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Chapter 127.

Writ of Audita Querela.

Secs. 1-7. Repealed by Public Laws 1959, c. 317, § 279.

Effective date and applicability of Public Laws 1959, c. 317. — Section 420, chapter 317, Public Laws 1959, provides as follows: "This act shall become effective December 1, 1959. It shall apply to all actions brought after December 1, 1959 and also to all further proceedings in actions at law or suits in equity then pending, except to the extent that in the opinion of the court the application of this act in a particular action pending on December 1, 1959 would not be feasible or would work injustice, in which event the laws in effect prior to December 1, 1959 would prevail."

Chapter 128.

Writ for Replevying a Person.

Sec. 1. Persons entitled to writ, and from what court.—If any person is imprisoned, restrained of his liberty or held in duress, unless by a lawful writ, warrant or other process, civil or criminal, he may have the writ for replevying the person, on complaint filed by himself or anyone in his behalf in the superior court, at the discretion of the court and not otherwise. (R. S. c. 115, § 1. 1961, c. 317, § 449.)

Effect of amendment.—Prior to the 1961 amendment this section provided for issuance of the writ, on application, by a justice of the superior court in term time or vacation.

Sec. 9. If plaintiff produced.—If the defendant, after the return of eloignment, produces the body of the plaintiff in court, the court shall deliver him from imprisonment, upon his giving the defendant such bond as hereinbefore in this chapter directed to be taken by the officer when the plaintiff is delivered by him; and for want thereof, he shall be committed to abide the judgment on the writ for replevying the plaintiff; and, in either case, the action shall be tried as aforesaid. (R. S. c. 115, § 9. 1961, c. 317, § 450.)

Effect of amendment.—The 1961 amendment substituted "action" for "suit" near the end of this section.

Chapter 129.

Writs of Error, Certiorari, Mandamus and Quo Warranto.

Writs of Error.

Secs. 1-10. Repealed by Public Laws 1959, c. 317, § 280.

Effective date and applicability of Public Laws 1959, c. 317. — Section 420, chapter 317, Public Laws 1959, provides as follows: "This act shall become effective December 1, 1959. It shall apply to all actions brought after December 1, 1959 and also to all further proceedings in actions at law or suits in equity then pending, except to the extent that in the opinion of the court the application of this act in a particular action pending on December 1, 1959 would not be feasible or would work injustice, in which event the laws in effect prior to December 1, 1959 would prevail."

Writs of Error in Criminal Cases.

Sec. 11. Writ of error in criminal cases.

Quoted in Dwyer v. State, 151 Me. 382, 120 A. (2d) 276.

Sec. 12. Effect; custody of plaintiff; release on bail; copies of judgment.

Errors that appear upon face of record.—This section and section 11 of this chapter, when this statute has been invoked, have been construed to apply to those errors that appear upon the face of the record. Dwyer v. State, 151 Me. 382, 120 A. (2d) **276.**

A writ of error coram nobis may be petitioned for in the superior court in the county where conviction was had, or judgment rendered, in the case, and where the record is. If the petition is in proper form and the petition shows on its face a valid cause (when or if proved by the petitioner at a hearing on the writ), the court should order the writ of error coram nobis to issue and hearing should be had thereon. Dwyer v. State, 151 Me. 382, 120 A. (2d) 276.

Writs of Certiorari.

Sec. 16. Limitation of applications.—No application for a writ of certiorari shall be sustained unless made within 6 years next after the proceedings complained of; but if the person entitled to apply for such writ is a minor, insane, imprisoned or not in the United States when becoming so entitled, then he, his heirs, executors or administrators may apply for the writ within 5 years after the removal of such disability. (R. S. c. 116, § 16. 1959, c. 317, § 281.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—Section 420, chapter 317, Public Laws 1959, provides as follows: "This act shall become effective December 1, 1959. It shall apply to all actions brought after December 1, 1959 and also to all further proceedings in actions at law or suits in equity then pending, except to the extent that in the opinion of the court the application of this act in a particular action pending on December 1, 1959 would not be feasible or would work injustice, in which event the laws in effect prior to December 1, 1959 would prevail."

Writs of Mandamus.

Sec. 17. Presentation of petition; questions of law reserved; issue and return.—A petition for a writ of mandamus may be presented to a justice of the supreme judicial court or of the superior court in any county, who may, upon notice to all parties, hear and determine the same, or may reserve questions of law arising thereon, upon appeal or otherwise, for the determination of the law court, which may hear and determine the same as provided; but in all cases where objections are made to any rulings, findings or decrees made upon such petition, the case shall be proceeded with as if no objections are made, until a decision shall be had and the peremptory writ shall have been ordered or denied, so that an affirmance on appeal would finally dispose of the case, which shall then be certified to the chief justice of the supreme judicial court as provided in section 18. If on such hearing such writ is ordered, it may be issued from the clerk's office in any county and be made returnable as the court directs. (R. S. c. 116, § 17. 1959, c. 317, § 282.)

Effect of amendment.—The 1959 amendment deleted "in term time or vacation" following "in any county" near the beginning of the section, substituted "appeal" for "exceptions," deleted "hereinafter" before "provided," substituted "objections are made" for "exceptions are alleged" and "objections are made" for "exceptions had been taken," added "or denied" following "ordered," substituted "an affirmance on appeal" for "the overruling of such exceptions," and substituted "section 18" for "the following section" at the end of the first sentence.

Effective date of 1959 amendment.—See note to § 16.

Sec. 18. Return to writ; answer; judgment and peremptory writ; costs; no action for false return.—When a writ of mandamus issues, the person required to make return thereto shall make his return to the first writ, and the person suing the writ may by an answer deny any material facts contained in

such return or may move to dismiss for insufficiency in law. If the party suing the writ maintains the issue on his part, his damages shall be assessed and a judgment rendered that he recover the same with costs, and that a peremptory writ of mandamus be granted; otherwise the party making the return shall recover costs. No action shall be maintained for a false return to a writ of mandamus. After judgment and decree that the peremptory writ be granted or denied, the justice of the court before which the proceedings are pending shall forthwith certify to the chief justice for decision any appeal based on objections to any rulings, findings or decrees made at any stage of the proceedings. Notice of such appeal shall be given within 5 days after judgment and decree. The appealing party shall, within 15 days thereafter, forward to the chief justice his written argument upon such appeal and shall, within said 15 days, furnish the adverse party or his attorney with a copy of such argument. The adverse party shall, within 15 days after receipt of such copy, forward to the chief justice his written argument in reply. Thereupon the justices of said court shall consider said cause immediately and decide thereon and transmit their decision to the clerk of the court where the petition is pending, and final judgment shall be entered accordingly. If the judgment is in favor of the petitioner, the peremptory writ of mandamus shall thereupon be issued. (R. S. c. 116, § 18. 1959, c. 317, § 283.)

Effect of amendment.—The 1959 amendment divided the next to last sentence into three sentences, substituted "deny" for "traverse," and "move to dismiss for insufficiency in law" for "demur" in the first sentence, added "or denied" following "granted," and substituted "any appeal based on objections" for "all exceptions which may be filed and allowed" in the fourth sentence, added the fifth sentence, and substituted "appealing" for "excepting" and "appeal" for "exceptions" in the sixth sentence.

Effective date of 1959 amendment.—See note to § 16.

Quo Warranto.

Sec. 21. Quo warranto.—Petitions, informations and other processes in quo warranto proceedings may be made returnable before the superior court, as and when the court may order, and by like order the cause may be heard in vacation if the justice hearing the same shall determine that justice so requires. (R. S. c. 116, § 21. 1961, c. 317, § 451.)

Effect of amendment.—The 1961 amendment substituted "the superior court, as and when the court may order" for "the supreme judicial court or the superior court, in term time or in vacation, as and when the court or any justice thereof may order" in this section.

History of quo warranto.—See State v. Elwell, 156 Me. 193, 163 A. (2d) 342.

Effect of new rules of civil procedure.—The new rules of civil procedure do not alter the practice prescribed for proceedings in quo warranto, Rule 81 (b). State v. Elwell, 156 Me. 193, 163 A. (2d) 342.

Proceedings may be begun by petition. While the procedure used in this state to test the title to a public office is an information in the nature of quo warranto, brought without the necessity of prior application to a court, it would appear that the Statute of Anne forms a part of our common law in this state and that a private citizen might file application with the court seeking authority to bring an action of quo warranto in the name of the state. State v. Elwell, 156 Me. 193, 163 A. (2d) 342.

But an information in the nature of quo warranto can be instituted only at the discretion of the attorney general, with his consent, and upon his official responsibility. State v. Elwell, 156 Me. 193, 163 A. (2d) 342.

Who is an essential party.—The attorney general in quo warranto proceedings is neither a nominal plaintiff nor a coplaintiff with the relators. He is the person essential to the institution and maintenance of the process of quo warranto and the ordinary rules existing between co-plaintiffs as to the power of dismissal without authority of the others is not applicable. State v. Elwell, 156 Me. 193, 163 A. (2d) 342.

And whose withdrawal from proceeding subjects action to dismissal.—The institution of an information in the nature of quo warranto, upon the relation of the attorney general, is a matter within the discretion of the attorney general, and the action cannot

be maintained without his consent. He may, therefore, withdraw from the proceeding at his discretion, without the assent of the relators, and if he does so, the action is subject to dismissal, either on motion of the attorney general, or upon motion of the respondents. State v. Elwell, 156 Me. 193, 163 A. (2d) 342.

Sec. 22. When attorney general need not be party.

Section modifies, etc.

In accord with original. See State v. Elwell, 156 Me. 193, 163 A. (2d) 342.

Chapter 130.

Crimes against the Person.

Murder, Assault with Intent and Attempt to Murder.

Sec. 1. Murder, definition.

History of section.—See State v. Arsenault, 152 Me. 121, 124 A. (2d) 741.

In this state degrees of murder, etc.

In accord with 1st paragraph in original. See State v. Arsenault, 152 Me. 121, 124 A. (2d) 741.

Nor is it limited to hatred, etc.

"Malice," as used in the definition of murder, does not necessarily imply ill will or hatred. It is a wrongful act, known to be such, and intentionally done without just and lawful cause or excuse. State v. Arsenault, 152 Me. 121, 124 A. (2d) 741.

And all homicide is, etc.

When the fact of killing is proved and nothing further is shown, the presumption of law is that it is malicious and an act of murder. State v. Arsenault, 152 Me. 121, 124 A. (2d) 741.

Voluntary intoxication. — Intoxication will not reduce to manslaughter where there is malice aforethought, and where there is no provocation or sudden passion. Voluntary intoxication is no excuse for murder. State v. Arsenault, 152 Me. 121, 124 A. (2d) 741.

The rule regarding the defense of insanity should never be extended to apply to voluntary intoxication in a murder case. It would not only open wide the door to defenses built on frauds and perjuries, but would build a broad, easy turnpike for escape. All that the crafty criminal would require for a well-planned murder, in Maine, would be a revolver in one hand to commit the deed, and a quart of intoxicating liquor in the other with which to build his excusable defense. State v. Arsenault, 152 Me. 121, 124 A. (2d) 741.

Sec. 6. Assault with intent to murder or kill.

A reckless and wanton disregard of rights of others may, under some circumstances be an assault even where no particular person was singled out or aimed at. State v. Barnett, 150 Me. 473, 114 A. (2d) 245.

Intent to kill or do bodily harm may be inferred from circumstances where one acts in a reckless or wanton disregard of the safety of others. State v. Barnett, 150 Me. 473, 114 A. (2d) 245.

Stated in State v. Cuccinello, 152 Me. 431, 133 A. (2d) 889.

Manslaughter.

Sec. 8. Manslaughter, definition.—Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, or, being under the legal duty to care and provide for any child or other person, willfully fails or neglects to provide for such child or other person necessary food, clothing, treatment for the sick or other necessaries of life, thereby causing or hastening the death of such child or other person, or commits manslaughter as defined by the common law, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years, except that if there is a violation of chapter 22, sections 151-B or 151-C, no prosecution for manslaughter shall lie. (R. S. c. 117, § 8. 1961, c. 262, § 3.)