

**GENERAL STATUTES**  
*of*  
**MINNESOTA**  
**1923**

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COMPILED AND EDITED BY  
HUBERT HARVEY, OF THE ST. PAUL BAR

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CHAPTER 87.

SPECIAL PROCEEDINGS

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159-M 193  
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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).

**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]

**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]

12-332, 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.

**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

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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 emergency, 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; 77-802, 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, 14-53; 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.

**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 proceedings 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; 43-236, 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).

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—Application for such writ shall be by petition, signed and verified 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]

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 of 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).

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,

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7-M 345  
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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).

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.

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]

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

9746  
5-NW 863

9752  
67-M 345

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9-NW 24

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234nw 649  
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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.

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	206-NW	202-NW	52
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**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]

9767-68  
229nw 582  
229nw 787  
9031  
10765

9769-70	98
162-M	25
171-M	51
202-NW	44
214-NW	79
9769-70	21
212-NW	38
163-M	38
165-M	49
166-M	339
204-NW	318
208-NW	18

127-519, 148+1082; 129-300, 152+541; 134-191, 153+826; 136-461, 161+714; 137-267, 161+1055; 148-336, 181+858; 194+403.

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.

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.

## CHAPTER 88

## ACTIONS AGAINST BOATS AND VESSELS

9774. For what liable—Every boat or vessel used in navigating the waters of this state shall be liable for the claims or demands hereinafter mentioned, and which shall constitute liens thereon:

1. For all debts contracted by the master, owner, agent, or consignee thereof on account of supplies furnished for its use, or on account of work done or services rendered on board for its benefit, or on account of labor done or materials furnished by mechanics, tradesmen, or others in and for building, repairing, fitting out, furnishing, or equipping the same;

2. For all sums due for wharfage or anchorage of such boat or vessel within the state;

3. For all demands or damages accruing from the non-performance or malperformance of any contract of affreightment, or any contract touching the transportation of persons or property entered into by the master, owner, agent, or consignee of the boat or vessel on which such contract is to be performed; and

4. For all injuries done to persons or property by such boat or vessel.

Provided, that no boat or vessel shall be so liable for any debt contracted on account of work done or services rendered on board of or for the benefit of such boat or vessel until such contract is fully performed. (4603) [8318]

Constitutional (43-192, 45+430; 44-510, 47+160). Liability of boat for death by wrongful act (8-97, 72). A common law remedy. Assignee of claim may sue (10-242, 190-10-250, 195). Jurisdiction when cause arises out of state (2-178, 146; 3-192, 124). Jurisdiction of state court of cause of action for breach of contract of affreightment (12-465). Extent of lien for supplies and service (69-537, 72+809). Jurisdiction of federal court (36 Fed. 197).

9775. Action — Warrant — Procedure — An action against a boat or vessel may be instituted by the filing in the district court of the county where it may be of a complaint against it by name, or if it have no name by description, verified by the plaintiff or some person having knowledge of the facts, and setting forth the demand, and on whose account it accrued. Thereupon the clerk shall issue a warrant, returnable in twenty days, directing the sheriff to seize such boat or vessel and detain it in custody, with its tackle, apparel, and furniture, until discharged by due course of law. Such warrant shall be served and returned as in the case of a writ of attachment. Upon the return of the warrant, proceedings shall be had against the boat or vessel seized in the same manner as if the action had been instituted against the person on whose

account the demand accrued. The master, owner, agent, or consignee of the boat or vessel may appear on its behalf and answer the complaint. For sufficient cause shown, he shall be entitled to a continuance, but such continuance shall not operate as a discharge of the boat or vessel from custody, and no continuance shall be granted to the plaintiff. (4604) [8319]

9776. Discharge of boat—Bond—If before judgment, the master, owner, agent, or consignee give bond to the plaintiff, to be approved by the court, or by a judge or the clerk thereof in vacation, conditioned to satisfy the amount which shall be adjudged to be due to the plaintiff, with costs, the boat or vessel, with its tackle, apparel, and furniture, shall be discharged from custody. (4605) [8320]

44-510, 47+160.

9777. Sale—Execution—If judgment be rendered in favor of the plaintiff against the boat or vessel, the court shall make an order, directing the sheriff to sell it, with its tackle, apparel, and furniture, or such part thereof or interest therein as shall be necessary, to satisfy the judgment and costs, and the order shall be executed and returned in the same manner as an execution. If a bond has been given, as provided in § 9776 and judgment rendered in favor of the plaintiff, execution shall issue for the amount thereof and costs against the principal and sureties on the bond. (4606) [8321]

44-510, 47+160.

9778. Owner, etc., summoned to show cause—When judgment is rendered in favor of the plaintiff against a boat or vessel, and prior thereto it has been discharged from custody by the giving of bond or otherwise, or when for any reason such judgment or any part thereof remains unpaid for sixty days, the master and owner, or either, may be summoned to show cause why they should not be personally bound by the judgment. Such summons shall be subscribed by the judgment creditor, his agent or attorney, and shall describe the judgment, specify the amount due thereon, and require the party summoned to show cause within twenty days after the service thereof, and may be served in the same manner as a summons in a civil action. It shall be accompanied by an affidavit of the person subscribing it, to the effect that the judgment has not been paid or satisfied, except as specified in the summons, to his knowledge, information, or belief. (4607) [8322]

9779. Pleadings—Trial—Judgment—The party summoned may by answer deny that the judgment was