gladden (dissenting opinion), (1958) 215 Or 129, 332 P2d 641, cert. denied, 359 US 948, 79 S Ct 732, 3 L Ed 2d 681.

Petition was deficient in not alleging restraint by defendant of the prisoner contrary to the provisions of some parole, pardon, release or discharge issued by the Governor. Fehl v. Lewis, (1937) 155 Or 499, 64 P2d 648.

FURTHER CITATIONS: Miller v. Gladden, (1959) 219 Or 538, 348 P2d 44; Wix v. Gladden, (1955) 204 Or 597, 284 P2d 356.

34.365

NOTES OF DECISIONS

Dismissal of appeal because of petitioner's financial inability to furnish bond, filing fees or transcript is deprival of equal protection under Federal Constitution. Daugharty v. Gladden, (1957) 257 F2d 750.

If defendant in state criminal proceedings loses, on the merits, an appeal to state Supreme Court and certiorari is denied, he is not required to seek collateral relief through state habeas corpus proceedings in order to establish exhaustion of remedies so he may file petition in federal court for habeas corpus. Id.

FURTHER CITATIONS: Daugharty v. Gladden, (1957) 150 F Supp 887.

LAW REVIEW CITATIONS: 39 OLR 339.

34.370

NOTES OF DECISIONS

Proceedings to secure the discharge of children from alleged illegal restraint are usually contests between those claiming the custody of the child, in which case inquiry is directed as to which contestant is better fitted to have control of the infant. Bowers v. Grant, (1915) 78 Or 390, 153 P 412.

Dismissal of appeal because of petitioner's financial inability to furnish bond, filing fees or transcript is deprival of equal protection under Federal Constitution. Daugharty v. Gladden, (1957) 257 F2d 750.

FURTHER CITATIONS: Ex parte Jerman, (1910) 57 Or 387, 112 P 416; Long v. Minto, (1916) 81 Or 281, 158 P 805.

ATTY. GEN. OPINIONS: The requirement of filing fees in habeas corpus proceedings, 1942-44, p 322.

34.420

NOTES OF DECISIONS

Parole officer and board are necessary parties where prisoner is in custody of parole officer. Fehl v. Lewis, (1937) 155 Or 499, 64 P2d 648.

FURTHER CITATIONS: Anderson v. Britton, (1957) 212 Or 1, 318 P2d 291.

34.530

CASE CITATIONS: Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289; State v. Huffman, (1956) 207 Or 372, 297 P2d 831; Ex parte Sherwood, (1960) 177 F Supp 411.

34.540

NOTES OF DECISIONS

Writ need not be disposed of upon the immediate date fixed for the return. Isakson v. Stevens, (1910) 57 Or 57, 110 P 393.

Where the return to the writ of habeas corpus did not have a copy of the commitment attached or plead an ordinance authorizing the punishment complained of, the return was demurrable. In re Application of Davis, (1926) 118 Or 693, 247 P 809.

The return to the writ is the principal pleading and corresponds to the complaint in civil actions. State v. Baird, (1954) 201 Or 240, 269 P2d 535.

FURTHER CITATIONS: Wilson v. Wair, (1959) 217 Or 450, 342 P2d 798.

34.580

NOTES OF DECISIONS

Court may have a reasonable time in which to investigate the grounds upon which the person in custody may be detained. Isakson v. Stevens, (1910) 57 Or 57, 110 P 393.

Where the return to the writ is unchallenged, the only question for determination is whether it shows sufficient facts to retain the petitioner in custody. Lane v. Word, (1913) 64 Or 389, 130 P 741.

In case of habeas corpus to obtain custody of children where a lawful right to retain possession is asserted, the question of physical restraint need be given no consideration. In re Henkle, (1936) 153 Or 337, 56 P2d 343.

The writ of error coram nobis is not available in Oregon

to one who has been convicted of a crime. Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289. **Distinguished in** State v. Huffman, (1956) 207 Or 372, 297 P2d 831.

The trial court has the inherent power to correct its own erroneous judgment of conviction upon a motion in the nature of a coram nobis. (concurring opinion) Id.

The writ of error coram nobis is not available in Oregon to one who has been convicted of a crime where there is any other available remedy, including habeas corpus. State v. Huffman, (1956) 207 Or 372, 297 P2d 831.

34.590

NOTES OF DECISIONS

Habeas corpus proceedings cannot be resorted to in order to review for error judgments or decrees of a court of competent jurisdiction, but the jurisdiction of the court over the person and subject-matter may be questioned in such proceeding. Harrington v. Jones, (1909) 53 Or 237, 99 P 935.

34.600

CASE CITATIONS: Ex parte Foster, (1914) 69 Or 319, 138 P 849; Wemme v. Hurlburt, (1930) 133 Or 460, 289 P 372.

LAW REVIEW CITATIONS: 4 WLJ 67.

34.610

NOTES OF DECISIONS

1. In general

A court hearing an application for habeas corpus may question the legal status of the court issuing the commitment. In re Application of Boalt, (1927) 123 Or 1, 260 P 1004; Archerd v. Burk, (1934) 148 Or 444, 36 P2d 338.

Alleged errors of law committed by the trial judge are not before the court in a habeas corpus proceeding. Archerd v. Burk, (1934) 148 Or 444, 36 P2d 338; Rust v. Pratt, (1937) 157 Or 505, 72 P2d 533.

Where the court imposes a punishment of the kind and at the place provided by law, though exceeding the term limited by statute, the prisoner cannot be discharged on habeas corpus till he has performed so much of the sentence as the court had power to impose. Ex parte Foster, (1914) 69 Or 319, 322, 138 P 849.

A judgment in a criminal case can be said to be void only when the court pronounces a judgment not authorized by law under any circumstances in the particular case made by the pleadings, whether the trial has proceeded regularly or otherwise. Rust v. Pratt, (1937) 157 Or 505, 72 P2d 533.

The provisions of ORS 34.620 were not intended to nullify the express provisions of ORS 34.670 which authorize the plaintiff to controvert any of the material facts set forth in the return or subsections (3) to (6) of this section. Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289. **Distinguished in** State v. Huffman, (1956) 207 Or 372, 297 P2d 831.

Recitals in a judicial record showing what was done in court import absolute verity and therefore cannot be collaterally attacked in habeas corpus. Id.

In an attack by habeas corpus upon a judgment of conviction, where the plaintiff expressly or by implication admits that the recitals in the record as to what was actually said and done in open court are true, he may present evidence outside of the judicial record which tends to invalidate but does not directly contradict the essential recitals of the judicial record. Id.

Where the jury was discharged on Sunday in consequence of their failure to agree upon a verdict, the court having no authority to sit on that day was without jurisdiction and its order was of no binding force, and the detention of a party thereafter was illegal and the process void. Ex parte Tice, (1897) 32 Or 179, 194, 49 P 1038.

Where petitioner was imprisoned for failure to obey an order of court and he petitioned for a writ of habeas corpus on the ground that he had complied with the order, the truth of this averment might be inquired into. Harrington v. Jones, (1909) 53 Or 237, 99 P 935.

Petitioner for habeas corpus arrested and imprisoned under a body execution issued in a civil action was entitled to the writ because the writ of arrest was not issued in a case allowed by law. In re Teeters, (1929) 130 Or 631, 280 P 660.

2. Validity of process

Defects rendering process voidable are not ground for discharge of the petitioner. Barton v. Saunders, (1888) 16 Or 51, 54, 16 P 921, 8 Am St Rep 261.

The writ will not lie to procure the discharge of a person detained by process issued in a civil action on an affidavit which failed to allege the facts which constitute the fraud. Id.

Habeas corpus will not afford relief, unless the process under which petitioner is held is not merely irregular but void. Ex parte Jung Shing, (1915) 74 Or 372, 377, 145 P 637.

The fact that the judge sentencing a prisoner did not sign the court journal or the prisoner's commitment does not affect the legality of the prisoner's confinement. Long v. Minto, (1916) 81 Or 281, 158 P 805.

Where petitioner showed no cause for discharge, the circuit court should have dismissed the writ and ordered a return of the prisoner to the warden's custody. Garner v. Alexander, (1941) 167 Or 670, 120 P2d 238.

FURTHER CITATIONS: Norman v. Zieber, (1870) 3 Or 197; Fleming v. Bills, (1870) 3 Or 286; Ex parte Howe, (1894) 26 Or 181, 37 P 536; Ex parte Houghton, (1907) 49 Or 232, 89 P 801; In re Vinton, (1913) 65 Or 422, 132 P 1165.

ATTY. GEN. OPINIONS: Confinement in state tuberculosis hospital, 1952-54, p 78; attacking title to office of judge, 1956-58, p 28.

LAW REVIEW CITATIONS: 4 WLJ 77.

34.620

NOTES OF DECISIONS

The provisions of this section were not intended to nullify the express provisions of ORS 34.670 which authorize the plaintiff to controvert any of the material facts set forth in the return or subsections (3) to (6) of ORS 34.610. Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289. **Distinguished in** State v. Huffman, (1956) 207 Or 372, 297 P2d 831.

Recitals in a judicial record showing what was done in court import absolute verity and therefore cannot be collaterally attacked in habeas corpus. Id.

In an attack by habeas corpus upon a judgment of conviction, where the plaintiff expressly or by implication admits that the recitals in the record as to what was actually said and done in open court are true, he may present evidence outside of the judicial record which tends to invalidate but does not directly contradict the essential recitals of the judicial record. Id.

FURTHER CITATIONS: Ex parte Foster, (1914) 69 Or 319, 138 P 849; Wemme v. Hurlburt, (1930) 133 Or 460, 289 P 372.

34.670

NOTES OF DECISIONS

Sufficiency of return may be controverted by demurrer or reply. Ex parte Wessens, (1918) 89 Or 587, 175 P 73; In re Davenport, (1925) 114 Or 650, 236 P 758.

It is presumed, in the absence of a showing to the contrary, that all legal proceedings referred to in the return were regular. Ex parte Stacy, (1904) 45 Or 85, 75 P 1060.

The court has a reasonable time in which to decide whether the person imprisoned should be released. Isakson v. Stevens, (1910) 57 Or 57, 110 P 393.

Where the return is unchallenged the only question to determine is whether it shows sufficient facts to retain the petitioner in custody for habeas corpus. Lane v. Word, (1913) 64 Or 389, 130 P 741.

In habeas corpus proceedings the parties are plaintiff and defendant rather than petitioner and respondent. Quinn v. Hanks, (1951) 192 Or 254, 233 P2d 767.

The provisions of ORS 34.620 were not intended to nullify the express provisions of this section which authorize the plaintiff to controvert any of the material facts set forth in the return or subsections (3) to (6) of ORS 34.610. Huffman v. Alexander, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289. **Distinguished in** State v. Huffman, (1956) 207 Or 372, 297 P2d 831.

Recitals in a judicial record showing what was done in court import absolute verity and therefore cannot be collaterally attacked in habeas corpus. Id.

The right bestowed by this section was not intended to extend to the direct contradiction of judicial recitals which import verity; the statutory authority to contradict any material fact set forth in the return refers to facts which must be included in the return. Id.

In an attack by habeas corpus upon a judgment of conviction, where the plaintiff expressly or by implication admits that the recitals in the record as to what was actually said and done in open court are true, he may present evidence outside of the judicial record which tends to invalidate but does not directly contradict the essential recitals of the judicial record. Id.

The authority to allege any fact to show that imprisonment is unlawful does not include the right to directly contradict judicial recitals which generally do appear in judgments of conviction and also in returns to a writ of habeas corpus, but which are not required by statute so to appear. Id.

Even though a sentence is declared void in a habeas corpus proceeding, the court may order the petitioners returned to the sentencing courts so that proper sentences might be imposed. Little v. Gladden, (1954) 202 Or 16, 273 P2d 443.

Habeas corpus will lie to correct an excessive sentence even though the valid portion of the sentence has not yet been served in full. Landreth v. Gladden, (1958) 213 Or 205, 324 P2d 475.

Habeas corpus will lie to set aside a sentence voidable because in excess of the power of the court to impose. Id.

Where excessive sentence, writ of habeas corpus does not operate to discharge prisoner but merely to remand him for lawful sentence. Id.

FURTHER CITATIONS: Harrington v. Jones, (1909) 53 Or 237, 99 P 935; State v. Kelly, (1958) 213 Or 197, 324 P2d 486; Shipman v. Gladden, (1969) 253 Or 192, 453 P2d 921.

34.680

NOTES OF DECISIONS

The return is a pleading and is to be construed and to have the same effect as a pleading in an action. Pomeroy v. Lappeus, (1881) 9 Or 363.

In habeas corpus proceedings the parties are plaintiff and defendant rather than petitioner and respondent. Quinn v. Hanks, (1951) 192 Or 254, 233 P2d 767.

34.690

LAW REVIEW CITATIONS: 39 OLR 353.

34.700

NOTES OF DECISIONS

A judgment rendered in accordance with this section cannot be modified by the trial court. Clark v. Olinger, (1950) 190 Or 202, 224 P2d 917.

FURTHER CITATIONS: Bartlett v. Bartlett, (1944) 175 Or 215, 152 P2d 402.

34.710

NOTES OF DECISIONS

1. In general

An appeal from a judgment in habeas corpus for custody of an infant is equitable and triable de novo on appeal. Turner v. Hendryx, (1917) 86 Or 590, 167 P 1019, 169 P 109; In re Henkle, (1936) 153 Or 337, 56 P2d 343.

The special proceedings prescribed by this statute are of a legal nature and appeals are taken with like effect as in an action. Bartlett v. Bartlett, (1944) 175 Or 215, 152 P2d 402; Smallman v. Gladden, (1956) 206 Or 262, 291 P2d 749.

A plea of former jeopardy is not permissible in a habeas corpus proceeding because it is a plea recognized by statute and if denied may be appealed. Claypool v. McCauley, (1929) 131 Or 371, 283 P 751.

Alleged errors of law committed by the trial judge are not before the court on appeal in a habeas corpus proceeding. Archerd v. Burk, (1934) 148 Or 444, 36 P2d 338.

The purpose of enacting this statute was to provide the immediate relief from illegal imprisonment that the common law writ gave. Armstrong v. Vancil, (1942) 169 Or 320, 128 P2d 951.

Where statutes authorize the right of appeal from orders discharging a prisoner from custody, and when such an order is reversed on appeal, the remanding of the prisoner to custody is not violative of the constitutional privilege of the writ of habeas corpus. Macomber v. Alexander, (1953) 197 Or 685, 255 P2d 164.

Requirement that undertaking be filed is unconstitutional as applied to a pauper. Barber v. Gladden, (1956) 210 Or 46, 298 P2d 986, 309 P2d 192.

Dismissal of appeal because of petitioner's financial inability to furnish bond, filing fees or transcript is deprival of equal protection under Federal Constitution. Daugharty v. Gladden, (1957) 257 F2d 750.

2. Conclusiveness of judgment

The principle of res judicata is fully applicable to habeas corpus; therefore, a petitioner is precluded from bringing a second petition, not only for any ground alleged in a prior petition but also for any ground which reasonably could have been alleged. Barber v. Gladden, (1958) 215 Or 129, 332 P2d 641, cert denied, 359 U S 948, 79 S Ct 732, 3 L Ed 2d 681; Macomber v. Gladden, (1959) 216 Or 579, 337 P2d 971.

Questions finally determined in a proceeding in habeas corpus cannot be re-examined upon any other proceeding by habeas corpus. Pomeroy v. Lappeus, (1881) 9 Or 363.

A circuit court order discharging a prisoner from custody is a "final judgment" within the meaning of this section, relating to appeals, but a person has not been "finally

discharged" within the meaning of ORS 34.720 until an appeal, if taken, has been decided by this court. Macomber v. Alexander, (1953) 197 Or 685, 255 P2d 164.

This section authorizes the appellate court to reverse orders discharging a prisoner from custody and to remand the prisoner to custody upon determination in the appellate court that the order of discharge was contrary to law. Id.

The granting of a writ of habeas corpus because of the insufficiency of the extradition papers was not res judicata to subsequent extradition demand. State ex rel. Yarbrough v. Snider, (1970) 2 Or App 97, 465 P2d 739, Sup Ct review denied.

FURTHER CITATIONS: State v. Endsley, (1958) 214 Or 537, 331 P2d 338.

LAW REVIEW CITATIONS: 32 OLR 210; 39 OLR 174, 338.

34.720

NOTES OF DECISIONS

A circuit court order discharging a prisoner from custody is a "final judgment" within the meaning of ORS 34.710, relating to appeals, but a person has not been "finally discharged" within the meaning of this section until an appeal, if taken, has been decided by this court. Macomber v. Alexander, (1953) 197 Or 685, 255 P2d 164.

FURTHER CITATIONS: Landreith v. Gladden, (1958) 213 Or 205, 324 P2d 475.

34.810

NOTES OF DECISIONS

The remedies obtainable under the writs of scire facias, quo warranto, etc., may still be obtained by an action at law. State v. Douglas County Rd. Co., (1882) 10 Or 198; State v. Cook, (1901) 39 Or 377, 65 P 89; State v. Sengstacken, (1912) 61 Or 455, 460, 122 P 292, Ann Cas 1914B, 230; State v. Port of Tillamook, (1912) 62 Or 332, 335, 124 P 637, Ann Cas 1914C, 483; State v. School Dist. 9, (1934) 148 Or 273, 31 P2d 751, 36 P2d 179.

Jury trial is not allowable in quo warranto proceedings. State v. Sengstacken, (1912) 61 Or 455, 460, 122 P292, Ann Cas 1914B, 230.

The findings of fact in quo warranto proceedings do not have the effect of verdicts. Id.

The burden of showing a franchise rests on the defendant in quo warranto proceedings. State v. Port of Tillamook, (1912) 62 Or 332, 124 P 637, Ann Cas 1914C, 483.

Quo warranto, not mandamus, is the proper method for trying title to an office. Alexander v. School Dist. 1, (1917) 84 Or 172, 164 P 711.

A copy of complaint and summons must be served on each of defendants to acquire jurisdiction. State v. Kleckneer, (1925) 116 Or 371, 239 P 817, 240 P 1115.

Statutes have substituted actions at law for writs of scire facias as a means of successive recoveries upon bonds. Title & Trust Co. v. U.S. Fid. & Guar. Co., (1932) 138 Or 467, 1 P2d 1100, 7 P2d 805.

In considering the two classes of quo warranto actions provided by the code, public interest is primary under the first class and private interest is only incidental while the second class embraces both a public and private interest. State v. Sch. Dist. 9, (1934) 148 Or 273, 31 P2d 751, 36 P2d 179.

The court will scrutinize the application of the relator with great care when the extraordinary writ of quo warranto is applied for and the defendant attacked is serving the public without compensation. State v. Sch. Dist. 23, (1946) 179 Or 441, 172 P2d 655.

FURTHER CITATIONS: McCracken v. Swartz, (1873) 5 Or 62; State v. Whitney, (1879) 7 Or 386; State v. Mills, (1912) 61 Or 245, 119 P 763; State v. Hill, (1947) 181 Or 585, 184 P2d 366; State v. Standard Optical Co., (1947) 182 Or 452, 188 P2d 309.

ATTY. GEN. OPINIONS: The procedure employed when a justice of the peace performs duties without being qualified, 1936-38, p 87; whether a corporation can practice medicine, 1936-38, p 570; whether a county court may rent space for the district attorney's office, 1936-38, p 592.

LAW REVIEW CITATIONS: 1 OLR 213.